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ALLAHABAD HIGH COURT

NOMINAL INDEX

Absence of Star denotes Cases of Provincial or Small Importance.
*** Indicates Cases of Great Importance.**
*** * Indicate Cases of Very Great Importance.**

A

****Abdul Aziz v. Shah Abdul Rahim 291
Abdullah v. Ahmad 817
*Abdullah Khan v. Kanhaiya 869
Abdul Majid Khan v. Emperor 364
Abdul Rahim v. Mahomed Salim 868
Abdul Rahim Khan v. Ramzan 518
Abdul Rashid v. Harish Chandra 940
Abdus Samad v. Abdur Rauf 780
Abhey Ram v. Jhanda 910
*Achhaibar Misir v. Emperor 614
Achhaibar Singh v. Rajmati 483
*Aftab Ali Khan v. Akbar Ali Khan 529
*Afzal Husain v. Huran Bibi 398
**Ahmad Husain v. Kallu Mian Sajhi 277
Ajaib, Mt. v. Noor Khan 808
Ajodhya v. Indra 330
*Akram Unnissa v. Mt. Mustafaunnissa 238
Ali Hammad v. Mahomed Nazir Ali 329
Ali Mahomed v. Manna Lal 972
**Altaf Begam v. Brij Narain 281
Amarjit Upadhiya v. Algu Chaube 71
Amir Ullah v. Taqdirunnissa Bibi 798
*Angad Singh v. Bahadur Singh 750(2)
*Angan Lal v. Saran Behari Lal 503
Anrup Misir v. Ram Harakh Misir 953
**Anwar Khan v. Mohammad Khan FB 105
*Asa Ram v. Karam Singh 586(1)
Asghari Begum v. Maula Baksh 381
*Ashrafunnissa Begam v. Sahdeo Pande 479
Askari Husain v. Chunni Lal 849
Ata Karim v. Municipal Board, Fatehpur 756(2)
*Atherton G. and Co. v. Habid Baksh 390
Azam Ali v. Emperor 710**

B

**Babu Ram v. Lala Ram 415
*Bachchi Lal v. Debi Din 300
Badruddin v. Tejram 233
*Bahal Singh v. Mahomed Yusuf 504
Baijnath v. Dhani Ram 577
Baijnath v. Dhani Ram 747
*Baij Nath v. Kundan Lal 831
Baikunth Nath v. Jai Kishun 449
Balbhaddar Prasad v. Mt. Bitto 754
*Baldeo Prasad v. Bhola Nath 941
Baldeo Prasad v. Sakhdeo Prasad 485**

Bal Kishan v. Chidda 654
*Bal Krishna v. Ram Kishun 957
*Balmakund v. Nanak Chand 433
*Banarasi Das v. Emperor 84
Banarsi Das v. Sagar Mal 403
**Banke Behari Lal v. Brij Behari Lal 170
*Bankey Lal v. Natha Ram 195
Bankey Lal v. Natha Ram 199
**Bank of Upper India Ltd. v. Fanny Skinner 161
Bansi Kurmi v. Sukh Mangal Pande 125
*Bansi Ram v. B. N. W. Ry. Co. 124
Banwari Barhi v. Ram Ratan Pandey 387
Basant Lal v. Basanti 551(1)
Bashir Husain v. Mohammad Ali 810
Basira Bibi v. Ata Ullah 453
Behari Lal v. Allahabad Bank, Ltd. Cawnpore 664
Bengali Lal v. Panna Lal 77
Beni Din v. Ram Naresh 824
Beni Madho v. Shambhu Nath 196
Beni Singh v. Emperor 608
*Bhagat Ram v. Emperor 114
Bhagwan Das v. Iqbal Sultan Banu 885
Bhagwan Das v. Tawn Mag. Budaun 767
Bhagwandas v. Zamurrad Hussain 676
Bhagwan Das Lachhmi Narain v. B. N. Ry. 597(2)
Bhagwan Din v. Emperor 935
Bhagwan Prasad v. Madan Murari Lal 811
Bhagwan Singh v. Tasadduq Husain 549
Bhagwat v. Salamat Khan 205
Bhagwati Prasad v. Emperor 709(2)
*Bhajan Singh v. Nokhe 168
Bhartu v. Deedar Singh 241
Bhickam Prasad v. Rani Indumati 984
**Bhola Nath v. Emperor 1
Bhola Nath v.Raghunath Das MithanLal 743
*Bhola Ram v. Dhani Ram 25
Bhoopal Rai v. Shiam Sunder Lal 781
*Bhullan v. Dasarath Pande 67
Bhullan Mal Asa Ram v. Secy. of State 960
Bikram Singh v. Emperor 535
Bisheshwar Upadhia v. Jagdeshwar Prasad 231
Boulton Bros. & Co. Ltd., Delhi v. New Victoria Mills Co. Ltd., Cawnpore 87

Brahmdeo v. Dubri Rai 548
Brijbhukhan v. Tota Ram 75
*Brij Kumar v. Jagdamba Prasad 671
Brij Narain Man Tewari v. Mt. Motirani 159
*Brij Raj Saran Singh v. Basant Singh 561

C

Chakhan Lal v. Kanhaiya Lal 72
Chandrika Lal v. Sami Nath 133
Chandrika Rai v. Shrikant Rai 597(1)
Chandu Mal v. Darbari Lal 592
Chauharja Singh v. Bachcha Lal 413
*Cheri v. Ram Sewak 428
Chhattar v. Emperor 897
Chhedda Lal v. Ghulam Abbas 242
*Chhotey Lal v. Bansi Dhar 699(2)
Chhotey Lal v. Manzur Ahmad 439
Chhot Khan Kurmi v. Ram Deo 76
Chiranji Lal v. Ram Sarup 267(1)
Chittaria v. Municipal Board, Bindraban 16
Chotey v. Dal Chand 862
**Chotey Lal v. Laiq Singh 15
Chunni Lal v. Emperor 99
Collector of Ballia v. Benaik Pershad Pandey 759(2)
——— v. Liladhar Bhagat 761(1)
Collector of Meerut v. Sagar Mal 454

D

Dalle Singh v Emperor 599(2)
Darbari Lal v. Damodar Das 792
Daropadi v. Mannu Lal 557
*Darshan Singh v. Wali Khan 102
*Dasami Sahu v. Param Shameshwar 315
Daulat Singh v. Sheo Nath 211
*Debi Dayal v. Ambika Prasad 545
Debi Dayal v. Ghasita 667
Debi Prasad v. Shamsher Khan 463
Dharam Narain v. Gur Saran 404
Dhu Ram v. Emperor 299
Dip Chand v. Munni Lal 879
*Dip Chand v. Sheo Prasad 593
Dodey Ram v. Mt. Gulkando 601
Dudh Nath Singh v. Mt. Munna Kuar 620
*Dulari, Mt. v. Edward Thelwal 761(2)
Dulichand v. Emperor 833
*Durgawati Kunwar v. Jagannath Prasad 680
Dwarka Prasad v. Ojha Dariao Singh 560

E

Emperor v. Abdul Ghafur 68
——— v. Angad 69
**——— v. Bashir 267(2)
*——— v. Dukhu 321
**——— v. Durg 260(1)
——— v. Jukhan 338
*——— v. Kumera 650
——— v. Motha 322
**——— v. Phuchai FB 33
——— v. Prem 270
*——— v. Ram Lal 273
*——— v. Ram Prasad 899(1)
Empire Engineering, Co., Cawnpore v. Municipal Board, Bareilly 801

F

**Fahiman, Mt. v. Awadh Behari Lal 279
Faqira v. Emperor 901(2)
Faqira v. Emperor 903
Faqir Chand v. Harkishun Das 599(1)
Faquir Pasi v. Behari Kundigar 411
Fateh Singh v. Emperor 320
Fazal Ahmad v. Har Prasad FB 465
Frank Coowbs v. Mufassil Bank Ltd., Gorakhpur 674

G

Gadhu Singh v. Bansgopal 859
Gajadhar v. Chunni Lal 559
*Gaje Singh v. Mt. Uchhaba 226
Gajram Singh v. Balwant Singh 702
Ganeshi Lal v. Chob Singh 755
Ganesh Shankar, *In the matter of* 81
Ganga Dihal Rai v. Ram Oudh 79
Ganga Din v. Piyare 63(1)
**Ganga Sagar v. Emperor 919
Ganga Sahai v. Emperor 271
Gargi Din Misra v. Debi Charan 805
*Gauri Datt Pandey v. Bandhoo Pandey 394
Gauri Shankar v. Emperor 905(1)
*Gauri Shankar v. Keshab Deo 148
Gayadin Singh v. Kalka Singh 332
Gaya Prasad v. Ram Sarup 101
Genda Mal v. Narsingh Das 553(1)
*Ghamandi Nath v. Babu Lal 899(2)
Ghasi Khan v. Kishori Ramanji Maharaj 380
Ghura Koer v. Bishun Ram 814
Ghurpat Sahi v. Mahabir 218
Girdhari v. Jodha 541
Girwar Singh v. Shah Ram Chander 586(2)
*Gobardhan Pande v. Debi Bux Kurmi 146
**Gomti v. Kanhaiya Lal 115
Gomti Singh v. Anari Kuar 492
Gopalji Maharaj v. Krishna Sunder Nath 887
Gopi Chand v. Jodhraj Deojit 458
Gopi Ram v. Durjan 63(2)
Govind Prasad v. Har Kishen 131
Govind Ram v. Gokul 806
**Govind Singh v. Bijay Bahadur Singh 980
Govind Singh v. Manglu 703
*Gur Diyal v. Sukhnandan Lal 236
Gurdial Singh v. Arjun Singh 551(2)

H

Habib Bakhsh v. Amina Bibi. 312
**Hansraj v. Dehra Dun Mussoorie Electric Tramway Co., Ltd. FB 353
Hans Raj v. Surja 324
**Hanwant Rai v. Chandi Prasad 293
Harbans Singh v. Suresh Datta 624
*Har Chand v. Devan Singh 550
Hardani Lal v. Ram Nath 704
Har Gobind v. Gitam 346
Har Saran Das v. Harbans Singh 335
*Hirdey Narain v. Emperor 850
Hoshiar Singh v. Udai Ram Singh 542
Hudson, L. v. Official Liquidator, Dehra Dun Massorie Electric Tramway Co. 826
Hukum Singh v. Surajpal Singh 337

I

Ibrahim Quareshi v. Abdul Hamid 797
Iftikhar Wali Khan v. Sarwari Begam 369
Imrat v. Emperor 916
Imtiaz Bibi v. Kabia Bibi 602
*Indian Turpentine & Rosin Co. Ltd. Cawnpore, *In the matter of* 118
*Irfan Ali v. Bhagwant Kishore 180
Ishri Singh v. Tejbir Singh 689
Ismal v. Emperor 705
*Israr Hasan Khan v. Deo Narain 372

J

Jadunandan Misra v. Sheopahal 272
*Jadunandan Singh v. Bechan Koeri 442
*Jagannath Sahu v. Chedi Sahu 144
Jagdeo Singh v. Kesho Prasad Singh 735
Jageshar v. Emperor 932
*Jagmohan Singh v. Ram Khilawan Dube 683
*Jahandar Begam v. Chinta 232
Jaideo Singh v. Dhoom Singh 419(2)
Jai Jai Ram v. Janki 756(1)
*Jai Nandan Tewari v. Umrao Koeri 305
Jamna Prasad v. Mahomed Zahir Uddinkhan 366
Janaki Dulari, Mt. v. Bishambher Nath 745

**Janeshar Das v. Emperor 202
Janki Kuar v. Nanda 847
*Jeot Ram Chandhari v. Mt. Lauji 751
Jhabboo Misir v. Havaldar Tewari 840
Jiwan Singh v. Dalip Singh 389
Johari Mal v. Balmakund 669
Jugul Kishore v. Banwari Lal 791
Jwala v. Emperor 575
**Jwala Debi v. Amir Singh 132
Jwala Nath v. Chhanga Mal 553 (2)

K

Kailash Chandar Jain v. Ram Lal 544
*Kalika Prasad v. Ajudhia Prasad 421
Kali Prasad Tewari v. Parmeshwar Prasad 127
Kalka Prasad, *In the matter of* 707(1)
*Kalloo v. Niadar Singh 252
Kallu v. Ganesh 348
*Kallu v. Ram Das 121
Kaluiya, Mt. v. Hira 950
**Kalyan Das v. Jan Bibi 12
*Kanhaiya Lal v. Girwar 753
*Karam Ali v. Mohammad Latif 326
Karimullah v. Rameshwar Prasad 774
Karimunnissa Bibi v. Mira Baksh 809
Kashi Pershad v. Ambika Prasad 165
Kasim Abbas v. Hans Ram 883
Katar Singh v. Bishamber Sahai 578(1)
Kaunsilla, Mt. v. Dip Singh 812
**Kayastha Co. Ltd. v. Sita Ram Dubey (FB) 625
Kazim Husain v. Ram Sarup 877
Kedar Nath v. Ganga Ratan 907
**Khairunnissa Bibi v. Oudh Commercial Bank Ltd. 287
Khooti v. Kishori Lal 512
Khuda Baksh v. Jai Shankar 386
*Kishan Sarup v. Brij Raj Singh 726
**Kishen Sahai v. Raghunath Singh 139
Kishau Mal v. Sakal Raj Mal 878
Koer Singh v. Pahalwan Singh 864
*Kora Mal v. Raghubir Lonia 861
Krishna Kishore v. Banwari Lal 259
Kundan Gir v. Jaswant Singh 765
*Kundan Lal v. Bhikhari Das Ishwar Das 254
Kundan Lal v. Manohar Lal 588
Kundan Lal v. Raj Behari Lal 513
*Kunj Behari Singh v. Bindeshri Prasad Singh 207

L

Lachmi Chand Babu Lal v. Unkar Mal Chote Lal 351
Lal Bahadur v. Emperor 914(1)
Lalta Prasad v. Chunni Singh 385

M

Madan Kishor v. Mahabir Prasad 816
**Madan Lal v. Gajendrapal Singh 243
*Madan Mohan Singh v. Narain Singh 521
Madusudan Lal v. Emperor 931
*Mahabir v. Baijnath Singh 609
Mahadeo Bharthi v. Mahadeo Rai 506
*Mahadeo Prasad v. Khubi Ram 793
*Maharaj Singh v. Suryapal Singh 29
*Maharani, Mt. v. Debi Das 253
Mahomed Akbar v. Ali Sajjad 691
Mahomed Daud Khan v. Jai Lal 265
**Mahomed Inayat Ali v. Fazal-ul Rahman 367
Mahomed Ishaq v. Baldeo Prasad 606
*Mahomed Ishaq v. Balmakund Lal 116
Mahomed Ishaq v. Jafri Begam 155
Mahomed Kamil v. Mahomed Salim 875
Mahomed Najaf v. Badri Narain Prasad 658
Mahomed Niaz Ahmad Khan v. Nanhe Mal 615
Mahomed Raza Ali Khan v. Mahomed Israr Hasan Khan 459
Mahomed Sher Khan v. Amjad Husain 494
Mahomed Unis v. Janeshar Das 881
*Mahomed Abdul Wahid Khan v. Radha Kishun 581
Mahomed Yusuf v. Emperor 901 (1)
*Mahomed Zahur Ahsan v. Mt. Maimuna 142
*Makhan Lal v. Narain Das 377
*Malik Singh v. Shiam Lal 440
Malkhan Singh v. Gulab Singh 32
Mangali Pershad v. Babu Ram 365
*Mangat Lal v. Ghasi Khan 800
Mangat Rai v. Babu Ram 85 (1)
Manohar Singh v. Emperor 220
Mansa Singh v. Emperor 750 (1)
Mansa Tewari v. Parmeshwar Tewari 327
Man Singh v. Emperor 928
Man Singh v. Guman Singh 619
*Maqbul Ahmad v. Pateshri Partab Narain Singh 677
Masitullah v. Umrao 414
Mauji v. Bhagole 419 (1)
Mehdi Ali Khan v. Chunni Lal 834
Meherban Ali Khan v. Sita Ram 374
Mewa Lal v. Emperor 349
*Mihi Lal v. Soni Ram 209
Mithan Lal v. Maya Devi 444
Mirza Mal Bhagwan Das v. Ramesher 536
Moola v. Bhuria 613
Moti Lal Agarhari v. Champa Lal 795
Mukat Nath v. Shyam Sundar Lal 659
Mukhram v. Emperor 930
Mukhtar Ahmad v. Lachman Prasad 845 (1)
*Mukhtar of Benares, *In the matter of* FB 655
**Mul Chandu Nandu Mal v. Kanhaiya Lal 134
*Mumtaz Begam, Mt. v. Mt. Lachhmi 174
Municipal Board, Allahabad v. Bahadur Johari 870
Municipal Board, Pilibhit v. Khalilul-rahman 382
Munna Lal v. Tara 83
Murli v. Emperor 720
Murli Dhar v. Surja 699 (1)

N

Nand Kishore Rai v. Ganesh Prasad Rai 446
*Nankoo Ahir v. Bhagelu Ahir 347 (1)
Narain Prasad v. Emperor 898
*Narshing Prasad Singh v. Rupan Singh 388
Nasrat Ali v. Rudra Nath 448
Natha Ram v. Ram Gir 673
Natho v. Babu Ram 399
Nathu v. Emperor 855
Nathu Singh v. Girwar Singh 657
*Naubat Lal v. Mahadeo Prasad Singh 309
Niadar v. Mahomed Ahmad 258
*Niranjan Prasad v. Behari Lal 302
Nirman Bahadur v. Fateh Bahadur 963

P

Padam Singh v. Reoti Saran 481
Paras Ram Singh v. Raj Kumar Singh 498
Parbhu v. Emperor 914 (2)
Parmeshri Kunwar v. Dhuman Kunwar 393
Parshadi v. Emperor 160
*Parsotam Narain v. Benares Bank Ltd. 59
Partab Singh v. Hemraj 497
Pearey Lal v. Sita Ram 266 (2)
*Phul Chand v. Gobardhan Das 739
Phul Chand Dube v. Emperor 917
Piare Lal v. Jhabba Lal 668
Pir Baksh v. Rameshwar Nath 52
Pitambar Das v. Punna 511
Prakash Narain v. Ram Charan 872
Pran Dei, Mt. v. Sat Deo 85 (2)

*Pratab Singh v. Mt. Sumitra 662
Prem Narain v. Emperor 82
Purnama Devi, Mt. v. Ram Prasad 266 (1)

R

Rachhpal Singh v. Sheo Ratan Singh 692
Radhey Shiyam v. Mewa Lal 210
*Rafiqunnissa Bibi v. Abdul Shakur Khan 400
Raghubar Dayal v. Puran Singh 432
Raghubar Saran v. Jumna Prasad 208
Raghubir Chaube v. Gauri Chaube 803
Raghuhath Das v. Chingan 62
Raghunath Singh v. Sheo Pratab Singh 409
Raghuraj Singh v. Hargobind 845 (2)
*Rahim Bakhsh v. Bachcha Lal 214
Raja Ram v. Emperor 936
Ramadhar v. Raj Narain 908
*Ram Autar Kurmi v. Ghulam Dastgir 250
Ram Chand v. Emperor 157
*Ram Chander v. Sher Ali 779
Ram Chander v. Tej Singh 906
Ram Charan v. Ghafoor 31
*Ram Charan v. Tulshi Ram 306
Ram Charan Banwari Lal v. Kishori Lal Ram Sarup 50
Ramdas Rai v. Ram Sarup 799 (1)
Ram Dawan v. Ram Surat 589 (1)
Ramdeo Ram v. Frank Coombs 437
*Ram Din Hazari Lal v. Mansa Ram Murlidhar 890
Ram Dubey v. Har Narain Dubey 799 (2)
Rameshar Prasad Lal v. Ghisiawan 531
Ram Ghulam Singh v. Emperor 396
Ram Kishore Singh v. Raghubir 78
Ram Krishna v. Anand Krishna 578 (2)
Ram Kumar Singh v. Muhammad Salim 339
*Ram Lal v. Harpal 237
Ram Narain v. Mt. Naudrani Kunwar 128
Ram Narain v. Ram Das 65
Ram Prasad v. Mt. Mukandi 443
*Ram Raj Singh v. Lachmi Singh 167
Ram Raj Tewari v. Sheoraj Saithwar 663
Ram Ratan v. Ram Lal Singh 759 (1)
Ram Rup Bhar v. Emperor 813
Ram Saran Das v. Bhagwan Singh 775
**Ram Saran Das v. Bhagwat Prasad SB 53
Ram Sarup v. Girdharilal 371
Ram Sarup v. Kanhaiya Lal 724
Ram Sarup v. Ram Richtpal 621
Ram Singh v. Subhan Mochi 519
Ram Sundar v. Emperor 904
Ram Swarup v. Bunyad Ali 126
Rang Lal v. Lilawati 375
*Ratan Dei Mt. v. Sher Singh 260 (2)
Resal Singh v. Baljit Singh 709 (1)
Riaz Uddin v. Mt. Phula Devi FB 977
Rikhab Kumar v. Trivedi & Co. 455
Rohan Lal v. Collector of Etah 525
Rup Kishore v. Collector of Etah 948
Rure Mal v. Emperor 937

S

*Sabir Husain v. Rirasat Ghaus 696
Sadho Kandu v. Mt. Jhinka Kuer 456
Sahdeo v. Budhai SB 571
Sahdeo Ram v. Salig Ram 543
Sahdeo Singh v. Ram Nawal Singh 790
Sahodra, Mt. v. Badri Prasad 737
Sah Ramchand v. Panna Lal 308
*Sahu Lal Chand v. Ram Chandra 462
Saiduddin v. Mohiuddin 556
Sakina Begam v. Harnam Singh 618
*Sakina Bibi v. Sairi Bibi 500
Santi Lal v. Raj Narain 858
**Sarju Kumar Mukerji v. Dwarka Prasad 296
Saroop Singh v. Narsingh 846
Sarwari Begam, Mt. v. Mt. Razia Khatun 158
*Sattar v. Nazir Khan 147
Sayiduddin v. Abdul Bari 857
*Secy. of State v. Bhagwan Prasad 769
———v. Harbans Prasad 848
*———v. Har Charan Das 417
———v. Nand Ram Chhotey Lal 749
*Shafiqullah Khan v. Md. Samiullah 943
Shamsher v. Gaya 576
*Shankar Singh v. Emperor 201
Shankar Singh v. Emperor 587
*Shantanand Gir v. Basudevanand Gir 794
Sharafat Ali v. Mt. Bhagwati 763
Sheo Nandan v. Mahomed Khalik 777
Sheo Prasad v. Dodi 164
Sheo Prasad v. Sanaullah 558
Sheo Prasad Singh v. Muffassil Bank Ltd., Gorakhpur 580
Sheo Ram v. Sone Lal 912
Sheo Saran Rai v. Jaimangal Misir 616
*Sheo Shanker v. Partab Narain Singh 213
**Shiam Lal v. Mt. Hukum Kuar 100
Shiam Lal v. Moti Ram 666
*Shiva Prasad v. Commr. of Income-tax U. P. 819
Shiva Prasad v. Emperor 347 (2)
Shri Dhar v. Udaibir Singh 17
Shujauddin Khan v. Mehdi Raza 873
*Shyam Lal v. Badri Prasad 789
Sibt Ahmad v. Amina Khatoon 18
*Sis Ram v. Emperor 585
Sita Ram v. Har Sahai 527
Sita Ram v. Thakur Prasad 429
Sobha Ram Gopal Rai v. Tara Chand 502
Sohan Lal v. Bhagwan Singh 788
Sohan Lal v. Peare Lal 865
Sri Kishan Pandey v. Ghana Nand Joshi 721(2)
Subedar Singh v. Komal Singh 656
Sukhdarshan Prakash v. Ram Das 815
Sukhwa v. Emperor 707 (2)
Sumer Chand v. Beni Prasad 123
Sundar Kunwar v, Baldeo Prasad 623
Sundar Lal v. Ghissa 589 (2)
Surajmal v. Shankar 600
*Suraj Narain v. Kalyan Das 430
Suraj Pal Singh v. Ramjit 341
Suraj Pal Singh v. Shib Lal 843
Surjan Kunwari v. Shantanand Gir 905 (2)
Surjan Lal v. Emperor 278
Swadeshi Cotton Mills Co. Ltd. Cawnpore *In the matter of* 70

T

Tamizan v. Nanhey Lal 334
Tayyabunnissa v. Nasarullah 378
Thakurji Maharaj v. Kamta Prasad 974
Thomas, J. W. v. Hanuman Prasad 837
Tikam Singh v. Likhi Singh 319
Tilak Singh v. Sheo Nandan Misir 612
Tirbeni Misir v. Mangal Chand 889
Tola Ram v. Mt. Govindi 555

U

**Umashankar v. Mahabir Prasad 854
Umrao Singh v. Sultan Singh 384

W

Wahidan, Mt. v. Mt. Aliman 844

Y

Yudhishter Lal v. Fateh Singh 721 (1)

Z

Zafar Ahsan v. Zubaida Khatun 604
Zafaryab Hasan v. Umar Daraz Ali Khan 610
*Zafer Ali v. Kanti Prakash 896
Zaki Husain v. Depty Commr. Gonda 687
Zalim Singh v. Raghunandan 379
Zorawar Singh v. Dip Chand 331

P. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

THE

ALL INDIA REPORTER

1929

ALLAHABAD HIGH COURT

SUBJECT INDEX

Absence of Star denotes Cases of Provincial or Small Importance.
*** Indicates Cases of Great Importance.**
*** * Indicate Cases of Very Great Importance.**

A

Acknowledgment
——*See* LIM. ACT, S. 19.

Acquiescence
——*See* LANDLORD AND TENANT.
——Essentials—Where defendants do not make mistake as to their legal rights there is no acquiescence **877***a*

Adverse possession
——Mere fact that other people are co-sharers cannot prevent acquisition of title by adverse possession **910***c*
——Possession of parti plot of land by ryot is not adverse but permissible—Rule has no application to possession of abadi plots **883**
——Possession of property as mortgagee—He cannot prescribe title as absolute owner **875***b*
——Person mortgaging certain plot and then selling same—Vendee bringing redemption suit and obtaining possession not only over the plot but also over another plot—Latter plot in possession of mortgagee under colour of mortgage—Vendee continuing in possession of both plots—By the redemption decree proprietary rights in 2nd plot went back to proprietor's vendor and possession of vendee is adverse to him **799 (2)**
——Onus lies on claimant **753***a*
——Decree-holder purchasing property at auction sale judgment-debtor remaining in possession—After purchase judgment-debtor agreeing to pay purchaser certain amount in satisfaction of decree in three years—Judgment-debtor's possession for those three years is not adverse **541**
——Original owner ceasing to be in possession—Widow and reversioners not taking steps to recover possession—Reversioners will be barred by limitation **419 (2)***a*
——Line of succession to trusteeship to be according to terms of wakf-deed—Legal heir of last trustee cannot acquire trusteeship by adverse possession against person legally entitled—Even if so acquired trustee would be bound by terms of the deed **404***a*
——Male owner being away, woman's name entered in village papers—Woman does not hold adversely **331***b*
*——Religious endowment—There can be adverse possession, not only as against the idols but over the idols themselves **315***b*
*——Donor of dedicated property can himself acquire title to it by adverse possession **315***c*
——Landlord and Tenant—Agreement to hold land rent-free ending—Tenant becomes trespasser **211***b*

Agra Pre-emption Act (11 of 1922)
——Pre-emptor can show real nature of alienation **859***b*
——Marginal notes inserted under legislature's authority can be referred to while exposing meaning of the sections **63*b*
——Marginal notes, in Agra Pre-emption Act, inserted under legislature's

authority an be referred to while exposing meaning of sections (FB) 53*b*
——**S. 3**—*A* selling his house to *B* for Rs. 175 and *B* agreeing to sell it back to *A* in case he sells at all, for Rs. 175 only and to another, only if *A* declines to purchase it to that price—*B* then selling it to *C*, who had notice of that agreement for Rs. 300 notwithstanding *A's* offer for Rs. 175—Agreement was not void but personal contract, which could be enforced against *C* who purchased having notice of it—*A's* suit to enforee that agreement would not amount to claim for pre-emption **667**
——**Ss. 3** and **5**—Village of three mahals—Wajibularz of one only recording custom of pre-emption—Property sold from third mahal—No wajibularz of this mahal or village prior to the Act recording custom of pre-emption—Right of pre-emption cannot be enforced **379**
——**S. 4**—Right to receive malikana is not interest of cosharer **618***a*
——**S. 4 (1)**—"Entitled as proprietor" means having proprietary interest and not merely possessory title **739***a*
——**S. 4 (1)**—Mere fact that person is recorded as cosharer and is in possession does not make him cosharer **413**
——**S. 4 (1)**—Proprietor—A person in adverse possession without actual title cannot be said to be entitled as proprietor to the property in his possession so long as his title has not matured by prescription within S. 4 (1) **300***b*
——**S. 4 (3)**—Land includes buildings **366***b*
——**S. 4 (7)**—Muafi plots—Holders of specific muafi plots are petty proprietors when they do not own any land jointly with the cosharer in mahal in the administration of affairs of which they are not entitled to take a part **385***b*
——**S. 4 (10)**—In the case of tangible property of Rs. 100 or upwards, mere mutation of names is not sale which can be pre-empted **549***b*
——**S. 5**—S. 5 lays down rule to determine whether right of pre-emption exists in mahal (FB) **977***a*
——**Ss. 5, 11** and **12**—Mahal in Ss. 5 (1), 11 and 12 applies to existing mahals (FB) **977***b*
——**Ss. 5, 11** and **12**—Where there is wajibularz containing mention of right of pre-emption applicable to portion of mahal, right of pre-emption should be deemed to exist throughout mahal (FB) **977***c*
——**S. 5**—Record recognizing right of pre-emption—Wajibularz is conclusive evidence of custom of pre-emption **755***a*
——**S. 5 (a)**—Entry in wajibularz meaning "at transfer of one cosharer's property other cosharers have right of pre-emption according to rights and usages of religion"—Although word "religion" is ambiguous, yet entry could be interpreted as laying down rule of pre-emption according to Mahomedan Law and so could not be taken out of S. 5 (a) **531***a*
*——**Ss. 6** and **11**—Sale deed executed in pursuance of decree by Court is sale within meaning of S. 11 and as exception in S. 6 does not apply to such sale deed, right of pre-emption can accrue in respect of it **462**
——**S. 9**—A divison of village into six complete pattis and one joint patti is not perfect partition, and there being only one mahal an exproprietary tenant in any patti can resist suit for pre-emption against him **448**
——**S. 11**—Scope—Before suit for pre-emption can be maintained, it is necessary to find that interest transferred is not only proprietary interest but also that of cosharer or petty proprietor **618***b*
——**Ss. 11** and **12**—Isolated plot—An isolated plot of land is pre-emptible **366***a*
——**S. 12**—Petty proprietor has preference over cosharers if he is coparcener in the very interest sold **755***b*
——**Ss. 12** and **5**—Right of pre-emption recorded in wajibularz must be deemed to exist—Who are entitled to that right is to be determined according to S. 12 and not wajibularz **385***a*
——**S. 12 (3)**—Vendor Hindu widow—Pre-emptor claiming preference by relationship must not only show that he is related to vendor but also that they have common ancestor **419 (1)**
——**S. 12 (3)**—Sharer—Bahari is a subdivision of the mahal very much like a thok, which si found in eastern districts of U.P. **300***d*
——**S. 13**—Persons equally entitled to pre-emption must pay equal consideration—To determine shares of joint plaintiffs circumstances under which payment is made are to be taken into account **953***c*

Advocate High C
Srinagar.

Agra Pre-emption Act
——**Ss. 14** and **15**—Mere posting notice is not sufficient—It must be served **600***a*
——**S. 14**—Cosharer intending to sell his share—Other cosharer refusing to purchase for want of money, but not showing intention to reserve his right to pre-empt—Vendee induced to purchase—Cosharer's refusal to purchase amounted to absolute refusal and he was estopped from claiming pre-emption, although no notice was given as required by S. 14 **531***b*
——**S. 17**—When the Court comes to the conclusion that the amount entered in the sale deed is grossly excessive and it is convinced that the whole of that amount could not have been paid to the vendor and there is no other material on the record to come to a definite finding as regards the actual price of it, it is entitled to proceed to find the market value of the property under S. 17 of the Act **600***b*
——**Ss. 19** and **20**—Even under S. 19 vendee must acquire indefeasible title—Ss. 19 and 20 should be consistently interpreted **765**
——**S. 19** — Purchaser obtaining gift from Hindu father during pendency of pre-emption suit and becoming cosharer —Gift did not create indefeasible interest and so pre-emption suit could not be defeated **703***a*
——**S. 19**—Pre-emptor having preferential right at sale — All pre-emptors equally entitled on date of decree—Property must be divided equally **663**
——**S. 19**—Pre-emption suit—Ex parte decree passed—Vendee getting suit restored and then acquiring interest in property cannot defeat suit **551 (2)**
*——**Ss. 19** and **20**—Defendant, a non-cosharer in mahal purchasing zamindari house—Plaintiff a cosharer suing for pre-emption—Defendant obtaining gift of share after institution of suit but before decree—Under S. 20 the acquisition must be made before suit—But under S. 19 plaintiff's claim would be defeated although gift is obtained after suit because he has no "subsisting right" at the time of decree **(FB) 53***a*
——**S. 20**—If gift of property in dispute to vendees is liable to be defeated they do not get indefeasible right **859***a*
——**Ss. 20** and **19** — "Indefeasible" does not include voidable for undue-influence, coercion or the like **703***b*
——**S. 20**—Indefeasible interest **300**
Agra Tenancy Act (2 of 1901)
——Option once exercised cannot be resiled from **341***a*
——**S. 4 (12) (d)**— No right under 4 (12) (d) exists in respect of abadi **76***a*
——**S. 10** — Mortgage by conditional sale gives rise to ex-proprietary tenancy in *sir* **864***b*
——**S. 10** — Mere occupying land for many years professedly as ex-proprietary tenant does not confer upon a person ex-proprietary tenancy **498***a*
——**S. 10**—No ex-proprietary right accrues on the passing of a foreclosure decree **498***b*
——**Ss. 17** and **22**—Occupancy holding —Division between joint tenants by common consent does not create separate holdings—Joint tenancy continues subject to devolution of inheritance under S. 22 **808***a*
——**S. 17**—Occupancy holding — Tenants cannot carve out fresh occupancy tenure without consent of zamindar—Permissive possession is in nature of license **808***b*
*——**S. 20 (2)**—Mortgage of occupancy holding not being unlawful but merely inoperative, mortgage of such holding along with other property is not wholly unlawful and other property will be liable for whole debt **394***c*
——**S. 47** — Tenant ejected and re-admitted—Tenancy is continuous only for S. 11—When ejected tenant is re-admitted, agreement changing rent need not be registered **78**
——**S. 75**—Compensation for rose trees —Principle enunciated **341***b*
——**S. 75**—Suit is to be tried as on the date of cause of action — Subsequent events can be considered only in exceptional cases **341***c*
——**S. 79**—Heir of Mahomedan occupancy tenant not obtaining possession actual or constructive—Suit by him for possession against other heirs recognized as tenants by landlord in compromise in ejectment suit lies in a civil Court **868**
——**S. 79**—Suit for ejectment by real tenant—Zamindar's acceptance of rent from trespasser is not his recognition as tenant nor it means that the suit is brought through zamindar's agency—

Agra Tenancy Act
Suit can be brought within ordinary limitation **196***a*
——**S. 87** — Abandonment by leaving village is question of fact depending on tenant's intention **218***a*
——**S. 87**—Tenant leaving village for more than 12 years without arranging to pay rent— Zamindar can prove abandonment without filing notice **218***b*
——**S. 95**—Where it is deducible from plaint that plaintiff's sole object is to obtain declaration to tenancy his suit is triable by revenue Court, although one of the reliefs asked for is such as, if that alone were asked, can be entertained by civil Court **613**
——**Ss. 95** and **167** — Civil Court is barred to entertain suit by tenant based on wrong decision of Collector regarding boundary of his holding **442***b*
——**S. 146, Para. (3)**—Plaintiffs suing for value of crops and alleging that crops were misappropriated shortly after distraint and that some time afterwards decree for arrears of rent was obtained, execution of which was applied for by plaintiff's arrest — S. 146 does not apply so as to bring suit within revenue Court's exclusive jurisdiction **669***b*
——**S. 159** — Lambardar continuing to be lambardar after partition and paying revenue for years subsequent to partition on behalf of other cosharers— In his suit for recovery of such revenue it does not lie upon him to prove prior collection of arrears and that he paid it from his own pocket **689***a*
——**S. 161**—Suit for arrears of revenue by assignee of revenue only falls under S. 161—Suit instituted not by assignee from Government but by assignee of assignee and not for arrears of revenue does not fall under S. 161 — Assignee clearly means assignee from Government **781***a*
——**S. 161**—Interest — No interest is payable under S. 161—The right of interest depends on contract express or implied or some rule of law allowing it **29***b*
——**Ss. 163** and **164**—Cosharers suing lambardar for profits can join in same suit **668**
——**S. 164** — A revenue Court order subsequent to the presentation of the plaint will not affect the plaintiff's right to sue for the profits for the years during which his name was entered in the village record **378***b*
——**S. 165** — Non-lambardar cosharer suing another for his share of profits on entire rental—Defendant pleading non-collection of entire rent but failing to produce his account books — Court is justified in decreeing plaintiff's whole claim **702**
——**S. 177**—Question of proprietary title a matter in issue when appeal filed —Subsequent abandonment of the plea by respondent rendering decision on it unnecessary—District Judge's jurisdiction to hear appeal is not barred **67***b*
——**S. 198 (2)** — Previous suit in revenue Court by malguzar to eject tenant —Tenant claiming possession as servant of a third person—The person added as a defendant—State of land decided but no issue as to status of the third person —Ejectment decree passed against the tenant—Subsequent suit in civil Court by the third person claiming land as grove—Prior decision is not res judicata **17**
——**S. 199**—Option exercised cannot be revoked **164**
——**S. 201 (3)** — Presumption arising under S. 201 (3) will not be removed by inferential decisions of civil Courts by reason of res judicata **378***a*
——**S. 201 (3)** — Entries in revenue register are conclusive in suit for profits Judgment prior to years of profits does not operate as res judicata and should be ignored **155***a*
——**S. 273** — Revenue Court deciding lease to be valid—Civil suit for avoiding it can lie **387***a*
——**(3 of 1926)**—Retrospective effect— Suit instituted before but decided after Agra Tenancy Act (3 of 1926) — Appeal is governed by old Agra Tenancy Act **745***a*
——**S. 3 (11)** — Tenant constructing well close to, but without, his holding —No special damage to landlord — Landlord has no cause of action— (*Obiter*) **544***b*
——**S. 3 (15)** — Considerable portion containing trees sufficient to prevent land from being cultivated—Land continues to be grove **557***c*
——**S. 15**—Transfer of share in mahal —Vendor being exproprietary tenant of all cosharers and not vendee alone,

Agra Tenancy Act
holding cannot be relinquished in favour of vendee alone **803**
——**S. 17**—Occupancy plot becoming grove can be transferred **777***c*
——**S. 20 (3)**—Application—Interest of a permanent lessee of agricultural land, although declared to be transferable by lease, cannot be transferred, as such transfer is barred by S. 20 (3) **612***a*
——**S. 24**—Occupancy plot becoming grove—Bandhu can succeed as heir **777***d*
——**S. 44**—Lambardar being entitled to let out lands according to S. 3 (6) is landholder—Lambardar ejecting person—Cosharers stealthily taking possession are liable to be ejected **869**
——**S. 79** — Tenant ejected — During ejectment proceedings property attached and purchased in execution of money decree against tenant—Purchaser cannot in a subsequent suit by landlord raise the plea that the tenant being grove-holder could not be ejected for arrears of rent **159**
——**S. 99**—Defendant on basis of document of relinquishment claiming as landholder right to eject plaintiff and ejecting him — Plaintiff's remedy lies under S. 99 **656**
——**Ss. 99** and **121** — Suit for declaration of joint tenancy and possession—Defendants alleging to be tenants—Suit lies in revenue Court **(SB) 571***a*
——**Ss. 99** and **121**—Tenant need not declare that he is claiming through landholder **(SB) 571***c*
——**S. 99 (1)** — Perpetual lessee suing landholder for possession—Suit number undivided — Suit involving redemption of mortgage with regard to part of suit number — Civil Court is proper forum for suit for possession and two separate suits are not necessary **616***c*
——**S. 103** — Zamindar can settle surrendered holding with any tenant **196***b*
——**S. 110** — Tenant can construct well without proving any local custom **544***a*
——**S. 121 (2)**—Landholder is necessary party to suit **(SB) 571***d*
——**S. 146**—Civil and revenue Courts—Question of tort included—Suit can be tried by civil Court **669***d*
——**S. 181**—S. 181 merely provides for precedence of rent claim where distraint is genuine—No relief is afforded to third person against fraudulent distraint by zamindar **845 (1)***a*
——**S. 197 (a)** — Character of land granted for maintaining grove changed—Ejectment is permissible—No express or implied abandonment is necessary. **557***a*
——**S. 198**—On failure to recover rent, suit brought in civil Court—Plaintiff is entitled to declaration only and not to decree for possession **576**
——**S. 198**—*D* suing for subtenant's ejectment—Latter pleading that he was tenant of *P*—Revenue Court making *P* party and deciding that he was *D's* subtenant—*P's* suit to declare his title will not be barred by revenue Court's decision because mistake in making *P* party to suit cannot invest it with jurisdiction to try proprietorship between parties **548**
——**S. 230**—Scope — (*Sulaiman, J.*)—S. 230 is very wide and mandatory. So long as the suit or application specified in Sch. 4 can be heard by the revenue Court the jurisdiction of the civil Court is completely ousted **(SB) 571***b*
——**S. 231**—Specific section in Tenancy Act providing for applicability of Limitation Act, S. 5—It is not intended by that section to exclude applicability of rest of Limitation Act to suits and proceedings under Tenancy Act **745***b*
——**S. 236**—One cosharer in undivided mahal in possession of property by collecting rent for coparcenary body—Other cosharer cannot sue for joint possession and mesne profits in civil Court, but must go in revenue Court **810**
——**S. 242 (1) (a)** — Interpretation — "Subject matter" in S. 242 (1) (a) refers to subject matter of suit and not to subject matter of appeal **845 (2)***a*
——**Ss. 243** and **270**—Suit for rent under S. 132—Defence under S. 270 that rent was paid in good faith to third person—No appeal lies to District Judge under S. 243 **512**
——**S. 248 (3)**—Suit for profits against lambardar—Claim partially decreed—On appeal by plaintiff District Judge setting aside trial Court's order and remanding suit—No second appeal would lie against such remand **586 (2)***a*
——**S. 249** — No appeal lies to High Court under Tenancy Act from order of remand by District Judge in appeal **560**
——**S. 253**—No cause for interference arises where lower Court acts within jurisdiction **898***b*

Agra Tenancy Act
——**S. 253**—Revision—High Court has no power of revision except under S. 253—Expression "such revenue Court" does not include District Judge—High Court has no power of revision of order by District Judge **735**
——**S. 253**—No revision lies to High Court in suits for profits decided by revenue Courts if valuation of suit does not exceed Rs. 200 because in such cases no appeal lies to District Judge **586 (2)***b*
——**S. 266** — Some cosharers not impleaded—Suit though bad under S. 266, should not be dismissed—Plaintiff should be allowed to bring the cosharers on record **847**
——**S. 266 (1)**—Scope—It is wrong for a revenue Court to decree ejectment at the instance of one cosharer alone **609***a*
——**Sch. 2, List 2, Serial No. 2**—A set off is not admissible in the revenue Court under Sch. 2 List 2, Serial No. 2 **691***b*

Allahabad High Court Rules (Civil)
——**Ch. 3, R. 37**—Amin alone can be deputed to prepare map and if Court deputes person other than amin on party's prayer, it must give reasons in detail **446***b*
——**Ch. 7, R. 3**—Non-compliance with R. 3 is only irregularity merely on account of which re-hearing of case cannot be asked for under Civil P. C., S. 151 **403***b*

Appeal
——Memorandum insufficiently stamped—High Court can reject it—[But see *A. I. R.* 1923 *All.* 349 (1).] **75**

Arbitration
——Award—Proof of award is sufficient evidence of fact and validity of award in the absence of agreement to refer to arbitration **415***a*
——Obiter dictum of arbitrator does not bind parties **(FB) 465***b*
——Powers of Court—Arbitration pending—Order of Court to continue proceedings, without giving time to parties, upon non-receipt of award up to a certain date is undesirable **259**

Arbitration Act (9 of 1899)
——**S. 19**—Failure in the endeavour to solve differences by arbitration does not affect the validity of the arbitration clause **455***a*

Arms Act (11 of 1878)
——**Ss. 15** and **17**—U. P. Arms Rules and Orders (1924), R. 35—Repairer of

Arms Act
Arms in possession of guns for repairs cannot be convicted of offence of being in possession of arms without license—Length of time of possession depends upon circumstances **720**
——**S. 19 (f)**—In Aligarh District, for prosecution under S. 19 (f), District Magistrate's sanction is not necessary **69**
——**Ss. 19 (f)** and **29**—Where unlicensed possession is clear, previous sanction under S. 29 is unnecessary **68***a*
——**S. 29**—In Aligarh District for prosecution under S. 19 (f) sanction was necesary only for three months after the Act commenced and not subsequently **69**
——**S. 30**—In U. P. Officer in charge of Police Station is empowered to conduct search—Officer taking action must be presumed to be empowered **68***b*
——**S. 30**—When unlicensed possession is clear accused cannot question legality of search **68***c*

B

Bengal Alluvion and Dilluvion Regulation (11 of 1825)
——**S. 2**—Custom of "dhardhura" pleaded—Incidents of custom must also be pladed and proved **233**

Bengal N. W. P. and Assam Civil Courts Act (12 of 1887)
——**S. 17** — When Court which has passed decree is abolished, it is the Court to which its business is transferred which is competent to execute decree **677***c*
——**S. 22**—District Judge is competent to transfer appeal from order under Criminal P. C. S. 476 to Subordinate Judge **774***b*

Bundelkhand Alienation of Land Act (2 of 1903)
——**S. 4**—An order under S. 4 allowing Local Government to determine what persons are to be deemed to be agriculturists must be deemed to have retrospective effect **421***f*
——**Ss. 9 (1), 10** and **16**—Applications of Ss. 10 and 16 being restricted to those mortgages which are covered by Act, they cannot affect simple mortgage between members of same tribe which is excluded from S. 9 (1) **421***b*
——**S. 16**—S. 16 is retrospective **421***c*

C

Charitable and Religious Trusts Act (14 of 1920)
——**S. 2**—District Judge is subordinate to High Court **581***b*

Charitable and Religious Trusts Act
——**S. 5**—(Per *Niamatullah, J.*)—Alleged trustee failing to institute suit for which permission given under S. 5—District Judge passing order against him—He can bring regular suit for declaration of his private right to property or that it was not held in trust (*Mukerji, J.* contra) **506***a*
——**S. 7**—Application to District Judge for advice is case **581***c*
——**S. 12**—High Court has revisional powers under the Act **581***d*
Civil P. C. (5 of 1908)
——**S. 2 (2)**—Ex parte order granting leave to apply for execution does not have the force of decree **390***a*
——**S. 2 (2)** Order striking off objection of judgment-debtor for default is not appealable (*Obiter*)—Remedy is S. 151 or O. 47 **123**
——**S. 10**—S. 10 is inapplicable unless both subject matter and reliefs are identical—Fact of one issue being in common would not necessitate stay of subsequent suit—"Matter in suit" means entire matter in controversy **805**
——**S. 11**—Suit dismissed on ground that a person had no right to continue suit cannot act as res judicata against his sons **910***a*
——**S. 11**—Finding is not conclusive if decree is not based on it but is made in spite of it **910***b*
——**S. 11**—Suit dismissed for want of cause of action is not a bar **844**
——**S. 11**—Nine out of 15 properties mortgaged, purchased by mortgagee, 4 by *A* and 2 still in mortgagor's possession—*A* suing for redemption making mortgagor and mortgagee defendants—Court taking account of liability for redemption and deciding that certain sum was payable by properties in mortgagor's possession—Decision is binding on mortgagor in his subsequent redemption suit **814***b*
——**S. 11**—Findings arrived at in representative suit enure to benefit of entire family **775***a*
*——**S. 11** — Ex parte decree acts by way of res judicata quite as much as decree passed on proper contest **761(2)***b*
——**S. 11**—Suit for redemption — Possession of part of mortgaged property claimed — Subsequent suit for proportionate contribution for part owned by other party is not barred by res judicata **696***a*
Civil P. C.
——**S. 11** — Decree passed in terms of award without objection cannot afterwards be treated as nullity because arbitrators had wrongly decided mixed question of fact and law **521***a*
*——**S. 11**—Stray remark, not incorporated in operative portion of award, cannot supersede previous decree **521***b*
——**S. 11**—Scope—A plea in bar can be allowed to succeed only where the law expressly provides for it or the implication is so irresistible that its provisions are inconsistent with a contrary hypothesis **506***b*
*——**S. 11**—One member of one of two branches of deceased Mahomedan suing other members of his branch and *S* a member of other branch for partition—Suit property decided to belong to common ancestor—*S* then acquiring interest in suit property of *P* a member of his branch — *S* with *X* and *Y*, two more members of his branch bringing subsequent suit for partition of their share—Although *X* and *Y* were not parties to former suit and although *S* was now suing also as assignee of *P*, decision in former suit would be res judicata in subsequent suit **500**
——**S. 11**—Sale taking place after preparation of tarz taqsim — Suit to set aside such sale will not be barred by res judicata nor would it be barred by U. P. Land Revenue Act, S. 233 (k) provided suit does not disturb partition **463**
——**S. 11** — Previous redemption suit dismissed for failure to pay sum decreed for redemption does not bar subsequent suit for redemption **409***a*
——**S. 11**—Scope—Any matter arising in a previous redemption suit which was dismissed for failure to pay decretal amount, and decided in that suit, cannot be reopened in a subsequent redemption suit **409***b*
——**S. 11**—Title—Meaning of — Word "Title" has nothing to do with the particular cause of action on which party sues or is sued—It refers to capacity or interest of party **400***a*
——**S. 11** — Ex parte decision operates as res judicata **346***a*
——**S. 11**—Minor defendants are bound where their co-defendants had identical interest **346***b*
——**S. 11**—Appeal from preliminary decree pending — Final decree passed is valid **287**

Civil P. C.

*——**S. 11**—Person brought on record after preliminary decree as representative of mortgagor challenging mortgage —Court refusing to go behind preliminary decree and passing final decree—Final decree will not bar suit for declaration that mortgage was not binding on him **252***b*

——S. **11**—Might and ought—Compromise decree cannot be taken to decide every point that ought to have been pleaded though decree on merits must **243***d*

——S. **11** — Decision as to jurisdiction does not act as res judicata **132**

*——**S. 11** — Adjudication in ex parte proceedings operates as res judicata — Amount claimed as revenue or rent with interest decreed ex parte—Right to receive interest in subsequent suit cannot be res judicata—Unless finding in previous suit decides expressly or by necessary implication question of recurring right to receive interest, decision cannot be res judicata so as to entitle plaintiff to interest on arrears accruing due subsequently—Interest claimed as damages in previous suit—Subsequent default in different circumstances cannot entitle plaintiff to damages **29***d*

*——**S. 11**—Pleadings and decision in previous suit must be strictly construed **29***e*

——**S. 11** — Previous suit in revenue Court by malguzar to eject tenant—Tenant claiming possession as servant of a third person who was added as defendant—State of land decided but no issue as to status (grove-holder) of third person framed — Ejectment decree passed against tenant—Subsequent suit in civil Court by third person claiming land as grove—Decision in revenue Court does not amount to res judicata, nor does it act as estoppel against third person **17**

*——**S. 11, Expl. 4** — When failure to plead specific cause of action is due to wrong view of law Expl. 4 will apply though it can seldom apply where such failure is due to plaintiff's honest belief as to fact or series of facts — Sub-mortgagee, wrongly suing as assignee of mortgagee—His subsequent suit as sub-mortgagee will be barred by Expln. 4 **400***b*

——**S. 20 (a)** — Cause of action partly arises where partnership is entered into **236***a*

——**S. 21**—Scope—The objection as to the place of suing cannot be allowed by an appellate Court, unless there has been a consequent failure of justice **236***b*

——**S. 24 (4)** — Appeal—A suit transferred from the file of a Court with Small Cause powers, the presiding Judge having been transferred from the place, to the Court of the Additional Munsiff—No appeal lies from its decision **50**

——**S. 24 (4)**—Transfer of Judge trying Small Cause suit — Successor not invested with Small Cause powers — Suit transferred therefore to Additional Munsiff—Decision of Additional Munsiff is not appealable **50**

*——**Ss. 30** and **32**—Fine can be imposed only upon persons not appearing in obedience to summons to give evidence and required to give evidence and not on persons not required subsequently to produce evidence **850***c*

——**S. 32**—Jurisdiction to impose fine vested by S. 32 can be exercised only in manner laid down by O. 16 **850***a*

——**S. 35**—Witnesses attending but not examined — Still diet money can be charged when defence is not disclosed **873***b*

*——**S. 35**—Plaintiff finding difficulty in valuing his claim—He is entitled to full costs **214***f*

——S. **35**—Costs—Either party must produce all material documents in his possession although other party does not apply for their production—High Court would deprive party of costs for failure to do so **134***a*

——**S. 39**—Sending decree to another Court for execution is not itself execution of it **390***b*

——**S. 47**—Consent decree on condition that if defendant deposited certain amount within certain time suit shall stand dismissed or else it shall stand decreed—Defendant depositing amount but after period fixed—Court declaring deposit to have retrospective effect dismissed suit—Court's order not being in discharge or satisfaction of decree was not appealable—Court had no power to extend time for making deposit **666**

——**S. 47**—Legal representative of deceased judgment-debtor asserting that certain property is his own and not part of assets of deceased in his hands—His objection is one under S. 47 and so it cannot be raised by regular suit **602**

Civil P. C.
——**S. 47** — Ex parte order granting leave to apply for execution does not have the force of decree **390***a*
——S. 47**—(*Sen, J.*)—Conflict between judgment-debtors inter se—S. 47 does not apply—(*Niamatullah, J. dissenting*) **291***a*
*——**S. 47**—Mortgage decree — Purchaser of part, made defendant—He applying that his portion be sold last—Court granting application but imposing certain conditions—Order is not one relating to execution, etc. **291***b*
——**S. 47**—Suit against a supratdar on ground of damages due to his misappropriating the property is barred **266(2)**
*——**S. 47**—Questions going behind decree and not decidable by execution Court—Suit raising such questions is not barred **252***c*
——**S. 47**—Order rejecting application for stay of sale is not order under S. 47 conclusively determining rights of parties and is not appealable **85(1)**
*——**S. 55 (4)** — Judgment-debtor failing to apply within one month—Option as to whether security should be realized or judgment-debtor committed to prison lies not with decree-holder but executing Court **377**
*——**S. 60 (k)** — Compulsory deposit made in General Provident Fund is not attachable even after contributor's retirement **417***a*
——**S. 91**—S. 91 is inapplicable to issues arising on encroachments on village roads kept open by right of easement—Suit lies without permission of Advocate General **790***a*
——**S. 92**—Constant visitors of trust temple, who are also close relatives of founder can sue for trustee's removal **433***a*
——**S. 92**—Mere indebtedness of trustee does not justify inference that he wasted money on immoral purposes **433***b*
*——**S. 92**—Trustees's being guilty of neglect of his duty in not keeping proper accounts is not adequate cause for his removal from office **433***c*
——**S. 96 (3)**—Parties agreeing that Judge should decide case after hearing documentary evidence and making local investigation—They further agreeing to accept his decision—Decision being virtually award was not appealable **577***a*
——S. 97**—Appeal from preliminary

Civil P. C.
decree pending—Final decree passed is valid **287**
——**S. 97**—Court while passing final decree cannot reopen questions determined by preliminary decree **252***a*
——**S. 97**—Preliminary decree not appealed against—Court cannot go behind it while passing final decree **65**
——**S. 99**—Defect of multifariousness not affecting merits or jurisdiction—Appellate Court cannot interfere **148***a*
——**S. 100**—Finding of fact cannot be reversed in second appeal **885***a*
——**S. 100**—Inference from proved facts is question of law **875***a*
——**S. 100**—Proper effect of proved fact is a question of law **872***a*
——**S. 100**—Finding whether right of easement has been acquired is a finding of law and can be challenged in second appeal **862***a*
——**S. 100**—Proper effect of proved fact is question of law—Appellate Court can draw inference from facts admittedly proved **861***b*
——**S. 100**—Legal conclusions erroneously deduced from ascertained facts—There is error of law which can be challenged in second appeal **767***b*
——**S. 100**— Question of law — Sufficiency of evidence for holding whether grove land has changed character is question of law **557***b*
——**S. 100**—Finding whether agreement is intended to settle immediate trouble or is binding for future is not one of fact **519***b*
——**S. 100**—Finding that a public lane has not been narrowed down so as to cause damage to the residents in the lane is a finding of fact **504***a*
——**S. 100**—Finding of fact can be set aside when not based on admissible or reasonable evidence **481***b*
——**S. 100**—Whether the existence of other property to meet the decree is sufficient evidence of the genuineness of a transfer is a question of fact **458***b*
——**S. 100**—Point of law— In second appeal a Court will not take up a point of law for the satisfactory determination of which there is no material in the pleadings and judgments of the lower Courts **456***c*
——**S. 100**—Suit for damages for malicious prosecution—Whether there was reasonable and probable cause is question of fact—If lower Courts after judi-

Civil P. C.
cially considering evidence find against plaintiff, High Court cannot disturb finding nor can it certify case for Letters Patent Appeal **429**
——**S. 100**—Finding as to execution is one of fact **419 (2)***b*
——**S. 100**— Redemption suit — Mortgagee claiming compensation for guava grove of 75 trees from 7 to 11 years old —Lower Court finding it impracticable to remove trees with roots and allowing neither compensation nor removal of trees —Question being one of fact, High Court did not interfere **330***a*
*——**S. 100** — Question whether property is sulka stridhan is not question of law pure and simple **25***b*
——**S. 104 (2)**—Decree-holder objecting to sale by which he purchased property. alleging that he had agreed to purchase it for Rs. 500, value of property estimated by him and accepted by Court, and so if sale be held to have taken place as recorded by amin, then great loss would result to him, and Court of first instance dismissing his objection— No second appeal lies to High Court under S. 104 (2) as order dismissing objection was under O. 21, R. 92 **553 (1)**
*——**S. 105 (2)**—To prevent obvious injustice High Court can refuse to be bound by remand order of Subordinate Court though neither party can question it **421(2)**
——**S. 109 (c)**—Point of general importance but settled by Privy Council decision—Case should not be sent up **339***a*
—— **S. 115** — Court deciding that it should proceed with suit does not decide case within meaning of S. 115 **957***a*
*——**S. 115** — Where suit has been stayed under S. 10, Court proceeding to try suit even under order of appellate Court having no notice of order under S. 10 acts improperly **957***b*
*——**S. 115**— Objection by judgment debtor under O. 21, R. 90 that decree-holders misled certain bidders by false representation that fictitious bids were offered and property was sold for inadequate consideration— Court hearing judgment-debtor and dismissing objection without allowing him opportunity to produce evidence in corroboration— Appeal to District Judge dismissed— There is material irregularity and High Court will interfere in revision though appeal was preferred to District Judge **793**
——**S. 115** — Indispensable party not brought on record—Court's act is illegal or materially irregular and so revisable **761 (1)**
——**S. 115**—"Case" may mean proceeding—Order superseding arbitration is revisable **743***a*
——**S. 115**—Court has inherent power to intervene and supersede arbitration but it can intervene only if its intervention is urgently necessary for ends of justice or to prevent abuse of process of law—Court not applying its mind as to necessity of intervention.—Court then acts with material irregularity and order can be interfered with in revision **743***b*
*——**S. 115**—Permission to withdraw with liberty to file fresh suit under O. 23, R. 1—No reason given—High Court can interfere **683***a*
——**S. 115**—Decision erroneous—Still revision does not lie **683***b*
*——**S. 115** — Expression "material irregularity in the exercise of its jurisdiction" explained **683***d*
——**S. 115**—Suit dismissed for default —Plaintiff appearing on same day and satisfying Court for his non-appearance —Court restoring suit on plaintiff's application—Defendant filing application to revise order restoring suit—High Court has jurisdiction to revise order and plaintiff's appearing on same day and giving explanation to satisfaction of Court is sufficient ground for restoration of suit **599(1)**
——**S. 115**—Scope — Revisional Court is not a Court of appeal and it is not every decision on a point of law or fact that can be corrected by the High Court in its revisional jurisdiction **593***b*
——**S. 115**—Application to set aside sale — Certain auction-purchasers not shown as opposite parties—Rejection of application held not mere wrong decision on point of law but irregularity of procedure justifying interference by High Court on revisional side **593***c*
*——**S. 115**—High Court has revisional powers under Charitable and Religious Endowments Act (14 of 1920), S. 12 **581***d*
——**S. 115**—Jurisdiction—High Court cannot in revision correct error of judgment **581***c*

Civil P. C.
——**S. 115**—Civil P. C., O. 47, R. 1—The only remedy for the applicant, to correct an order postponing consideration of an application for review is revision under S. 115, Civil P. C. **375***c*
——**S. 115**—Arbitrator appointed but refusing—Dispute as to whether arbitration should be superseded or continued—Court ordering to continue and appointing new arbitrator—Order is one deciding a case and is revisable **144***b*
——**S. 115 (c)**—Result of following ruling illegal—High Court can interfere **593***d*
——**S. 115 (1)**—"Case decided"—Meaning explained **581***a*
——**S. 141**—Application for setting aside ex parte order in execution proceedings is not maintainable and S. 141 does not operate to make O. 9, R. 13, applicable to execution proceedings **485***a*
——**S. 144**—Nothing in S. 144 can affect decree in another suit in respect of same property between the same parties **527**
——**S. 145**—Security given by person in possession of property and profits, is liable for all claims of the decree-holder to the extent of that security **905(2)**
——**S. 145**—Suit against a supratdar on ground of damages due to his misappropriating the property is barred **266(2)**
——**S. 148**—Consent decree on condition that if defendant deposited certain amount within certain time suit shall stand dismissed or else it shall stand decreed—Defendant depositing amount but after period fixed—Court declaring deposit to have retrospective effect dismissed suit—Court's order not being in discharge or satisfaction of decree was not appealable—Court had no power to extend time for making deposit **666**
——**S. 150**—When Court which has passed decree is abolished, it is Court to which its business is transferred which is competent to execute decree **677***e*
——**S. 151**—Inherent jurisdiction—Application for setting aside ex parte decree if dismissed for default can be restored upon good cause shown **906**
——**S. 151**—Court wrongly dismissing suit under O. 9, R. 8 even when pleader for party is present can rectify its error and restore suit under S. 151 **811**
——**S. 151**—Court has inherent power to intervene and supersede arbitration but it can intervene only if its intervention is urgently necessary for ends of justice or to prevent abuse of process of law—Court not applying its mind as to necessity of intervention—Court then acts with material irregularity and order can be interfered with in revision **743***b*
——**S. 151**—Court can entertain application by judgment-debtor for restoration of his previous application made for setting aside sale—Application restored—Order will not be interfered **721(1)**
——**S. 151**—Court can under S. 151 restore application made for restoration of suit **624**
*——**S. 151**—To prevent obvious injustice High Court can refuse to be bound by remand order of Subordinate Court though neither party can question it **421***e*
——**S. 151**—Allahabad High Court Rules, Ch. 7, R. 3—Non-compliance with R. 3 is only irregularity merely on account of which rehearing of case cannot be asked for under S. 151, Civil P. C. **403***b*
——**S. 151**—Execution—Act not providing for execution of order under it—Inherent power should be invoked **211***a*
*——**S. 151**—Judgment including property of person other than judgment-debtor owing to accidental slip—Judgment can be corrected to avoid abuse of process of Court **147**
——**S. 151**—Order striking off objection of judgment-debtor for default is not appealable (*Obiter*)—Remedy is S. 151 or O. 47 **123**
——**S. 152**—Under S. 152 Court cannot only correct clerical or arithmetical mistakes in judgments, decrees and orders but also accidental slip or omission therein and such correction can be made even without application by parties **337**
*——**S. 152**—Judgment including property of person other than judgment-debtor owing to accidental slip—Judgment can be corrected to avoid abuse of process of Court **147**
——**O. 1, R. 1**—No misjoinder if two different sets of persons join to eject trespasser **790***b*
——**O. 1, R. 1**—Cosharers suing lambardar for profits can join in same suit **668**
——**O. 1, R. 8**—No representative suit can be brought without permission of

Civil P. C.

Court—Courts cannot go into merits of representative action unless permission is obtained **806**

——**O. 1, R. 8**—One cosharer can bring representative suit on behalf of another **439***b*

——**O. 1, R. 9**—Non-joinder of parties does not defeat suit **439***c*

——**O. 2, R. 2**—Redemption and contribution are different causes of action **696***b*

——**O. 2, R. 2**—Suit by alleged donor for cancellation of gift—Donor dying and suit abating under O. 22, R. 9—Next suit by his legatee for possession against the alleged donees is not barred **306**

——**O. 2, R. 2**—Government revenue of certain patti assigned to *M* and *V* in respect of 8 and 4 shares respectively—Plaintiff mortgagee of both suing for recovery of revenue in regard to *V's* share—Subsequent suit for recovery of revenue with regard to *M's* share is not barred **29***a*

——**O. 7, R. 7**—Suit for possession—Court finding that suit property was held by Hindu widow and transferred by her to defendant though without necessity—Court can grant declaration, though not asked for, that transfer was void beyond widow's life **555**

——**O. 7, R. 10**—Suit of small cause nature—Defendant pleading partnership—Small Cause Judge finding that there was partnership, dismissing suit—Plaint need not have been returned **907**

——**O. 7, R. 11**—Person claiming damages from railway but omitting to give details of his claim—Omission is not sufficient to dismiss his claim **597 (2)***a*

——**O. 8, R. 4**—Pleading should be specific **721 (2)***b*

——**O. 8, R. 6**—Sum due as damages ascertainable only after protracted inquiry cannot be set off **52***b*

——**O. 9, R. 4**—Suit dismissed for default of both parties—Application to restore the same dismissed—Plaintiff can bring a second suit on the same cause of action **131**

——**O. 9, R. 4**—Time to file application under R. 4 cannot be extended under Limitation Act, S. 5. **127**

——**O. 9, R. 6**—Scope—Even where a suit is ex parte plaintiff has to prove his case before he can obtain a decree **612***b*

*——**O. 9, R. 9**—Mortgagees fraudulently allowing suit to be dismissed for default — Attaching creditors are not bound by dismissal **861***c*

——**O. 9, R. 9**—Suit dismissed for default—Plaintiff appearing on same day and satisfying Court for his non-appearance—Court restoring suit on plaintiff's application — Defendant filing application to revise order restoring suit—High Court has jurisdiction to revise order and plaintiff's appearing on same day and giving explanation to satisfaction of Court is sufficient ground for restoration of suit **599***a*

——**O. 9, R. 13**—Application for setting aside ex parte order in execution proceedings is not maintainable and S. 141 does not operate to make O. 9, R. 13. applicable to execution proceedings **485***a*

——**O. 9, R. 13**—Defendant absent at the passing of final decree—Decree is ex parte and O. 9, R. 13 applies and defendant has right in asking it to be set aside and to show sufficient cause for his non-appearance **279**

——**O. 11, Rr. 14 and 21** — Non-compliance with order under R. 14—Dismissal under R. 21 is not justified **83***a*

——**O. 11, R. 21** — Order of dismissal wrongly passed under R. 21, without jurisdiction—It is decree and appeal lies **83***b*

——**O. 15, R. 4**—Adjournment granted conditionally on production of evidence—Condition not fulfilled — O. 15, R. 4 applies and decree is appealable even if suit is wrongly dismissed for default under O. 17, R. 2 **543**

——**O. 16**—Jurisdiction to impose fine vested by S. 32 can be exercised only in manner laid down by O. 16 **850***a*

——**O. 16, R. 1** — Examination of witnesses on commission though is within Court's discretion, issuing summonses to witnesses is matter of course **449***a*

*——**O. 16, R. 10 (2)**—Court can issue proclamation only when evidence or document is material **850***d*

——**O. 16, R. 12** — Order under R. 12 can be passed only if proclamation has been issued or a warrant for arrest is issued or order for attachment is passed **850***b*

——**O. 16, R. 12** — Witness or party present in Court—Court directing him to do certain act — Court need not go through procedure of issuing summons, proclamation or attachment of property to proceed under R. 12 **99**

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—O. 17, R. 2—Adjournment granted conditionally on production of evidence —Condition not fulfilled — O. 15, R. 4 applies and decree is appealable even if suit is wrongly dismissed for default under O. 17, R. 2 **543**

—O. 17, R. 3—Adjournment refused —Plaintiff not examining even witnesses in attendance—Suit dismissed—Dismissal order was on merits and so appealable **432**

—O. 18, R. 18 — Decision based entirely on local inspection should not be permitted except in exceptional cases **116***b*

*—O. 18, R. 18—Judge locally examining plot to see whether it was graveyard—He in his notes mentioning not facts as he saw but only his inferences—His examination is not adequate and should not be substituted for oral evidence **116***c*

—O. 20, R. 14—(Per *Sulaiman, J.*) —Joint decree does not pass title to all joint decree-holders even if one pays amount—Rights of decree-holders will have to be determined in case dispute arises—(*Boys, J.*, contra) **953***a*

—O. 20, R. 14 — Title to property accrues from date of payment — Mere passing of decree does not confer any title **953***b*

*—O. 20, R. 14 (b) — Pre-emptor's title to property accrues from date of deposit—Registration is not necessary **237***a*

*—O. 21, R. 1—Compromise decree —Option to pay direct or deposit in Court—Advantage cannot be taken of Courts being closed on date of payment **207**

—O. 21, Rr. 2 and 58—Applications under these may be combined **79***a*

—O. 21, R. 2—Decree-holder disputing adjustment—Court can record it if proved **79***c*

—O. 21, R. 2 (2) — Payment out of Court — Application for recording subsequent payment made six months after previous payment attaching receipt for previous payment and endorsement by decree-holder's pleader about acceptance of subsequent payment is not application for recording and certifying previous payment and is barred **674**

—O. 21, R. 15 — (Per *Sulaiman, J.*) — Deposit of pre-emption money in either proceeding in execution nor step-in-aid of it—O. 21, R. 15, does not apply—(*Boys, J.*, contra) **953***d*

—O. 21, R. 16 — Transfer of decree to relative of judgment-debtor does not amount to transfer to judgment-debtor **792***a*

—O. 21, R. 16—Notice to judgment-debtor is absolutely necessary—Decree for sale of mortgage property obtained against mortgagor and subsequent mortgagee—Decree assigned — Assignee applying for execution but not giving notice of his application to subsequent mortgagee—Subsequent mortgagee being a judgment-debtor, execution proceedings will be void for want of notice to him **437***a*

—O. 21, R. 18—*A* in execution of his decree against *B* securing attachment of *B's* decree against himself—*B* then applying for execution of his decree against *A*—O. 21, R. 18 applied and Court could set off smaller amount due from *A* against larger amount due to *A* **502**

*—O. 21, R. 50 (3)—Ex parte order granting leave to apply for execution does not have the force of decree **390***a*

—O. 21, R. 54—Sale of mortgagee's interest must be registered **161**

—O. 21, R. 54 (1)—Attachment operates as prohibition against alienation only from date on which proclamation is made and copy of order affxed **846***b*

—O. 21, Rr. 58 and 2—Application under these may be combined **79***a*

—O. 21, R. 66—It is as much judgment-debtor's duty as of decree-holder to see that sale proclamation is prepared correctly **704**

—O. 21, R. 72—Decree-holder allowed to purchase in full satisfaction of decree must pay poundage **266(1)**

—O. 21, R. 89—Application to set aside sale—Certain auction purchasers not shown as opposite parties—Rejection of application held not mere wrong decision on point of law but irregularity of procedure justifying interference by High Court on revisional side **593***c*

—O. 21, R. 90—Failure to state value of property does not necessarily amount to material irregularity **948***a*

—O. 21, R. 90 — Omission to affix proclamation on property itself amounts to material irregularity **948***b*

—O. 21. R. 90—Altering date of sale

Civil P. C.
without notice to parties amounts to material irregularity **948***c*
*——**O. 21, R. 90**—Objection by judgment-debtor under O. 21, R. 90 that decree-holders misled certain bidders by false representation, that fictitious bids were offered and property was sold for inadequate consideration—Court hearing judgment-debtor and dismissing objection without allowing him opportunity to produce evidence in corroboration — Appeal to District Judge dismissed—There is material irregularity and High Court will interfere in revision though appeal was preferred to District Judge **793**
——**O. 21, R. 90**—Scope—Sustaining substantial injury by material irregularity is sufficient **671***b*
*——**O. 21, R. 92**—In execution sale, property not mortgaged wrongly included—Judgment-debtor ignorant of it—Suit to recover possession of property thus sold in excess—Purchaser is not entitled to recover money for the property—Suit is not barred either by O. 21, R. 92 or by Lim. Act, Art. 12 **673**
*——**O. 21, R. 92** does not apply to confirmation of irregular sale **671***a*
——**O. 21, R. 92** — Civil P. C., S. 104 (2)—Decree-holder objecting to sale by which he purchased property, alleging that he had agreed to purchase it for Rs. 500, value of property estimated by him and accepted by Court, and so if sale be held to have taken place as recorded by amin, then great loss would result to him, and Court of first instance dismissing his objection—No second appeal lies to High Court under S. 104 (2) as order dismissing objection was under O. 21, R. 92 **553(1)**
——**O. 21, R. 92**—Court could not use its inherent powers of relief where application to set aside execution sale was time barred **485***d*
*——**O. 21, R. 92 (2)**—Court has to give notice of application to set aside sale—Applicant need not indicate parties affected by his application **593***f*
*——**O. 22, R. 2**—On the death of any plaintiff or defendant when the surviving plaintiffs or defendants alone can sue or be sued, Court will make entry to that effect and proceed, there being no abatement **347(1)***a*
*——**O. 22, Rr. 3** and **4**—Abatement occurs only when survivors cannot sue alone **347(1)***b*
——**O. 22, R. 4**—Proceedings as regards taking additional evidence, under the direction of the appellate Court, pending in lower Court—One of the respondents dying—Application for substitution of names can be entertained by the appellate Court and not by the lower Court **319**
*——**O. 22, R. 9**—Suit by alleged donor for cancellation of gift—Donor dying and suit abating under R. 9—Next suit by his legatee for possession against the alleged donees is not barred **306**
——**O. 22, R. 10**—Case of assignee of preliminary decree comes within R. 10 and not Rr. 3, 4 and 8—It is not governed by Limitation Act Arts. 171 and 176 **444**
——**O. 23, R. 1**—Plaintiff wishing to give formal proof of a document essential to his success—Permission to withdraw suit should be given **133**
——**O. 23, R. 1 (2)**—Permission to file a fresh suit—Suit finally disposed—Failure to comply with terms strictly bars second suit **692**
*——**O. 23, R. 1 (3)**—Suit for ejectment of year to year tenant withdrawn in 1918 without permission—Suit for ejectment from 1924 is not barred **67***a*
——**O. 23, R. 2** — "Other sufficient ground" must be ejusdem generis with formal defect **683***c*
——**O. 26, R. 4**—Examination of witnesses on commission though is within Court's discretion, issuing summonses to witnesses is matter of course. **449***a*
——**O. 32, R. 2**—Persons sued as members of firm — Minor member impleaded as major — Decree passed in suit is not bad for that reason **148***g*
——**O. 32, R. 3**—Costs — There is no authority in the Civil Procedure Code to award costs personally against a guardian ad litem **18***d*
*——**O. 34, R. 1, O. 1, Rr. 9, 10 (2)**—Court should add necessary parties and then apply S. 22, Lim. Act, to see result on relief—No relief asked against party to be added—O. 34, R. 1 should not be used to dismiss whole suit **941**
——**O. 34, R. 1** — Attaching creditor has no right to be made party in mortgage suit — His attachment creates no lien or title **861***a*

Civil P. C.
——O. 34, R. 1—Scope—A co-mortgagor who is not suing for redemption is a necessary party in a redemption suit **814*a***
——O. 34, R. 1 — Subsequent mortgagee paying prior mortgagee — Suit by puisne mortgagee — Subsequent mortgagee cannot insist on prior mortgage being paid—Property can be sold subject to prior mortgage **296
——O. 34, R. 1, S. 11—Prior usufructuary mortgagee not made party in suit by subseqnent mortgagee against mortgagor for possession — Decree in such suit cannot bind prior mortgagee **126*b***
——O. 34, R. 3 — Defendaut absent at the passing of final decree—Decree is ex parte and O. 9, R. 13 applies and defendant has right in asking it to be set aside and to show sufficient cause for his non-appearance **279
——O. 34, R. 4—Decree under, can be passed in terms of compromise—Period can be extended by Court **881*c***
——O. 34, R. 4 — Decree-holders are bound to apply for final decree before proceeding to execution **881*d***
——O. 34, R. 4 — Scope — Appellate Court's decree is last preliminary decree and in that decree first Court's decree must be deemed to have become merged **677*f***
——O. 34, R. 4—Appellate Court confirming lower Court's preliminary decree is not bound to fix period of six months for repayment **677*g***
*——O. 34. R. 5—Sale effected in execution of mortgage decree — Deposit by purchaser of equity of redemption under O. 21, R. 89—Right of redemption does not come to an end—Suit to recover the amount from mortgagor is not covered by Limitation Act, Art. 61 **309*a***
——O. 34, R. 5—Appeal from preliminary decree pending—Final decree passed is valid **287**
——O. 34, R. 5 — Court while passing final decree cannot reopen questions determined by preliminary decree **252*a***
——O. 34, R. 5 (2) — Plaintiff is not bound to describe, in his application, properties with respect to which he asks for final decree for sale unless he intends that particular property should be omitted from order of Court passing final decree **551(1)**
——O. 34, R. 6—Preliminary mortgage decree for certain amount against Hindu father—Sons, not parties to suit, subsequently obtaining declaration that smaller amount was binding on family —Final decree passed for the smaller amount but silent as to balance—Plaintiff applying under R. 6 for recovery of balance after three years after declaratory decree obtained by sons—No application can lie under R. 6 since balance ceased to be mortgage debt as result of declaratory decree—Remedy of plaintiff is by execution of decree for balance as money decree — Since right accrued on date of declaratory decree, application is barred under Limitation Act, Art. 181 **15*a*
*——O. 34, R. 6—"Amount due" means amount, to recover which, decree for sale has been passed **15*b***
——O. 34, R. 8 — Refusal by treasury officer to take money though tendered in time does not amount to default **881*a***
——O. 34, R. 14 — Mortgage declared to be nullity — Mortgagee obtaining money decree in lieu of original supposed mortgage — R. 14 has no application **580**
——O. 39, R. 1 (a) (Amended by Allahabad) — *G* successfully resisting attachment — Decree-holder getting declaration in subsequent suit that the property was attachable—*G* applying for stay of execution in appeal against the declaratory decree—Application was rejected—(*Cf.* Civil P. C., O. 41, R. 5). **115
——O. 41, R. 2—Appeal — Memorandum insufficiently stamped—High Court can reject it—[But *See A. I. R.* 1923 *All.* 349 (1)] **75**
——O. 41, R. 4—Appellate Court can grant decree in favour of all plaintiffs on appeal by one of them **393*a***
*——O. 41, R. 22 — Cross-objections cannot be filed against pro forma co-respondent not interested in appeal **195*a***
——O. 41, R. 22 (3) — Substitution of words "the party who may be affected" for "appellant" in R. 22 (3) does not give absolute right of filing cross-objections against any co-respondent even not interested in appeal — Discretion under O. 41. R. 33 should not be exercised to allow such cross-objections—Civil P. C., O. 41, R. 33 **195*b***
——O. 41, R. 27—Additional evidence should not be accepted if it cannot be

Civil P. C.
used for the purpose for which it is tendered **375***a*
——**O. 41, R. 27**—Proceedings as regards taking additional evidence, under the direction of the appellate Court, pending in lower Court — One of the respondents dying—Application for substitution of names can be entertained by the appellate Court and not by the lower Court **319**
——**O.41, R. 31**—Scope—Order O. 41, R. 31 and O. 20 and the rules thereunder do not apply to the Chartered High Courts as the rules relating to judgments were in force when the Civil Procedure Code was enacted **403***a*
*——**O. 41, R. 33**—Pre-emption suit alleging vendor's want of title to part of property sold but offering to pre-empt even whole property — Trial Court decreeing pre-emption only as regards part of property — Pre-emptor submitting to decree but vendee in appeal urging that whole suit was bad for partial pre-emption — Although pre-emptor did not appeal appellate Court can consider claim to pre-empt whole property and can decree suit **393***a*
——**O.41, R. 33**—Appellate Court can grant relief to defendant who could have but has not appealed **334**
——O. 41, R. 33** — "Parties" include person not party to appeal — Decree can be passed in favour but cannot be passed against person not party to appeal **243***a*
——**O. 41, R. 33** — Substitution of words "the party who may be affected" for appellant in R. 22 (3) does not give absolute right of filing cross objections against any co-respondent even not interested in appeal—Discretion under R. 33 should not be exercised **195***b*
——**O. 43, Allahabad High Court Court Rules, Rr. 2** and **3** —Filing of formal order after limitation does not bring appeal outside limitation so long formal order is filed before hearing **858***a*
——**O. 43, R.1 (j)**—Scope—Appeal does not lie when no objection has been specially allowed or dismissed by executing Court **671***c*
*——**O. 45, R. 7 (1) (b)** — Appeal by judgment-debtor to Privy Council — Decree-holder applying to attach deposit .by judgment-debtor for costs of Privy Council—Idea of application being that decree-holder would attach and obtain deposited money and then be able to contend that judgment-debtor having no necessary deposit appeal should be dismissed—Such manoeuver is grossly improper and offence to Court **794***b*
——**O. 45, R. 7 (1) (b)** — Attachment of deposit discouraged **794***b*
——**O. 47**—Order striking off objection of judgment-debtor for default is not appealable (*obiter*)—Remedy is S. 151 or O. 47 **123**
*——**O. 47, R. 1** — Newly discovered evidence must be believable and if believed must be conclusive **545***b*
——**O. 47, R. 1** — A condition precedent for making an application for review, is that there has been no appeal preferred — Subsequent appeal is no ground for refusing the application **375***b*
——**O. 47, R. 1**—The only remedy for the applicant, to correct an order postponing consideration of an application for review is revision under S. 115, Civil P. C. **375***c*
——**O. 49, R. 2**—Scope—O. 41, R. 31 and O. 20 and the rules thereunder do not apply to the Chartered High Courts as the rules relating to judgments were in force when the Civil Procedure Code was enacted **403***a*
——**Sch. 2, Para. 1** — Application for reference need not be signed **763***a*
——**Sch. 2, Para. 1**—Person choosing to remain absent is not necessarily person not interested—Test is whether he is a necessary party **763***b*
——**Sch. 2, Para. 5** — Court ordering name of nominee of plaintiff to be substituted in order of reference for one of arbitrators— Defendant entitled to see whom plaintiff is going to appoint but if he acts as if nominee is legally appointed and objects to award when it goes against him, he is estopped from questioning validity of appointment **559**
*——**Sch. 2, R. 5**—Matter referred to named arbitrator—That arbitrator refusing to act — Defendant supplying list of persons for choosing arbitrator—Plaintiff unwilling to proceed with arbitration—Court appointing one from defendant's list as arbitrator and ordering parties to any costs equally—Order appointing arbitrator as also to pay costs was illegal **144***a*

Civil P. C.
——**Sch. 2, R. 5** — Arbitrator appointed but refusing — Dispute as to whether arbitration should be superseded or continued—Court ordering to continue and appointing new arbitrator —Order is one deciding a case and is revisable **144***b*
——**Sch. 2, R. 14** — Judge, who was also constituted sole arbitrator, ought to admit review of his judgment if much of what is said in his judgment is not to be found in operative part of it **747***a*
——**Sch. 2, R. 15 (c)** — Decree passed in terms of award without objection cannot afterwards be treated as nullity because arbitrators had wrongly decided mixed question of fact and law **521***a*
——**Sch. 2, Para. 16** — Parties agreeing that Judge should decide case after hearing documentary evidence and making local investigation — They further agreeing to accept his decision—Decision being virtually award is not appealable **577***a*
——**Sch. 2, Para. 16 (2)**— Parties agreeing to substitute local examination by Judge for oral evidence — Decision of Court is appealable **116***a*
——**Sch. 2, R. 21 (1)** — Application to file award—Court after hearing objections and concluding that award was lawfully made passed order that "plaintiff's suit is decreed. The decree is to be prepared according to award as prayed."—Order is really a combined order and Court should not make such order **799 (1)***a*

Companies Act (7 of 1913)
——**S. 2 (ii)** — Articles of Association not mentioning auditor as officer though appointed at general meeting—Article dealing with conduct of business granting indemnity to officers except as regards their wilful acts and defaults—Company suffering loss through neglect of auditors—Auditors held not officers and not entitled to come within purview of the Article **826***a*
——**S. 2 (ii)**—Auditor deliberately passing over manifest illegal payments is guilty of misfeasance **826***c*
——**Ss. 91-A** and **91-C**—Agent entering into understanding with third party —Agent must disclose such understanding to his principal—(*Obiter*) **87***b*
——S. 171** — Secured creditor can stand outside winding up proceedings—He must, however, obtain leave to proceed from winding up Judge **(FB) 353***b*
** ——**S. 171**—Leave can be refused absolutely — Winding up Judge, however, cannot annul secured creditor's security or decree— Except in exceptional cases leave should be refused only for such time as would be necessary to make up his mind either one way or other **(FB) 353***c*
** ——**S. 229**— "Rules" include rules in sections, under Act and of practice **(FB) 353***a*
——S. 229** — Secured creditor can stand outside winding up proceedings—He must, however, obtain leave to proceed from winding up Judge **(FB) 353***b*
*——**Ss. 231** and **232** — Winding up Court cannot adjudicate upon title of third persons—Liquidator must file regular suit for it **(FB) 353***d*

Compromise
——One filed in suit affects only decree **243***c*
** ——A compromise decree cannot be taken to decide every point that ought to have been pleaded though decree on merits must **243***d*

Contempt
——Selling property in defiance of injunction is contempt of Court and amenable to punishment **815**

Contempt of Courts Act (1922)
——**S. 2**—Article in a newspaper highly prejudical to a fair trial—Article also written with that object—Writing is a gross contempt of Court **81**

Contract Act (9 of 1872)
——**S. 2 (d)**—Time barred debt can be good consideration **657***a*
——**S. 18**—Seller although only leaseholder professing to be owner of property—There is misrepresentation **837***a*
——**S. 23**—No cause of action arises against person for merely financing appellants in appeal when costs could not be recovered from appellants **797**
——**S. 23** — No reason to show why non-compoundable complaint was withdrawn—Withdrawal is not unlawful for it may be due to the complaint being unlikely to succeed **456***b*
——**S. 23** — Void contract cannot be validated by parties acting on it **394***d*
*——**S. 25 (3)** — Defendant executing money bond in favour of plaintiff in consideration of his father's time barred debt—He is liable only to extent of

Contract Act
joint family property as S. 25 (3) covers only case of person who would be liable to pay but for limitation barring suit **586 (1)**
——**S. 30**—"Wagering contract"—Mere fact that contract is of highly speculative nature is not sufficient **890***b*
——**S. 30**—Parties agreeing to speculate in differences—No intention of delivery of goods — Agreement is of the nature of wager **134***c*
—— **S. 39**—Contract of agency subsisting—Agent's shortcomings in the discharge of his duties under agreement—Principal is liable to pay commission under agreement **87***a*
——**S. 43** — Joint decree for costs against defendants — Defendants not taking interest in suit are exempt from contribution **654**
——**S. 56**—Contract to do act becoming impossible by reason of uncontrollable event becomes void **837***d*
——**S. 62** — Pro-note containing promise to pay debt due under former pro-note wipes out old debt giving rise to new liability **980***c*
*——**S. 62** — Mere executory contract which has to be specifically enforced to procure contract and which is to be substituted for old contract, would not supersede a registered mortgage deed by which interest in property has passed **503***a*
*——**S. 62**—Hundi embodying only part of contract between parties being inadmissible in evidence as not properly stamped—S. 91 does not exclude evidence showing terms of whole contract **254***b*
*——**S. 64**—Contract with a certificated guardian is voidable—Benefit received must be restored **890***c*
——**Ss. 65** and **70**—Same members of joint Hindu family selling property to *M*—Part of consideration applied to repayment of antecedent simple money debts and rest to repayment of antecedent debt under usufructuary mortgage—Other members challenging sale and Court finding that no valid transfer of property was made under sale-deed—*M* is not entitled to repayment of consideration money applied to payment of simple money debts but he must be allowed repayment of that part of consideration money which was applied to

Contract Act
payment of debt under usufructuary mortgage **659***b*
——**S. 65**—Suit for cancellation of lease granted by another—Plaintiff cannot be put on terms **387***d*
——**S. 70**—Person discharging liability of others lawfully and not gratuitously is entitled to compensation **834***c*
——**S. 70**—Suit on hundi—Hundi held inadmissible—Plaintiff can still succeed if his suit can be treated for money had and received or for compensation of money paid to defendant's creditor **254***d*
——**S. 73**—Breach of contract—Other party is entitled to interest on price as damages **801***d*
——**S. 74**—Term "penalty" is not applicable where parties agree to revert to situation immediately prior to new agreement though it involves payment by one of greater sum than if he had carried out agreement **558**
——**S. 74**—Penal clause in a sale deed when expressed in ambiguous terms will not be given effect to when the claimant thereunder does not depose as to the true meaning which he understood by it **281***a*
——**S. 77**—Additional sum paid for supplying goods under prescribed conditions—Additional sum is price of the goods **118***b*
——**S. 118**—Sale of goods—In case of breach of warranty buyer may accept or refuse goods—Only reasonable time to examine goods can be allowed to him—If goods are kept for longer period he loses his right to return or refuse to pay price **801***a*
——**S. 118**—Sale of goods—To claim compensation for breach of warranty notice must be given within reasonable time after discovery of breach **801***b*
——**S. 118**—Distinction between "condition" and "warranty" in English Law is avoided in India **801***c*
——**S. 127** — Money partly paid and partly promised to be advanced to principal debtor is sufficient consideration for surety—Advances need not benefit surety **72***a*
——**S. 128**—Security bond—Liability of surety for money received by mukhtar in virtue of his office "as mukhtar"—Mouey received by a mukhtar contrary to directions—Surety was liable **687***a*

Contract Act
——S. 128—Surety is liable for interest awarded on amount embezzled as damages **687***b*
——S. 132—Illustration—Person executing promissory note cannot he held in law to have position of surety **664***b*
——S. 135—Defence of giving time contemplates subsequent contracts between creditor and debtor to extend original contract time **664***a*
——S. 16C—It is duty of railway company to deliver goods in accordance with reasonable directions of consignee **960***b*
— S. 205—Certain company appointing another company as managing agents for 20 years, incentive to do so being latter company's commercial reputation —Latter company losing its previous reputation—First company terminating contract before expiry of 20 years—Resolution dismissing latter company's services passed at meetings held irregularly—Irregularities not material—Dismissal is valid—No damages can be claimed as loss of reputation of company was sufficient cause to end contract **87***d*
——S. 215 — Agent entering into understanding with third party—Agent must disclose such understanding to his principal (*obiter*) **87***b*
——S. 239—Where one member enters into partnership with strangers, there is no presumptien that he does so in representative character so as to make other members liable as partners—If they are sought to be made liable, it can be done by evidence of consensus or by evidence to prove agency through which contract of partnership was brought into existence **536***a*
——S. 239—Agreement to share loss is not a necessary ingredient of partnership under the Act **536***b*
——S. 251—Two of the partners executing pro-note to third agreeing to pay certain sum to him on taking partnership accounts—Pro-note will not bind other partners **542**
*——S. 253 (10)—Hindu Law—Joint family as partner—Managing member dying—Partnership is not dissolved **148***b*
*——S. 254 — Failure — The mere failure of business does not dissolve a partnership **236***d*
——S. 343—*N* and *K* in possession of property under same thikanama — In suit decree was passed jointly against *N* and *K* in accordance with their shares under thikanama — *N* paying amount of decree and *K* paying nothing—*K* is bound to contribute to extent of his share **792***b*

Cosharers
——One cosharer in undivided mahal in possession of property by collecting rent for coparcenary body—Other cosharer cannot sue for joint possession and mesne profits in civil Court, but must go in revenue Court **810**
——Suit by cosharer against lambardar for his share in arrears collected by latter for years prior to partition—Lambardar has to bring all evidence in his possession to prove his collections — Otherwise it would be presumed that he made collections in full **689***b*
*——In execution of decree for ejectment obtained without other cosharers' consent one cosharer obtaining possession—Joint possession cannot be refused to other cosharers although their title was never denied and although such joint decree might result in breach of peace **609***b*
——Building on common land—One cosharer alone can sue another for action prejudicial to his joint possession without proving special damage **393***b*
——Damages—One co-tenant enjoying area slightly smaller than but roughly corresponding to what he would be entitled on strict division — He cannot claim damages **324**
*——Mutual relation—Cosharer zamindar, who mortgages his share to another cosharer, continues to be cosharer and can obtain peaceful possession of holding unless shown to have lost this particular right by virtue of mortgage **167**
——Lambardar is entitled to reasonable remuneration for collecting revenue if actual charges are unascertainable **155***b*

Costs
——*See* CIVIL P.C., S. 35

Court-fees Act (7 of 1870)
——S. 4—Appeal — Memorandum insufficiently stamped — High Court can reject it—[But see *A.I.R.* 1923 *All.* 349 (1)] **75**
——S. 7 — Plaintiff can always effect saving of court-fee by reducing his claim if otherwise permissible **308**

Court-fees Act

——**S. 12**—One effective way of enforcing payment of deficiency in court-fees is to refuse in second appeal to hear counsel of that party **577***b*

Criminal Procedure Code (5 of 1898)

——**S. 54**—Village Chowkidar is not "police" officer **935***a*

——**S. 83**—Political Agent cannot be directed to produce a person in custody in Native State **347 (2)***c*

——**S. 103**—S. 103 does not apply to search warrant under U. P. Public Gambling Act, S. 5 **937***c*

——**S. 103**—Search in absence of two or more respectable men and without recording grounds of belief that house contains prohibited liquor is irregular **901 (2)***b*

——**S. 106**—Conviction under S. 323, Penal Code—Offence involving breach of peace—Taking security depends on probability of recurrence **349***b*

*——**S. 109 (a)**—Magistrate within whose jurisdiction concealment is to be effected has jurisdiction and not one within whose jurisdiction precautions are taken **(FB) 33***a*

——S. 109 (a)**—(Per *Full Bench*)—Concealing to be effected at a certain place—Magistrate having jurisdiction at that place can demand security although residence of the person in that jurisdiction is well known: (*Boys* and *Banerji, JJ.*, contra)— **49 All. 240=A. I. R. 1927 All. 50=97 I. C. 428 and 9 All. 844=A. I. R. 1927 All. 592 =102 I. C. 503, Overruled (FB) 33***b*

*——**S. 109 (a)**—No time limit can be put on taking of precautions—It is to be determined on particular facts **(FB) 33***c*

——S. 109 (b)**—(Per *Full Bench*)—"Give a satisfactory account of himself" does not mean "explain what he was doing" at a particular time or place—Person's failure to explain a person's presence does not bring him within S. 109 (b) (*Boys* and *Banerji, JJ.*,contra) **(FB) 33***e*

——**S. 110**—When charge in the notice under S. 110 amounts to definite and specific offence, preventive sections could not be used **813***a*

——**S. 110**—That "you possess a bad reputation in the vicinity of your village" is not a proper notice under S. 110 and cannot be basis of order under this preventive section **813***b*

Criminal P. C.

——**S. 110**—Notice—That you "have only a nominal means of livelihood except the proceeds of theft and burglary" is not a proper notice under S.110 **813***c*

——**S. 110** — Scope — That you "have been strongly suspected to have committed the following burglaries" cannot be the ground of proceedings under S. 110 **813***d*

*——**S. 110**—Evidence—Admissibility —General repute—Merely saying person "is bad character" does not suffice—Nature of the character should be given **650***a*

——**S. 110**—Order under S. 118, can be proved against a person proceeded against under S. 110, though the order is not a conviction under Evidence Act. S. 54, Expln. 2 **650***e*

——**S. 110**—What S. 110 desires to guard against is freedom of dangerous man without security and not freedom entirely **608**

——**S. 110**—Mere suspicion unless supported by good reasons is inadmissible to support order under S. 110—Evidence of general bad character is admissible but its weight varies with circumstances of each case **599 (2)**

——**S. 110** — Joint notice — A joint notice to show cause to more than one person is undesirable **273***a*

*——**S. 110**—Previous convictions are relevant to show character **273***c*

*——**S. 110**—Suspicions of theft are inadmissible though by police officer **273***d*

*——**S. 110**—Evidence of general repute must be tested **273***e*

*——**S. 117 (4)**—Evidence of general repute though necessarily consisting largely of hearsay evidence is admissible **650***c*

*——**S. 117**—Evidence that accused is suspected though not evidence of general repute within the meaning of S. 117, is admissible to support opinion of the witness **650***d*

——**S. 133, (2)**—Jurisdiction of civil Court is barred only when the order is conditional but not when order is absolute **833**

*——**S.133, Para. (2)**—"Remove" does not include restoring status quo **114**

——**S. 137**—High Court can modify order under S. 137 **220***c*

Criminal P. C.
——S. 139-A—Who is to have existence of right decided by civil Court or what order Magistrate has to pass is not stated—Magistrate must, however, fix a date for getting the right decided **709 (1)**
——S. 139-A—Court has discretion to decide whether materials are sufficient for not deciding question in criminal Court **220*a***
——S. 139-A (2)—Presence of reliable evidence and not bona fides are to be considered **220*b***
——S. 195—Court making complaints should devote some thought to the matter, frame proper charge and name witnesses supporting the case **905 (1)**
——S. 195 (5)—Local Self-Government Election Rules (1925), Part. 1, Rr. 16, 17—District Magistrate has jurisdiction to hear appeal from returning officer under S. 195 (5), Criminal P. C. **931*a***
——Ss. 234, 235 and 236—Scope (*obiter*)—Ss. 234, 235 and 236 are mutually exclusive (*obiter*) **202*b***
——S. 239—"Same transaction"—Offences under U. P. Public Gambling Act, Ss. 3 and 4, are complements of one another—Persons accused under Ss. 3 and 4 can be tried together **937*a***
——S. 239 (As amended in 1923), —Section is exclusive—Joint trial of two persons in three cases of embezzlement or "abetment"—Trial is illegal **202*a*
——S. 240—Conviction on one or more charges—Subsequent application in revision to inflict sentences with regard to others—Withdrawal of application amounts to acquittal on same **899 (2)*a***
——S. 240—S. 240 applies to every grade of Court **899 (2)*b***
——S. 256—Whether accused prejudiced by failure to follow provisions of S. 256 doubtful—Conviction was set aside **904**
——S. 257 (2)—Provisions are mandatory and no discretion is left to Magistrate—Appellate Court can ask trial Court to comply where it has not been done with microscopic exactness **914 (2)**
——S. 260—Grave offence committed—It should not be minimised to justify summary trial **349*a***
——S. 260—Summary trial in some case may be legal but not desirable **267 (2)*b***
——S. 307—High Court can interfere with jury's verdict if it is perverse or patently erroneous—Accused charged under Penal Code S. 394—Guilt established by prosecution evidence—No evidence led to prove his innocence—Jury giving verdict of not guilty because injury caused was trivial and stolen goods were not found in accused's house—Verdict held to be perverse **338**
——S. 337 (1-A)—Magistrate ordering "accused has stated that if he be given pardon he would make correct disclosure of facts . . . . The Court therefore tenders pardon"—First sentence of this order states reason and pardon is not irregular **321*a***
——S. 337 (1-A)—Mere omission to record reasons is not material irregularity but it must further be proved that such omission has occasioned injustice **321*b***
——S. 339 (3)—Accused to whom pardon was granted in one statement stating that he accompanied murderer and caught murdered's legs while murderer gagged his mouth—In other statement he stating that he was out on the night when offence took place—Two statements directly contradictory—Sanction for prosecution was given—No locus paenitentiae was allowed **321*c***
——S. 342—Evidence—Court should not supplement prosecution evidence by selecting passages from accused's statement corroborating prosecution evidence and by rejecting others exonerating him **1*b***
——S. 353—Obstruction to police officers entering house without search warrant—No harm beyond push—No offence is committed **903**
——S. 397—High Court has power to direct separate sentences of separate trials to run concurrently **585*b***
——S. 403—Where offences are distinct, S. 403 is no bar to prosecution for second offence **940*a***
——S. 403—Not framing charge under particular section amounts to discharge and not acquittal **940*b***
——S. 403—Where accused is acquitted on ground that lower Court has no jurisdiction, S. 403 does not bar second prosecution **940*c***
——S. 403 (1) and (2)—Separate charges except under S. 235 (1)—Accused cannot be tried again after acquittal or conviction **899 (2)*c***

Criminal P. C.
——S. 403 (1)—Section forbids retrial only where a person is convicted or acquitted and the conviction and acquittal is in force **710***b*
——S. 423 (1) (b) (1)—Appellate Court can reverse finding and sentence of death if there is no evidence to justify conclusion that there has been murder **710***a*
——S. 423—Without misdirection by Judge or misrepresentation of jury, Court of revision cannot reverse jury's verdict **364**
——S. 435—District Magistrate exercising jurisdiction under Election Rules does not act as criminal Court and no revision lies from his order **931***b*
——S. 435—Meaning of legality and propriety explained **587***a*
——S. 435—High Court is precluded from interfering if finding has basis in some evidence **587***b*
——S. 436—Revision Court cannot direct futher inquiry into an offence under S. 193, I. P. C. where the sanction of the Court in which that offence was committed is wanting **374***b*
——S. 438—High Court would not go into merits unless there is material departure from legal principles **273***b*
——S. 438—District Magistrate should not merely forward the Prosecuting Inspector's notice en bloc to the High Court **273***f*
——S. 438—Magistrate sentencing accused to six months' rigorous imprisonment without considering previous convictions—Previous conviction being prior to two years and half, sentence was not enhanced **270***b*
* ——S. 438—Prosecution negligent in bringing facts justifying enhanced sentence to Court's notice—High Court should not enhance sentence on reference **267 (2)***a*
——S. 439—Court of revision cannot order further inquiry merely because of disagreement with Magistrate's conclusion **588**
——S. 439—Scope—High Court refused to dismiss important application on a technical ground **347 (2)***a*
——S. 439—Revision filed without approaching District Magistrate or Sessions Court—Allahabad High Court refuses to hear it even after ex parte admission of it **272**
——S. 439—High Court can modify order under S. 137, Criminal P. C. **220***c*
* ——S. 446—Case against Indian accused together with one European—Magistrate cannot assume jurisdiction over Indians by discharging the European—He must commit them to Sessions **84**
——S. 476—Civil Court exercising jurisdiction under S. 476 does not cease to be a civil Court **774***a*
* ——S. 476-B—Court taking action under S. 476 not being moved by any party—Appeal lies under S. 476-B. **899 (1)**
——S. 476-B—No appeal lies from complaint made by appellate Court under S. 476-B **898***a*
——S. 488—Wife subjected to cruelty and oppression is entitled to maintenance even though parties belong to low class **950**
——S. 491 (1)—Section does not apply in case of person in a Native State **347 (2)***b*
*——S. 496—Proviso in S. 496 that bail can be granted only to person other than person accused of non-bailable offence is not applicable to the Court of Session acting under S. 498 **614***b*
——S. 497 (1)—Magistrate should not refuse bail unless likelihood of accused absconding or terrorizing prosecution witnesses or committing similar or other serious offence **614***a*
* ——S. 498—Proviso in S. 496 that bail can be granted only to person other than person accused of non-bailable offence is not applicable to Court of Sessions acting under S. 498 **614***b*
——S. 498—A Sessions Judge has wide powers under S. 498 **320***a*
——S. 498—Prosecution of two parties—Member of other party released on bail—Sessions Court must consider these facts and applicant should be released on bail if there is no danger of his absconding **320***b*
——S. 514—Bond obtained by Court without jurisdiction is nullity and no action can be taken under S. 514 against accused **914 (1)**
——S. 528—Powers given by S. 528 should be exercised when absolutely necessary—Notice of application for transfer .should be served upon opposite party **932**
——S. 537—Illegality or irregularity

Criminal P. C.
in search unattended by prejudice to accused does not vitiate trial **937***d*
——**S. 562**—Enticing away widow of 16 years for honourably marrying her—Discovery by father—Charge against enticing youth under Penal Code. S. 366—No attempt to seduce or illtreat her—Case held fit for criminal being treated as first offender **930**
Criminal Trial
——Identification—Evidence as to ought to be subject to close and careful scrutiny **928***b*
——Sentence — Maximum punishment should be awarded only in extreme cases—Ability of accused to pay fine easily—Maximum fine should not be awarded if offence is not serious **919***e*
——Evidence—Appreciation of—First information report cannot be used as primary evidence of fact in dispute **916**
*——Evidence—Admissibility—A witness can be permitted to say that he himself suspected accused of having committed certain offence **650***b*
——No reason to show why non-compoundable complaint was withdrawn—Withdrawal is not unlawful for it may be due to the complaint being unlikely to succeed **456***b*
——Duty of prosecution—Previous conviction should be brought to notice at proper time **270***a*
——Court's duty—Grave offence committed—It should not be minimised to justify summary trial **349***a*
——Particular guilty person not ascertained—Capital sentence may be given **160***b*
——Evidence—Court should not supplement prosecution evidence by selecting passages from accused's statement corroborating prosecution evidence, and by rejecting others exonerating him **1***b*
Custom
——If custom is proved to exist in 1912 it follows that it was ancient unless there is contrary evidence **561***f*
——Evidence—Custom of "Dhardhura" pleaded—Incidents of custom must also be pleaded and proved **233**
——**(Punjab)**—Jats in Ballabgarh District—Adoption—Custom of adopting an orphan prevails amongst the Jats of Ballabhgarh District **561***e*

D

Damages
——No cause of action arises against person for merely financing appellants in appeal when costs could not be recovered from appellants **797**
Decree
——Setting aside—Declaration that property in possession of party to mortgage suit should be saved from burden of mortgage decree cannot be obtained by the party who remains absent, and decree is not tainted by fraud **889***a*
Deed
——Construction—"La Aulad" means issueless **963***e*
——Construction—Language similar but not identical—Document should not be interpreted by language of another **908***b*
——Construction—"Wilful" in "wilful acts and defaults" is used not as a definition but as description **826***b*
——Construction—On partition village *X* given to one cosharer *A*—Agreement that *A* should pay certain amount from profits annually to other sharers and that the sharers had right to recover same from whoever was in possession (for the time being) of *X*—Payment regarded as "Malikana"—Agreement created not mere personal liability—It was not only charge but created interest in land **737***a*
——Construction—Where a fund is indicated for payment of a certain allowance, the latter must be deemed to be a charge on the former **737***c*
——Construction—Security bond—Liability of surety for money received by mukhtar in virtue of his office "as mukhtar"—Money received by mukhtar contrary to directions — Surety was liable **687***a*
——Construction—Whether document in question was will **620**
——Construction—Settlement deed held to have intended to bind parties permanently for future **519***a*
——Construction—Authorities effecting settlement between various parties likely to cause serious trouble—For determining whether leaders entered that settlement in representative character, attitude of those whom they were supposed to represent must be considered **519***c*
——Construction—Hindu of Mitakshara School executing tamliknama making his two wives along with himself joint owners of his property—Tamliknama

Deed
providing that neither he nor his wives could transfer share without consent of all—Shares not specified—Subsequently he executing another document purporting to cancel tamliknama—Tamliknama created tenancy-in-common and each was to get 1/3rd share—It could not be cancelled by subsequent document—Provision prohibiting transfer was absolute restraint on alienation within Transfer of Property Act, S. 10 **492**
——Construction—Factors for consideration besides wording indicated (FB) **465***a*
——Construction—Forfeiture clause in a deed illegal—Executant pardanashin lady made to sell her property on the strength of the clause—Clause must be enforced **281***b*
——Recital—A recital in a deed of recent date executed by a Hindu widow is no evidence of the fact recited **223***e*

Defamation
——*See* (1) PENAL CODE, S. 499; (2) TORT—DEFAMATION.

Dismissal for default
——*See* CIVIL P. C., O. 9, R. 4.

E

Easements Act (5 of 1882)
——**S. 4**—Suit by *N* to restrain *M* from preventing *N* from using well water—Well situated in ground belonging neither to *M* nor to *N*—*N* proving right of easement to take water from well—*M* interfering with right of *N* by enclosing well with wall and preventing *N* from having access to well—House of *N* formed dominant tenement and ground in which well stood was servient tenement and *N* held entitled to decree ordering demolition of construction made by *M* **779**
*——**S. 4**—Residents in houses situate in public lane cannot sue for encroachments over such lane **504***b*
——**S. 7, Illus. (e)**—S. 7 does not apply to land burdened with building—S. 15 should be applied to such case—Easements Act, S. 15 **885***b*
——**S. 8**—Scope—A tenant can acquire an easement against property held by another tenant **862***b*
——**S. 15**—Easements Act S. 7, Illus. (e)—S. 7 does not apply to land burdened with building—S. 15 should be applied to such case **885***b*
——**S. 15**—To apply 60 years rule

Easement Act
Government ownership must exist on the date when easement is claimed **382***b*
——**S. 15**—Bye-law passed by Board and sanctioned by Government signifying the Board's intention to let out the sides of roads to hawkers does not create Board's ownership to those sides but merely extends its power of user **382***c*
——**S. 15, Expl. 2**—Right of easement established—Failure to exercise it for two years prior to suit does not extinguish it **497**
——**S. 15, Expl. 2**—Mere obstruction is not sufficient but further acquiescence for one year must be proved **382***d*
——**S. 18**—Plaintiff suing defendant for infringement of her right of privacy by certain construction—Her house already overlooked from another house and she not showing reason why she did not object to being so overlooked—She also enduring without protest invasion of privacy by defendant for two years—She is not entitled to right of privacy **809**
——**S. 18**—Plaintiff alleging infringement of right of privacy must prove customary right of privacy in neighbourhood and that he is individually entitled to take advantage of such custom **676**
——**S. 28 (c)**—Injunction for disturbance of easement of light can be granted only where damage is proved **430***c*
——**S. 35**—Injunction is not independent form of relief **430***b*
——**S. 35 (a)**—"When" must be construed to mean "when and where" **430***a*
*——**S. 35 (a)**—Injunction for disturbance of easement of light can be granted only where damage is proved **430***c*
——**Ss. 56** and **60**—Riyayas in cities and towns, unlike in agricultural areas being presumed to have right of transfer, licensor suing to eject transferee has not only to prove his ownership, but must prove custom, or terms of original grant, entitling him to recover possession of site **494**

Equity
——Court of equity cannot contravene direct provisions of Code to attain equitable result nor can it excuse breach of mandatory rule because such breach has resulted in justice **437***b*

Evidence
——Court may find evidence unworthy of credit—There can be no finding unless based on legal evidence **873***a*
——Where investigation of fact, is difficult contemporary documentary evidence, if trustworthy should be preferred to any amount of oral evidence **545***c*
——Circumstantial — Where there is very strong feeling between the parties and direct evidence on both sides is of a partisan character, it is safe to decide the case upon the circumstances and probabilities **18***a*

Evidence Act (1 of 1872)
——**S. 13**—*X* making statement in former suit that he was orphan when adopted—His adoption was not attacked in that suit on the ground of his being orphan—Still his statement was admissible in subsequent suit to prove instance of orphan's adoption **561***d*
——**S. 18**—Admission of party's pleader whether of law or fact binds that party and cannot be reopened in appeal **446***a*
——**S. 26**—Statement made in presence of police officer is not admissible **855**
——**S. 30**—Statement by co-accused should not be accepted unless corroborated in material particulars **928***a*
——**S. 34**—Account books to be admissible must be regularly kept **170***b*
——**S. 54, Expln. 2**—Criminal P. C., S. 110—Order under S. 118 can be proved against a person proceeded against under S. 110 though the order is not a conviction under Evidence Act S. 54, Expln. 2 **650***e*
——**S. 66**—Pardanashin woman living with her brother—Summons served on brother constitutes notice such as is required by S. 66 **680***a*
*——**S. 66, Proviso (2)**—Pro forma defendant is not necessarily "adverse party" **680***b*
——**S. 68**—No attempt to prove attestation of mortgage deed—Document cannot be used as evidence **389**
*——**S. 90**—Genuineness of even unregistered document can be presumed from its copy though such presumption can only be made after careful consideration of circumstances—Document purporting to be will produced in Court in 1897—On its basis public adoption made in 1903—It being admitted to be genuine in litigation in 1901, 1903 and 1910—Since death of testator in 1879 to institution of suit in 1923 no suggestion ever made that it was forgery—Original document proved to have been lost—Presumption of its genuineness can be made from its copy **561***b*
——**S. 91**—S. 91 does not apply to agreement to refer **415***b*
*——**S. 91**—Hundi embodying only part of contract between parties being inadmissible in evidence as not properly stamped—S. 91 does not exclude evidence showing terms of whole contract **254***b*
——**S. 91**—Bill of exchange or hundi does not necessarily embody whole contract between parties **254***c*
——**S. 92**—Party to registered sale-deed cannot prove contemporaneous oral agreement that title to portion of property sold would not pass to vendee **578(2)***a*
——**S. 92**—Proof of subsequent adjustment of decree is not inadmissible **79***b*
——**S. 92 (4)**—Mortgage suit for sale—Defendant pleading subsequent oral agreement to accept six shops worth Rs. 95,000 and 7,000 cash in full satisfaction of mortgage. On date of agreement Rs. 1,12,000 due on mortgage—Oral agreement being modification of original contract was inadmissible **615**
——**S. 106**—Date of oral mortgage not being particularly known to mortgagee—No burden lies on him to prove date **209***a*
*——**S. 114**—Where plaintiff's delay in bringing suit has prejudiced defendant, tendency of Court should be to make inference against plaintiff and such inference should be considered in testing evidence actually given **561***a*
——**S. 114**—In absence of evidence non-compoundable complaint is to be presumed to be withdrawn and not compounded **456***a*
——**S. 114, Illus. (b)**—Statement by co-accused should not be accepted unless corroborated in material particulars **928***a*
——**S. 115**—Person consenting to transfer is estopped from claiming pre-emption not only against vendor and vendee but also against rival pre-emptor **589(1)**
——**S. 115**—Parties to sale deed entering piece of property within Sub-Registrar's jurisdiction in order to give him jurisdiction without intending the property to pass by the deed cannot get any relief in Court of justice **578(2)***b*

Evidence Act
——**S. 115**—Court ordering name of nominee of plaintiff to be substituted in order of reference for one of arbitrators —Defendant entitled to see whom plaintiff is going to appoint, but if he acts as if nominee is legally appointed and objects to award when it goes against him, he is estopped from questioning validity of appointment **559**
——**S. 115**—There can be no estoppel contrary to a statutory enactment **549***a*
——**S. 115**—Cosharer intending to sell his share—Other cosharer refusing to purchase for want of money, but not showing intention to reserve his right to pre-empt—Vendee induced to purchase—Cosharer's refusal to purchase amounted to absolute refusal and he was estopped from claiming pre-emption, although no notice was given as required by Agra Pre-emption Act, S. 14 **531***b*
——**S. 115**—Person, in whose favour three mortgages on same property were executed, assigning second of them to another—Assignee suing making assignor pro forma defendant—Assignor not disclosing third mortgage by written statement—He cannot sue auction-purchaser on his third mortgage **511**
——**S. 115** — Pre-emptor expressing clear intention not to pre-empt and waving objection in unequivocal language to the property being sold—Pre-emptor is estopped personally from pre-empting **453**
——**S. 115**—Tenant making grave on abadi—Zamindar's servants standing by and not objecting — That does not amouut to agent's acquiescence **386***c*
——**S. 115**—Forfeiture clause in a deed illegal — Executant pardanashin lady made to sell her property on the strength of the clause—Clause must be enforced **281***b*
——**S. 115**—Fraud—Party is estopped from pleading his own fraud **237***b*
——**S. 115**—Reversioner relinquishing his rights for consideration cannot resile **196***c*
—— **S. 115** — Mahomedan Law — Pre-emption—Preliminary demands as to all items—Pre-emptor can sue for some of them only **158**
——**S. 116**—Usufructuary mortgage — A usufructuary mortgagee cannot deny the title of the mortgagor and set up adverse possession unless he actually leaves the holding and enters under a different status **305***b*
* ——**S. 157**—Guardian's former application containing ward's date of birth is admissible **550**

G

General Clauses Act (10 of 1897),
——**S. 3 (25)** — Sale of mortgagee's interest must be registered **161**
General Provident Fund Rules
* ——**R. 10**—Compulsory deposit made in General Provident Fund is not attachable even after contributor's retirement **417***a*
Government of India Act (1919),
——**S. 96-B, sub-S. 4**—Sub-S. (4) is not sufficiently wide to cover rules regulating General Provident Fund (*obiter*) **417***b*
Grant
——Pension from generation to generation—Predecessor of each generatien is Government **781***e*
Guardian and Ward
*——Certificated guardian—Powers to start new and speculative business are very limited **890***a*
——Jurisdiction — District Judge appointing *X* as guardian—Prior to such appointment *Y* being in possession of minor's property as trespasser—District Judge has no jurisdiction to pass any order against *Y* **597 (1)**
——Alienation—Guardian has no power to make gifts on minor's behalf which would appreciably reduce value of minor's estate **454**
Guardians and Wards Act (8 of 1890)
——**S. 4 (2) (3)** — Word "guardian" is of general import and includes natural and testamentary guardians and guardians appointed by Court **879***b*
——**S. 17** — Guardianship — Right to custody of minor child depends upon circumstances concerning welfare of minor **857**
* ——**S. 30** — Contract with a certificated guardian is voidable — Benefit received must be restored **890***c*

H

Hindu Law
*——Adoption — Married Marwari Brahmin cannot be adopted in absence of proof of custom allowing such adoption **739***b*
*——Adoption—Hindu authorizing wife to adopt by his will — Will directing

Hindu Law
that boy in particular family should be adopted in first place — Daughter's son from that family adopted—Adoption is valid under will **561***c*
——Adoption—If adoption is attacked on the ground that adoptee was of different gotra, a special custom to the effect that such adoption is invalid must be proved **561***g*
——Alienation — Head of joint Hindu family cannot transfer by gift immovable property to stranger unless for spiritual benefit **854*a*
——Alienation — Gift declared void—Compensation cannot be awarded in lieu of it **854***c*
*——Alienation — Father—Antecedent debt--Alienation by father for paying off antecedent debt--Court cannot enquire into prior history of the debt **789***a*
——Alienation — Alienation by father for necessity—Application of consideration need not be looked to by vendee **789***b*
*——Alienation—Suit by sons for setting aside sale deed executed by their father—Vendee never in possession of property—Suit is governed by Lim. Act, Art. 120 **750(2)**
——Alienation—Mortgage executed by father for antecedent debt neither immoral nor illegal, being binding on son, decree passed against father in suit for sale of mortgaged property binds son though he is not party to it **553 (2)**
——Alienation—Father—Necessity for Rs. 9,800 proved — Necessity for balance of Rs. 200 should be assumed **503***b*
——Alienation—Mortgage by father—Recitals in deed as to necessity are of little evidential value although they may assume value when they amount to representation of family need or when owing to length of time it is impossible to produce other evidence **481***a*
——Alienation—Transfer by manager, otherwise than for legal necessity or antecedent debt, if avoided by other coparceners wholly inoperative **479***a*
——Alienation- Father—Perpetual lease is not in ordinary course of management **387***b*
**——Alienation — Manager — Transferee from coparcenary body can challenge validity of prior alienation by manager — Voluntary transferee of

Hindu Law
equity of redemption cannot challenge the mortgage as his deed would define his interest—Purchaser in execution, however, can challenge the mortgage **243***b*
——Alienation—Father — (Per *Ashworth, J.*,) Necessity proved—Adequacy of consideration is immaterial unless fraud or collusion is proved—(*Sulaiman, J.* contra) **199***b*
——Alienation—Father's disability to alienate moveables is same as immovables **199***c*
——Alienation by father — Legal necessity—Money borrowed for paying purchase money under pre-emption decree is not for paying antecedent debt or for legal necessity **139*a*
*——Alienation by father—Mortgage by Hindu father for paying pre-emption money set aside at son's instance—Money can be charged on pre-empted property **139***b*
——Alienation by widow—Recitals in a deed are not evidence of legal necessity—Representation of necessity to the transferee and his honest belief in it will be sufficient—Recitals of necessity are sufficient proof of representation—Where sale deed is very old, detailed evidence of circumstances cannot be expected **128**
——Alienation — Father or manager cannot charge joint property as surety **72***c*
——Alienation by manager—Defect in title by one party (e. g., Hindu manager)—Exchange is not inoperative **63 (2)***a*
*——Debts—Liability of sons arising before partition and corresponding right of creditor to recover money from them are not affected by partition to which the creditor is not a party **726***b*
——Debts—Decree against father is binding on sons **726***c*
——Debt—Necessity—Loan, taken by certain members of joint Hindu family for instituting suit for declaration that transfer by Hindu widow is not binding on them, cannot bind joint family property **623**
——Debts—Son's liability—Surety accepted by father for debts promised to be advanced—Sons are liable for principal and interest **72***b*
*——Debts—Legal necessity — Ancestral property cannot be transferred to raise money to start or carry on a new

business even for family benefit. [But *see A. I. R.* 1928 *All.* 454 (*F.B.*)] **59***a*

——Joint family—Gift by father of 1/8th share of entire property to a Brahmin richer than himself and a legal practitioner is not valid **865***a*

——Joint family—Gift of portion of family property by father—Gift beyond authority and so invalid—Son not avoiding gift—Still donee cannot sue father's representatives for possession **865***b*

——Joint family—Where one member enters into partnership with strangers, there is no presumption that he does so in representative character so as to make other members liable as partners—If they are sought to be made liable, it can be done by evidence of consensus or by evidence to prove agency through which contract of partnership was brought into existence **536***a*

*——Joint family—Manager for securing economical management of family property taking up management of neighbouring property and creating charge on family property to secure honest management—Manager does not exceed his powers nor does he burden family property without legal necessity **479***b*

——Joint family—Relinquishing equity of redemption **365***b*

——Joint family—Sale of joint family property—All major members joining—Circumstances raising presumption of existence of valid necessity not existing—Court cannot hold that there was legal necessity—Burden of proving want of legal necessity is not thrown on minor members challenging sale **205**

——Joint family—Trade—Manager by reason of having minor son is not bound to continue partnership with a stranger **199***a*

——Joint family—Trade—Strangers as partners with joint family—Relations are governed by Contract Act **199***d*

*——Joint family—Joint family as partner—Managing member dying—Partnership is not dissolved **148***b*

——Joint family—A joint family can become a partner in partnership business **148***c*

——Joint family—Whole joint family property is liable for ancestral family business—But minor member is not personally liable nor his self-acquired property **148***f*

*——Maintenance—Father-in-law gifting portion of his self-acquired property to one of his sons—Widow-daughter-in-law is entitled to maintenance out of such property **751**

——Partition—Father is competent in his lifetime to effect separation in family—Deed of partition giving separate shares to sons has effect of partition—Separation by metes and bounds is not necessary **63***d*

——Partition—Immoral debts of father do not create charge on family property—Individual property of sons acquired by partition is not liable to attachment in execution of money decree against father **775***b*

——Partition—Intent to defeat creditor—Liability of sons for father's debts is not affected **726***a*

——Partition — Decree against father after partition cannot be executed against sons **726***d*

*——Partition—Rule that unequivocal intention creates severance of status is inapplicable to minors **726***c*

——Partition—One member separating—It is for those who assert jointness to prove that they continued joint or reunited—*X* separating from father and minor brother—Minor brother's share, though ascertained, yet not actually separated — Father managing minor's share also—Minor's mother already dead but minor having stepmother—Separation in minor's interest— After *X's* separation, father and minor held to have not continued to be joint **513***a*

——Partition — One member separating from the rest—Continuance of jointness between remaining members is not same as their reunion **513***b*

——Partition—Declaration of intention by notice does not effect separation when parties agree to withdraw it **170*c*

——Partition—Reunion— Agreement to reunite must be proved—Such agreement can be inferred from conduct **148***d*

——Partition—One member separating—No presumption about others remaining united—But their union can be inferred from conduct **148***e*

——Religious Endowment—Idol—Person not manager though in charge of deity cannot represent idol— Civil P.C.

Hindu Law
contains no rule for suits on behalf of idols **887**
——Reversioner—Suit by reversioners if collusive does not bind reversioner succeeding to estate **859***c*
——Reversioner—Consent to alienation by attestation can be given only by presumptive reversioner **223***d*
——Reversioner—Reversioner relinquishing his rights for consideration cannot resile **196***c*
——Stridhan— Daughter's daughter is preferred to daughter's son **71**
*——Stridhan—Immovable property can be sulka stridhan **25***a*
*——Stridhan—Question whether property is sulka is not question of law pure and simple **25***b*
——Stridhan—Sulka—Fact of gift being made in contemplation of marriage does not give rise to inference that it was price for marriage—Distinct allegation and cogent evidence that gift was prompted by desire to benefit parents induced thereby to give girl in marriage is necessary to prove character of property—Every ante-nuptial settlement is not sulka **25***c*
——Stridhan — Sulka — Inheritence—Children are excluded by parents and maternal relations **25***d*
——Succession—Counting of degree is from common ancestor according to Allahabad view **739***d*
——Widow — Compromise — Where widow agrees by way of compromise that her husband died joint and that she is entitled only to maintenance, she cannot be said to represent estate and compromise by her does not bind reversioners **963***b*
——Widow—Compromise by pardanashin widow not with full appreciation of circumstances and not after taking legal advice does not bind reversioner **963***c*
——Widow — No adverse possession against reversioners during lifetime of widow **739***c*
——Widow—Widow's purchasing property does not raise presumption that money has come from savings of husband's property **449***b*
——Widow—Original owner ceasing to be in possession—Widow and reversioners not taking steps to recover possession—Reversioners will be barred by limitation **419 (2)***a*

Hindu Law
*——Widow—Reversioners consenting after widow's death to oral gift by widow in favour of stranger—Even assuming reversioners are estopped from claiming possession, full proprietary title does not vest in donee **300***a*
——Widow—A recital in a deed of recent date executed by a Hindu widow is no evidence of the fact recited **223***e*
*——Will—Bequest made not successive but alternate to that in favour of an unborn person is not void **102***b*
——Will — Property bequeathed to widows and subsequently to *R*—*R* to be owner after testator's death—After *R*, *R's* son to be owner—But in case *R* died without son, *D* was to get—Widows did not get Hindu widows' estate but only life-interest—*R's* son did not get vested interest in *R's* lifetime but was to succeed only after *R's* death—Bequests in favour of *R's* unborn son and *D* were not successive but alternative **102***a*

I

Income-tax (11 of 1922)
——S. 1—Assessee can use all legal devices to avoid tax **919*d*
*——S 10 (2) (9)—Government supplying raw material to a company on payment at a fixed rate and an additional sum if profits of company exceed certain percentage—Additional sum paid is not assessable **118***a*
——S. 10 (2) (7)—Obsolete machine sold after it broke down—S. 10 (2) (7) still applies **70**
*——S. 13—Assessee is entitled to deduct from his estimated income actual losses suffered in particular year and amount of irrecoverable debts that should have been discovered in particular year **819***b*
——S 22 (3)—Letter with statement of income in Hindi—Request by letter to Income-tax Officer to fill in income-tax form—Letter of request with income statement is sufficient return **919*a*
*——S. 22 (3)—Revised return made before assessment is returned in due time—Offence committed with return under Cl. (2) need not be condoned even if revised return is true **919***c*
——S. 24—Purchase of shares—Price exceeding face value paid—Excess is no loss **919***g*

Income-tax Act
——S. 34—Taxes on escaped income cannot be recovered for more than one year **919***f*
—— S. 52—Offence under S. 52 is committed on day return made under S. 22, is verified by party **919***b*
—— S. 52—Verification of untrue statement is essence of offence **919***h*
*—— S. 66—S. 66 requires High Court to decide questions of law that arise in the case i. e., High Court is entitled to "resettle issues" as it were and to decide those issues **819***a*
Interest
——Cause of action held not accruing on default of payment of interest as there was no clear provision to that effect **908***a*
——Twelve annas per cent per mensem at six monthly rests is not unreasonable or unconsionable **59***c*
Intrepretation of Statutes
——Same meaning should be given to same word in different parts of enactment **(FB) 977***d*
——Proper course is to examine language and find out natural meaning—Judge should not go outside the letter of enactment according to its true construction **850***e*
——Repealing Acts— Particular interpretation attached to certain words, same interpretation should be attached to subsequent repealing Acts **845 (2)***b*
—— Construction — Where there are two possible constructions it is the duty of the Court to use the common-sense construction **750(1)***b*
-——Retrospective effect—Suit instituted before but decided after Agra Tenancy Act (3 of 1926)—Appeal is governed by old Agra Tenancy Act **745***a*
*——Language, interpreted by decisions, reproduced in new Act—Judicial interpretation should be assumed to have been accepted **(FB) 625***c*
——Words unambiguous — Words not found in Act should not be read into context **(FB) 625***d*
——Section—Any section in any Act must be interpreted in the light of the rest of the Act **421***d*
——Penalty—It is seldom that an Act can be construed to declare something unlawful unless that Act provide a penalty for breach of the provision **394***b*
Interpretation of Statutes
——Excise Act should be strictly construed **210***c*
——Express words— Words especially important must be given appropriate meaning **174***a*
——Marginal notes, in Agra Pre-emption Act, inserted under legislature's authority can be referred to while exposing meaning of sections **(FB) 53*b*
——Two distinct words in same sectio do not mean same thing **(FB) 33**

J

Jurisdiction
——Civil Courts—Jurisdiction of civil Court arises where a person derives benefit by fraud or collusion **845(1)***b*
——Civil and revenue Courts—Liability of land to be assessed separately or jointly; so also questions regarding validity of engagement with Government and assessment and distribution of revenue do not come within jurisdiction of civil Court **798**
——Bar of—Municipal Board Act of, can be questioned by a civil Court if power not given by law is assumed **756(2)***a*
——Civil and revenue Courts—Question of tort included—Suit can be tried by civil Court **669***d*
-——Civil or revenue Court—Where a plaint as originally drafted would clearly lie in the civil Court and subsequently evidence showed that in regard to part of property for which suit is brought a suit might have laid in the revenue Court, civil Court has jurisdiction to grant relief for possession **616***b*
* —— Objection to—Tenant suing proprietor in civil Court for determining boundary of his holding—Objection as to jurisdiction not raised in both Courts —High Court can allow it to be raised for first time **442***c*
——Civil Court is barred by decision of revenue Court that a person is agricultural tenant—But when revenue Court's decree is void by fraud, civil Court can re-agitate the question whether he was grove-holder or agricultural tenant **232***a*
*——Civil Court is proper Court to declare a decree to be void by fraud—Finding of revenue Court is not binding on civil Court **232***b*

K

Khaekar Tenure
——*See*, LAND TENURE

L

Land Acquisition Act (1 of 1894)
*——**Ss. 18, 19,** and **20**—Making of reference is act within jurisdiction of Collector—" Court " cannot go behind reference to see whether Collector acted rightly or wrongly **769***a*
——**S. 18 (2) (B)**—(Per *Mukerji, J.*), Limitation runs from the date of filing of award—Date of award is the date of filing award. (*Niamatullah, J.*, contra) **769***b*
——**S. 21**—Division of compensation between landlord and the occupancy tenant is 10 to 6 annas in a rupee—only landlord and not tenant objecting—Landlord is entitled to only proportionate share in increase **525***b*
——**S. 23, Sub-S. (1)**—Market value of land determines compensation **525***a*

Landlord and Tenant
——Rent may be assessed on portion of grove consisting of compact plots when that portion loses character of grove **699(1)**
——Abadi—Abandonment of site or house is sufficient for its reverting to zamindar and it is unnecessary to prove that tenant has given up all connexion with village **439***a*
*——Abadi—Planting of trees by residents in vacant land near their houses is not by itself evidence of their exclusive possession of that land **428***b*
——Custom whereby agricultural tenants occupy abadi sites is so well known that it will be presumed to exist in absence of proof to contrary **439***d*
——Zamindars can get rid of grave made in abadi without their knowledge as soon as they come to know of it **386***a*
——In U. P. zamindar is owner of trees in tenant's land but subject to contrary custom **335***b*
——Merger—Tenant purchasing share in zamindari—He does not become khudkast holder but remains only tenant **258**
——Abadi—Tenant not authorized to sell house—Cosharer not authorized to build without other's consent cannot buy **241**
*——Tenant giving up nothing as consideration for permission to plant trees—Zamindar is entitled to trees. **146**

Landlord and Tenant
——Abadi—Tenant cannot use sahan for building purposes **125***a*
——Acquiescence—There can be no acquiescence where a kachcha house is put up in a short time costing little to put up or to pull down **125***b*
——Abadi—Tenant occupying land in abadi is mere licensee—License to use open land is different from license to build—Tenant allowed to use land for tying cattle cannot use it for building purposes **76***b*
——Landlord failing to put tenant in possession of part of property—Recovery of arrears of proportionate rent can be made **52***a*

Land Tenure
——Khaekar tenure—History of Khaikari-tenure, its origin, and its incidents and rights traced **223***a*
——Permanent tenure—Succession to heritable permanent tenure is according to personal law—Allegation of special custom excluding collaterals from inheritance must be proved **223***b*
*——Khaekar tenure—Reversioners though not joint in cultivation with tenant or limited owner can succeed **223***f*

Lease
——Perpetual lease by person beyond his powers does not entitle lessee to possession. (*Obiter*) **387***c*

Legal Practitioner
——Admission—Admission of party's pleader whether of law or fact binds that party and cannot be re-opened in appeal **446***a*
——Counsel of a company asking witness whether that company was not biggest in that town—Counsel on opposite side remarking that it was also the most dishonest—Remark being defamatory and uncalled for, counsel cannot plead privilege **214***e*

Legal Practitioners Act (18 of 1879)
——S. 13**—Refusal to take up case merely with intention of not appearing against professional brother is professional misconduct—General rule for accepting cases enunciated **367**
*——**S. 14**——Formalities under S. 14 not observed—Reference is not valid **(FB) 655**

Letters Patent (Allahabad)
——**Cl. 10**—Suit for damages for malicious prosecution—Whether there was reasonable and probable cause is question of fact—If lower Courts after judi-

Letters Patent
cially considering evidence find against plaintiff, High Court cannot disturb finding nor can it certify case for Letters Patent appeal **429**

Limitation Act (9 of 1908)
——Equity—There is no question of equity in cases governed by the Limitation Act **677***c*
——**S. 1**—Defence—There can be no limitation against a plea in defence **77***a*
——**S. 3**—Scope—Appellate Court is not bound to take notice suo motu of the fact that application made at trial Court, was barred by limitation **485***c*
*——**S. 4**—Period of limitation expiring in vacation—On Court's reopening day application filed in wrong Court—Applicant is not entitled to take advantage of both S. 4 and 14 and to tack on vacation to period spent in prosecuting application in wrong Court **677***b*
——**S. 5**—Reasonable diligence is the test **351**
——**S. 5**—Civil P. C., O. 9, R. 4—Time to file application under R. 4 cannot be extended under S. 5 **127**
——**S. 5**—Court must give reasons for rejecting appeal **101***a*
——**S. 5**—Delay condoned ex parte—The question of condoning can be reconsidered at the hearing **31***a*
——**S. 5**—Discretion exercised by lower Court—High Court cannot interfere in the discretion **31***b*
——**S. 7**—Joint decree for possession and demolishing construction, in favour of a major and minor—Interests distinct and separate—Execution application by minor within three years of majority is not barred **267(1)**
*——**S. 7**—Wife of a Mahomedan predeceasing her husband—Suit by sons for share of her dower debt—S. 7 does not apply **142***b*
——**S. 8**—Where plaintiff is minor when cause of action arises time does not run against him until minority is over **963***a*
*——**S. 14**—Period of limitation expiring in vacation—On Court's reopening day application filed in wrong Court—Applicant is not entitled to take advantage of both, S. 4 and 14 and to tack on vacation to period spent in prosecuting application in wrong Court **677***b*
——**S. 14**—S. 14 does not apply to proceedings in totally different suit **101***b*

Limitation Act
——**S. 14 (2)**—Time spent in prosecuting application for execution cannot be excluded while counting limitation for application for preparation of final decree **677***d*
——**S. 18** — Where plaintiff alleges fraud, initial burden of proving date on which he acquired knowledge for first time is on plaintiff, but where, although plaintiff definitely alleges date of his acquiring knowledge, defendant's pleadings are evasive and do not raise specific issue as regards such date, burden of proving date is not on plaintiff **721(2)***a*
*——**S. 18**—Active concealment with intention to deceive is fraud within S. 18 **213**
——**S. 19**—Receipt can serve as proof of acknowledgment, though inadmissible as bond for want of proper stamp **980***a*
——S. 19**—Clear and unconditional acknowledgment can itself be a foundation of action **980***b*
——**S. 19**—Person in one case in settlement Court maintaining all along that he was full tenant and denying anybody's right to redeem him—But judgment stating that he admitted that he did not get mutation of names effected because he held possession as mortgagee—Exact statement not before Court—Statement did not amount to acknowledgment **332**
*——**S. 19**—Acknowledgment containing admission of right to redeem—Mortgage held to be executed within period of redemption before acknowledgment **209***b*
——**S. 20**—One co-mortgagor, making payment of interest, keeps mortgage alive **380***a*
——**S. 21 (2)**—One co-mortgagor, making payment of interest, keeps mortgage alive **380***a*
——**S. 23**—Under S. 228 (b), U. P. Municipalities Act 1916, it is duty of Board to allow owner to connect his house with the main pipe — Disconnexion amounts to continuous breach giving rise to continuous cause of action **870**
——**S. 26**—Right of easement established—Failure to exercise it for two years prior to suit does not extinguish it **497**
——**Art. 11-A**—Art. 11-A does not apply if plaintiff is claiming on his original title **610***a*

Limitation Act
*——**Art. 12**—In execution sale, property not mortgaged wrongly included —Judgment-debtor ignorant of it—Suit to recover possession of property thus sold in excess—Purchaser is not entitled to recover money for the property—Suit is not barred either by O. 21, R. 92 or by Art. 12 **673**
——**Art. 44**—Art. 44 applies whether transfer is by ordinary or certificated guardian **879*a***
——**Art. 44**—Art. 144 and not Art. 44 applies in case of transfer of minor's property by unauthorized person **879*c***
——**Art. 48**—No allegation of criminal charge—Application of Limitation Act, Art. 48 cannot raise presumption of criminal charge—Arts. 35 and 43-A, Provincial Small Cause Courts Act were held not applicable **208**
——**Art. 61**—Where subsequent mortgagee pays off amount of prior mortgage, Art. 61 applies **943*d***
——**Art. 61**—Sale effected in execution of mortgagee—Deposit by purchaser of equity of redemption under O. 21. R. 89 —Right of redemption does not come to an end—Suit to recover the amount from mortgagor is not covered by Limitation Act, Art. 61 **309*a***
——**Art. 74**—Waiver—Acceptance of instalment after default amounts to waiver **881*b***
——**Art. 75**—Where benefit of provision as to recovery of the whole amount is waived, cause of action accrues on each default **812**
*——**Arts. 115** and **116**—Vendee undertaking to pay prior mortgage but sale deed not stating that vendee was to pay at some future time or when he pleased but stating that vendee was responsible for future interest and was to pay before property endangered—Vendee shall be deemed to have broken the contract when he undertook to pay or within short but reasonable time: (*Obiter*) **121*b***
——**Art. 116**—Time runs from date of breach of contract—Where no date is fixed it runs from date of deed itself **775*c***
——**Art. 116**—T. P. Act, S. 55 (2) —Covenant of indemnity—Pre-emptor's vendee can take benefit—Case is governed by Limitation Act, Art. 116 **293*a***
——**Art. 116**—'Contract'—The word "contract" in Art. 116, includes an implied contract also **293*b***
——**Art. 116**—Money payable on demand—Right to personal decree against mortgagor is barred after six years **139*c***
——**Art. 120**—Suit by sons for setting aside sale deed executed by their father —Vendee never in possession of property—Suit is governed by Limitation Act, Art. 120 **750(2)**
*——**Art. 120**—Suit for declaration of title by owner, against whom adverse entry is made in khewat more than six years ago, is not necessarily barred because any fresh invasion of owner's right may give a new cause of action **529*a***
——**Art. 120**—Scope—Article 120 applies to all declaratory suits **529*b***
*——**Art. 127**—Suit by minor **302*b***
——**Art. 132**—Suit for enforcing hypothecation lien—Art. 132 applies **121*a***
*——**Art. 142**—Art. 142 is restricted to cases in which relief sought is based on possessory title **753*c***
——**Art. 144**—Art. 144 and not Art. 44 applies in case of transfer of minor's property by unauthorized person **879*c***
*——**Art. 144**—Art. 144 applies to suit for possession of immovable property on basis of title **753*b***
——Art. 148**—Redemption decree in favour of all mortgagors—Only some paying entire mortgage money—Dying mortgagors recorded in revenue papers proprietors as to portion and mortgagees as to rest—Others suing them within 60 years from original mortgage for recovery no payment of their shares—Suit is not barred by limitation—Mortgagors who paid on behalf of others became mortgagees while others remained as mortgagors **100**
——**Art. 171**—Case of assignee of preliminary decree comes within Civil P. C., O. 22 R. 10 and not Rr. 3, 4 and 8—It is not governed by Limitation Act, Arts. 171 and 176 **444**
——**Art. 173**—Scope—Under Art. 173, 90 days time is allowed to the petitioners for review from the date of their knowledge but the contention that where the knowledge is after that period, there is no period prescribed by the Limitation Act, or Art. 181, Sch. 2, Lim. Act at most applies is wrong **545*a***
——**Art. 173**—Application for review of order is barred if not filed within 90 days of that order **485*b***

Limitation Act

——**Art. 174**—Payment out of Court—Application for recording subsequent payment made six months after previous payment attaching receipt for previous payment and endorsement by decree-holder's pleader about acceptance of subsequent payment is not application for recording and certifying previous payment and is barred **674**

——**Art. 176** - Case of assignee of preliminary decree comes within Civil P. C., O. 22, R. 10 and not Rr. 3, 4 and 8—It is not governed by Limitation Act, Arts. 171 and 176 **444**

——**Art. 181**—Application for preparation of final decree is governed by Art. 181 **677***a*

——**Art. 181**—Application for execution—Giving of time to judgment-debtor without record in the proceedings—Art. 182 and not Art. 181 applies **606**

——**Art. 182**—Application for execution—Giving of time to judgment-debtor without record in the proceedings—Art. 182 and not Art. 181 applies **606**

——**Art. 182**—Sending decree to another Court for execution is not itself execution of it **390***b*

*——**Art. 182**—Period will run from amendment of decree only if original decree was incapable of execution **253**

——Art. 182 (5)**—Application in accordance with law to proper Court is sufficient—Bona fide intention to execute need not be shown (FB) **625***a*

——**Art. 182 (6)** Major judgment-debtor described as minor is party to execution proceedings——Issue of notice to him gives fresh starting point **795***b*

——**Art. 182, (7), Expln. 1**—Application for execution against some judgment-debtors keeps decree alive against all—Joint liability is not affected though decree differentiates between the judgment-debtors as regards mode of execution **795***a*

Local Inspection

——*See* CIVIL P. C., O. 18, R. 18

M

Mahomedan Law

——Waqf—Civil Court can entertain application for sanction to transfer waqf property—District Judge takes place of qazi of day of old **849**

——Pre-emption—Person immediately on hearing of sale saying "I am pre-emptor and shall pre-empt"—This is valid first demand **556**

Mahomedan Law

——Waqf—Mutawalli de facto—He has right to collect money of the trust (rent of shops) **518**

——Pre-emption—Intention to purchase must be gathered from the words used and the surrounding circumstances at the time of demand **459***a*

——Pre-emption—Second demand has to be performed within reasonable time and without unreasonable delay from the first in presence of witnesses either before the vendor or the vendee or on the premises **459***b*

——Dower—Marriage not consummated—Still dower is payable on wife's death **369**

——Shia Law—Waqf—Facts insufficient to prove creation of waqf **329***a*

——Shia Law—Waqf—Writing is not necessary—Dedication can be inferred from long user **329***b*

*——Dower—Widow's right of retention may be sold **326***a*

——Widow selling husband's property of which she was in possession for Rs. 700—Her dower debt was only Rs. 51—No mention of dower amount in sale-deed—She intended to transfer not merely right of retention but property itself and heir's right to recover accrued since date of sale **326***b*

——Gift of undivided share by one co-sharer to another is not invalid **312**

——Marriage—Kharch-i-pandan is personal allowance **281***e*

——Waqf—T. P. Act, S. 53 does not infringe rule of substantive Mahomedan Law—Waqf executed as device to defeat creditors is therefore invalid **277**

——Mahomedan usufructuary mortgagee dying—Mortgage debt paid to one of his his heirs without concurrence of others—Such payment is not valid discharge **250***a*

*——Guardianship—Brother is not legal guardian—If he, without being authorized by legal guardian assumes management of minor's property, he cannot impose obligations on minor except such as afford protection to his estate **250***b*

*——Debt secured by usufructuary mortgage—Property in possession of minor and his de facto guardian—Minor not competent to assent—Guardian cannot release property **250***c*

——Waqf—Non-appointment of trustee from public does not invalidate **180***b*

Mahomedan Law
——Waqf—Permanent dedication explained **180***c*
*——Waqf—(Per *Sen, J.*)—Mere use of word " waqf " does not indicate ultimate dedication to poor—(*Niamatullah, J.*, contra) **180***d*
*——Waqf—(Per *Sen, J.*)—Intention to benefit the family exclusively—Public having no right to control—Ultimate benefit to poor cannot be implied—(*Niamatullah, J.*, contra) **180***e*
——Waqf—Validity — (Per *Niamatullah, J.*)—If the deed of waqf is otherwise valid, the intention to defeat the creditors of his heirs cannot affect the validity **180***f*
——Pre-emption — Preliminary demands as to all items—Pre-emptor can sue for some of them only **158**
——Dower—To support a claim for dower very satisfactory evidence is absolutely essential **142***a*
——Marriage—In the case of Shias the age of puberty begins with menstruation and the presumption is that menstruation takes place between the age of nine and ten years **18***b*
——Marriage — Girl adult — Father's consent to marriage is not substitute for girl's consent **18***c*
Malicious Prosecution
——Plaintiff should not be required to prove that he was innocent of charge upon which he was tried **878**
——No positive proof of innocence is necessary—Case not of surmise but of actual seeing by complainant—Acquittal raises presumption of reasonable and probable cause **265**
Minor
——Mortgage in favour of minor can be enforced by him **604***a*
Mortgage
——*See* CIVIL P. C., O. 34
*——Suit for redeeming usufructuary mortgage—Plaintiff alleging mortgage to be under two deeds—Admission of defendant that property is held by him as mortgagee under 12 mortgages—Court can allow plaintiff to succeed on defendants admisssion **305***a*
——Redemption—Admission by defendant that he is mortgagee in possession is acknowledgment that he is liable to be redeemed **242**
——Mortgage of non-transferable tenure is valid as between mortgagor and mortgagee **223***c*
Mortgagor and Mortgagee
——Usufructuary mortgagor perpetually leasing mortgaged property and then selling his rights in it to mortgagee himself — Mortgagee purchases subject to perpetual lessee's right to redeem **616***a*
——(Per *Boys, J.*)—Mortgage with condition as to foreclosure—Suit by mortgagee—Trial Court striking out condition as to foreclosure and holding that thereupon whole mortgage was destroyed—Appellate Court holding that in spite of striking out that condition mortgage subsisted and remanding suit—Effect of remand order is to reduce mortgage to simple mortgage (*Ashworth, J.*, contra) **421***a*
Motor Vehicles Act (8 of 1914)
——U. P. Rules R. 32—Words " if any person is injured " in R. 32 govern whole clause **750(1)***a*
Multifariousness
——*See* CIVIL P. C., S. 99
Municipal Board
——Rules — The Muradabad rules of 1877 were duly cancelled with the necessary sanction on 27th May 1927 **201***b*
Mussalman Waqf Validating Act (6 of 1913)
——Act does not contemplate concurrent gift to charity—If ultimate gift is for charity, paltriness of the income set apart for such purpose is immaterial **180***a*
——**S. 3**—" Property " does not mean mere title (*Mukerji* and *Niamatullah, JJ.* contra) (FB) **465***c*

N

Negotiable Instruments Act (26 of 1881),
——**S. 4**—Person executing promissory note cannot be held in law to have position of surety **664***b*
——**S. 98 (e)**—If acceptor is one of drawers, both drawers would be liable though no notice of dishonour is given—(*Obiter*) **254***a*
Northern India Canals and Drainage Act (8 of 1873),
——**Ss. 20** and **21**—Water-course 30 years old—Presumption of agreement or action under the Act arises **271**

O

Oaths Act (10 of 1873),
——**Ss. 9** and **11**—Statement on oath by witnesses is conclusive and binding on party offering to be bound by it **759 (1)***a*

Oaths Act
——S. 9—Offer to decide case in accordance with particular witness's deposition is binding **759 (1)***b*
——Ss. 9 and 11—Evidence is binding against parties offering to bind **759 (1)***c*

Occupancy holding
——Proprietor mortgaging sir plots—Proprietary rights purchased by stranger—Purchaser treating mortgagor as exproprietary tenant—Mortgagee cannot resist mortgagor's tenancy rights **231***b*

P

Pardanashin lady
——Agreement for reference and its legal consequences not fully explained—Award though registered is not binding on her **824**
——Forfeiture clause in a deed illegal—Executant pardanashin lady made to sell her property on the strength of the clause—Clause must be enforced **281***b*

Partition Act (4 of 1893),
——Act must be strictly construed **443***a*
——S. 2—Request that sale should be held and that highest bidder among cosharers may be given property is not request under **443***b*
——S. 4—Conditions to be fulfilled for application of S. 4 **414***a*
——S. 4—One member selling his interest and his portion separated—S. 4 will apply to the rest of house **414***b*
——S. 4—Undivided family is used not in technical sense—It means same thing as "undivided family" in Transfer of Property Act, S. 44 (2) **414***c*

Partnership
——No suit for recovery of money lies until amount is known **236***c*
——Two of the partners executing pronote to third agreeing to pay certain sum to him on taking partnership accounts—Pronote will not bind other partners **542**

Part Performance
*——Equitable doctrine of part performance cannot override provisions of S. 107 or of Registration Act, S. 17 **831***b*

Payment under protest
——*See* CONTRACT ACT, S. 70

Penal Code (45 of 1860),
——S. 43—"Illegal"—Scope and meaning explained **935***b*
——S. 53—(Per *Mukerji, J.*)—Maximum punishment should be awarded only in extreme cases—Ability of accused to pay fine easily—Maximum fine should not be awarded if offence is not serious **919***e*
——S. 53—Sentence — The words that offender convicted under S. 420 "shall be punished with imprisonment and shall also be liable to fine," mean that some sentence of imprisonment must be given and the Court has a discretion to add or refrain from adding a fine **260 (1)
——S. 95—Charge of obstructing peon of municipality is very slight **940***d*
——S. 96—Accused hitting deceased being attacked by him, acts in self-defence **897**
——Ss. 99 and 103—Decoits about to break into house—Accused firing at them which caused death of one—Firing was in right of private defence **299**
——S. 177 — Verification of untrue statement is essence of offence **919***h*
——S. 193—Statement designedly false—Accused is liable irrespective of fact whether statement has material bearing or not upon matter under enquiry **936***a*
——S. 193—Perjury committed in administrative enquiry—No appeal lies against order for prosecution **936***b*
——S. 193—Instead of taking down the evidence patwari was directed to file statement according to his papers—On false statement patwari is liable under S. 193 and not under Penal Code, S. 218 **374***a*
——S. 193 — Revision Court cannot direct further inquiry into an offence under S. 193, I. P. C., where the sanction of the Court in which that offence was committed was wanting **374***b*
——S. 218—Instead of taking down the evidence patwari was directed to file statement according to his papers—On false statement patwari is liable under S. 193 and not under S. 218 **374***a*
——S. 221—Duties of chowkidar ought not to be confounded with those of public servant—Obligation of chowkidar to detain not established—Chowkidar cannot be penalized under S. 221 **935***c*
——S. 302—Persons lying in wait for deceased with intention of beating—Previous enmity—Beating causing death—Persons held guilty of murder **707 (2)**
——S. 302—Person using lathi with fatal result in expected fight—Know-

Penal Code
ledge that the result would follow may be presumed 160*a*
—— **Ss. 304, 149** and **323**—Eight persons, none of whom carried lathies, beating another to death by breaking his ribs—It is for prosecution to prove that common intention was to break ribs or that breaking ribs was such act as they knew to be likely to be committed, if all are to be convicted under S. 304/149 575
—— **S. 304**—Dispute between accused and another—Deceased, friend and partisan of other party, intervening—Accused, thinking him to have come to help his opponent, giving him only one blow with his kasi—Blow causing death—Offence was punishable under S. 304 535
—— **S. 366**—Girl kidnapped under 16—Accused believing her to be over 16—Accused cannot be protected 82*a*
—— **S. 366**—Illicit intercourse does not cease to be so merely because it is repeated 82*b*
—— **S. 366**—Consent of minor does not prevent commission of offences under S. 366-A 709 (2)
—— **S. 366-A**—When after inducement offender offers girl to several persons, fresh offence is not committed at every fresh offer of sale 585*a*
—— **S. 403**—Trying to dispose of another's missing bullock amounts to offence under S. 403 917*b*
—— **S. 411**—Missing bullock found in possession of accused is not "stolen property" and accused cannot be convicted under S. 411 917*a*
—— **S. 420—Sentence—The words that offender convicted under S. 420 "shall be punished with imprisonment and shall also be liable to fine"—This means that some sentence of imprisonment must be given and the Court has a discretion to add or refrain from adding a fine 260 (1)
—— **Ss. 463** and **464**—False certificate is not forgery 396*a*
—— **Ss. 463** and **464**—Entry of excess payment in muster roll is not forged document 396*b*
—— **Ss. 463** and **464**—Scope—The "making of a part of a document" must be the making of a part of a false document and in the making of a part of a document not only the intention or purpose must be proved but the fact that the document was false must also be proved 396*c*
—— **S. 499—(Per *Mukerji, J.*)—To prove that certain words were defamatory, Court must be put in possession of actual words used and context in which they were used—Court cannot accept mere impression of witnesses (*King, J.* contra) 1*a*
—— **S. 499, Excep. 9**—A European lady living with *S* as wife and subsequently marrying him—She making attempts to murder her husband—Her father-in-law making statements that she was insane and likely to cause danger to her husband and that she was "man-mad"—Father-in-law was protected by Excep. 9, so far as first statement was concerned but not for his second statement regarding her immorality 1*c*
—— **S. 499, Excep. 9**—Person claiming protection under this exception must have made imputation in good faith for protecting interest—Merely believing in good faith that imputation is for protection of interest of himself or of someone else is not covered by the exception 1*d*

Pensions Act (23 of 1871)
—— **Ss. 4, 5** and **6**—Scope of, explained 781*b*
—— **S. 12**—Scope—The word "pension" does not include grant of land revenue 781*d*

Pleading
——Pre-emptor alleging vendor's want of title to part and alternatively offering to pre-empt whole—Such alternative prayer is not fatal 398*b*

Police Act (5 of 1861)
*——**S. 30 (4)**—Prohibition of every kind of music is not covered by the word "regulate" 201*a*

Police Officer
——*See* EVIDENCE ACT, S. 25.

Practice
——Precedents—Obvious error made in dictating the judgment, it cannot be said that such is the opinion of the High Court 896*a*
——When issue cannot be reopened, decision thereon must be accepted without inquiry 761(2)*a*
——Grounds of appeal abandoned in first appeal cannot be raised in second appeal 761(2)*c*

Practice
——Appeal should lie to Court to which it lay when suit filed in spite of subsequent change in law **756(1)**
——Arbitrator—Practice of some Judges of accepting also the post of an arbitrator is strongly deprecated, for Civil Procedure Code nowhere contemplates such procedure **747*b***
——New plea — Appeal after retrial on remand — Plea of res judicata raised — Plea is quite competent **724**
*——Subsequent events -- Point not available before trial Court — Point raised in appeal on subsequent events — Appellate Court should send the matter to trial Court for amending its order but should not decide it itself **699(2)**
——High Court — Appellate Court confirming lower Court's preliminary decree is not bound to fix period of six months for repayment under O. 34, R. 4, Civil P. C. **677*g***
——Jurisdiction — Civil Court holding suit non-entertainable by it but entertainable by revenue Court cannot dismiss suit but must return plaint for presentation to proper Court **669*a***
——Jurisdiction—Court cannot disown jurisdiction by assigning to suit character which plaintiff did not intend it to have **669*c***
——Suit for pre-emption brought by brother of vendor — It is necessary to determine question if two brothers were joint or separate at execution of sale deed as member of joint family cannot institute suit for pre-emption on sale of joint family property **658**
*——Pleadings — Point not alleged in pleadings but argument addressed on it —Defect in pleadings is not remedied **657*b***
——Jurisdiction—Where it is deducible from plaint that plaintiff's sole object is to obtain declaration to tenancy, his suit is triable by revenue Court, although one of the reliefs asked for is such as, if that alone were asked, can be entertained by civil Court **613**
*——New Plea—Jurisdiction — Tenant suing proprietor in civil Court for determining boundary of his holding—Objection as to jurisdiction not raised in both Courts — High Court can allow it to be raised for first time **442*c***
——Appeal called on — Appellant going to call his pleader who was arguing case in another Court—Case should be stood over for a few minutes in order that parties may have their case decided on merits **399**
——Subsequent events — Suit is to be tried as on the date of cause of action—Subsequent events can be considered only in exceptional cases **341*c***
——Evidence — The evidence of a witness cannot be admitted until the opposite party had an opportunity of cross-examining him **236*e***
——Duty of Court — Findings of facts should be arrived at before law is applied **170*a***
——Ground of attack not raised in lower Court cannot be allowed **148*h***
——Costs—Either party must produce all material documents in his possession although other party does not apply for their production—High Court would deprive party of costs for failure to do so **134*a***
——Subsequent events—Question of proprietary title—A matter in issue when appeal is filed—Subsequent abandonment of the plea by respondent rendering decision on it unnecessary — District Judge's jurisdiction to hear the appeal is not barred **67*b***

Precedent
——Authority—A case is only authority for what it actually decides **(FB) 625*b***
*——Full Bench case decided by three Judges although it may be a decision of two Judges against the decision of a third, is always entitled to respect from a Division Bench presided over by two Judges **593*a***
*——Stare decisis does not apply when point raised is one of procedure and not of substantive law **593*e***
*——Interpretation of statute is meant to dispel doubts and difficulties regarding a particular statute and to serve as guide to subordinate Courts—Subordinate Courts must, therefore, implicitly follow High Court's decisions until overruled **134*b***

Pre-emption
——Pre-emptor can abandon claim as proprietor and sue for pre-emption as a cosharer **780*a***
——Pre-emptor is liable to pay consideration not paid by the vendee **780*b***
*——Custom of pre-emption having once come to end cannot be revived **662**
——Suit for pre-emption brought by brother of vendor—It is necessary to

Pre-emption
determine question if two brothers were joint or separate at execution of sale deed as member of joint family cannot institute suit for pre-emption on sale of joint-family property **658**
——When transfer falls within definition of mortgage by conditional sale, it is pre-emptor's duty to show that it is out and out sale—In absence of circumstances showing that, no pre-emption suit would lie **619**
——Person consenting to transfer is estopped from claiming pre-emption not only against the vendor and the vendee but also against rival pre-emptor **589(1)**
——Pre-emptor expressing clear intention not to pre-empt and waiving objection in unequivocal language to the property being sold—Pre-emptor is estopped personally from pre-empting **453**
*——Purchaser during pendency of pre-emption suit, if a preferential claimant to pre-emptor, can retain property purchased by him because pre-emptor need not bring suit but may acquire property from vendee at private sale **440**
——Pre-emptor alleging vendor's want of title to part and alternatively offering to pre-empt whole—Such alternative prayer is not fatal **398*b***
——Court cannot inquire vendor's title **398*c***
——Active concealment with intention to deceive is fraud within S. 18 **213**

Principal and Agent
——Agent's acquiescence—An agent's acquiescence cannot be pleaded when the other party knows that he has no authority to acquiesce **386*b***
——Contract of agency subsisting—Agent's shortcomings in discharge of his duties under agreement—Principal is liable to pay commission under agreement **87*a***
——Agent entering into understanding with third party—Agent must disclose such understanding to principal: (*Obiter*) **87*b***

Provident Funds Act (19 of 1925)
* ——**S. 3(1)**—Compulsory deposit made in General Provident Fund is not attachable even after contributor's retirement **417*a***

Provincial Insolvency Act (5 of 1920)
** ——**S. 4**—(*Dalal* and *King, JJ.*),—S. 4 empowers the Court to deal with not only all questions of title and priority but all questions of whatever nature and the decision is a bar under S. 11, Civil P. C.—(*Sen, J.*)—Title under transfer beyond two years cannot be enquired into—A paper transaction can be gone into though fraudulent transfer cannot be enquired into **(FB) 105**
——**S. 42 (1) (a)** — Where insolvent gives no evidence for showing that he was not responsible for the circumstances, no order of discharge can be passed **858*b***
——**S. 42 (a)**—S. 42 (a) does not stand in way of discharge unless fraudulent acts on part of insolvent or circumstances which he could have controlled are shown **843**

Provincial Small Cause Courts Act (9 of 1887)
——**S. 17 (1), proviso**—Applicant not depositing amount due but desirous to give security — Applicant must seek Court's direction at the time of application—Evidence as to security may be taken subsequently **840**
——S. **23**—Court of Small Causes is to decide whether question of title is involved **816*b***
——**Sch. 2, Art. 15**—Suit for refund of money under terms of a contract is within Art. 15 **62*a***
——**Sch. 2, Art. 15**—Suit for refund against a person refusing to perform his part of contract is not barred—Contract Act S. 39 **62*b***
——**Art. 32**—Suit for share of price of branch cut from joint tree is not barred under Art. 35 (2), cutting not constituting mischief or theft **816*a***
——**Sch. 2, Arts. 35** and **43-A** — No allegation of criminal charge— Application of Limitation Act. Art. 48 cannot raise presumption of criminal charge—Arts. 35 and 43-A were held not applicable **208**
——**Sch. 2, Art. 43** (a) and **Art. 35**—No allegation of criminal charge — Application of Art. 48, Lim. Act, cannot raise presumption of criminal charge—Arts. 35 and 43-A were held not applicable **208**

R

Railways Act (9 of 1890)
——**S. 54**—Railway company can reclassify and re-calculate rates when right is reserved in railway receipt **848**
——**S. 72**—E. I. Ry. Traffic Code, part 2, R. 73—Railway company is bound to

Railways Act
re-weigh before delivery is taken where there is no risk-note **960***c*
——**S. 72**—Person suing railway company for damages—Some packages consigned to him under two risk-notes in form B lost — Waggon containing bags having no lock but only tin shackle—Theft not on running train — Sufficient evidence held established to support finding of fact of wilful neglect and consignee was entitled to damages **749**
*— **S. 72** - Risk-note A— Shortage in weight is covered **124***a*
——**S. 72**— Risk-note A — Burden of proof of proving misconduct on the part of railway's servants is on consignor **124***b*
——**S. 72 (1)**—Sub-S. (1) does not exclude other sections of the Contract Act, in regard to bailment **960***a*
— **S. 77**— "Deterioration" does not cover loss due to fall in market value **597 (2)***b*
Registration Act (16 of 1908)
— **S. 17**—Shop let out to *K* by *N*—No lease but document styled sarkhat executed by *K* providing *K* had taken shop for two years on rent and if *K* vacated shop before expiry of two years, *K* to pay rent for unexpired portion of term —Sarkhat not registered — Sarkhat is lease and being for more than one year and not registered it is inadmissible in evidence to prove claim for unexpired period but would be admissible to prove damages for use and occupation **831***a*
——**S. 17**—Award partitioning property though signed by parties to reference does not amount to partition and is not registerable **365***a*
—S. 17**—Sale of mortgagee's interest must be registered **161**
——**S. 28**—Property not belonging to vendor included in sale deed for convenience of registration but without intention to convey it— Registration of of sale deed is invalid **984**
——**S. 28**—Property included in sale deed only to give jurisdiction to Sub-Registrar but not intended to be transferred —No valid transfer is effected **659***a*
——**S. 28**—Parties to sale deed to hoodwink the registrar entering piece of property within Sub-Registrar's jurisdiction in order to give him jurisdiction cannot get any relief in Court of justice **578 (2)***b*

Registration Act
——**S. 49 (c)**—Shop let out to *K* by *N* —No lease but document styled sarkhat executed by *K* providing *K* had taken shop for two years on rent and if *K* vacated shop before expiry of two years, *K* to pay rent for unexpired portion of term—Sarkhat not registered—Sarkhat is lease and being for more than one year and not registered it is inadmissible in evidence to prove claim for unexpired period but would be admissible to prove damages for use and occupation **831***a*
*——**S. 50**— Mere executory contract which has to be specifically enforced to procure the contract and which is to be substituted for old contract, would not supersede a registered mortgage—deed by which an interest in the property has passed **503***a*
Religious Endowment
——Intention of executant should be seen and should be determined from language of deed, surrounding circumstances and subsequent conduct **315***a*
——Donor of dedicated property can himself acquire title to it by adverse possession **315***c*
—— Sons appointed managers— Practically whole income given to sons as managers— No fixed amount allocated for worship—Very little effect given to the endowment—Endowment is illusory **302***a*

S

Set Off
——*See* Civil P. C., O. 8
Specific Performance
—— Laches — Claim can be dismissed for laches of plaintiff—Burden of proving delay is on the defendant **767***d*
Specific Relief Act (1 of 1877)
——**S. 8**—Exchange complete — Suit is one for recovery of possession **63 (2)***b*
——**S. 9** — Person with established possession can bring suit on basis only of prior possession against person interfering with that possession **428***a*
——**S. 21 (b)**— Contract of service dependent on personal qualification cannot be specifically enforced **87***c*
*——**S. 22**—Specific performance should be refused where agreement is without consideration and due to fear **372**
——**S. 23 (b)**—Contract for sale can be assigned and representative-in-interest can enforce it **817***c*

Specific Relief Act
——**S. 27 (b)**—*A* selling his house to *B* for Rs. 175 and *B* agreeing to sell it back to *A* in case he sells at all, for Rs. 175 only and to another only if *A* declines at purchase it at that price—*B* then selling it to *C*, who had notice of that agreement for Rs. 300 notwithstanding *A's* offer for Rs. 175 — Agreement was not void but personal contract, which could be enforced against *C* who purchased having notice of it— *A's* suit to enforce that agreement would not amount to claim for pre-emption **667**
——**S. 35**—Contract in writing being voidable or subsequently becoming unlawful can be rescinded **837***c*
*——**S. 41**—Mortgage by Hindu father for paying pre-emption money set aside at son's instance—Money can be charged on pre-empted property **139***b*
——**S. 42, Proviso**— (Per *Mukerji, J.*) Suit for mere declaration that idols are owners of certain property – Consequential relief as to.appointment of trustees etc., not prayed for — Suit is barred. (*Niamatullah, J.* contra) **974***a*
——**S. 42, Proviso**—Plaintiff should be able to obtain consequential relief in date of suit **974***b*
——**S. 42**—Plaintiff suing for declaration that he was sharer in superior proprietary rights and entitled to recover rent from defendants, inferior proprietors—Court finding that defendants also were superior proprietors and that plaintiffs had agreed not to recover rent in pursuance of defendants agreeing not to recover rent from plaintiffs in another village — Plaintiffs are not prevented from getting declaration as prayed for **691***a*
——**S. 42**—Declaration of a right which plaintiffs do not possess even as spes successionis of a reversioner cannot be granted **404***b*
——**S. 42**—Suit for right to sacrifice cow in particular way is not barred **339***b*
——**S. 42**—Scope—For a suit for declaration there may be repeated causes of action and each new cause would give a fresh right to sue **331***a*
——**S. 42, Proviso** — Two brothers mortgaging property—One brother dying and his widow selling half equity of redemption—Other brother suing for declaration that he was owner of whole equity of redemption by survivorship and that sale by widow was void—Suit for mere declaration without relief of redemption was not incompetent **331***c*
——**S. 42, Proviso**—Mere declaration cannot be granted if consequential relief is not claimed **87***e*
——**S. 54**—Injunction is not independent form of relief **430***b*
——**S.54 (e)**—Parties entitled to "brit jajmani" agreeing to receive gifts periodically — One party interfering with right of other party— Prepetual injunction can be granted to restrain that party from so interfering **327**
——**S. 56 (j)**—Injunction should be refused where conduct of the claimant has been such as to disentitle him to assistance of Court **877***b*

Succession Act (39 of 1925)
——**S. 120**—Death of living person not being uncertain, interest to be obtained after one's death is vested interest **102***c*
*——**S. 214**— Plaintiff in redemption suit need not produce succession certificate **896***b*

T

Tort
——Defamation— Privilege — Application containing defamatory statement to civil Court asking to send certain papers to arbitrators in suit in which he is party—Occasion on which defamatory statement is made is absolutely privileged **972**
——Nuisance—Person founding cause of action upon public nuisance must establish particular injury to himself beyond what is suffered by rest of public **767***a*
——Nuisance—Special damage — Every citizen having house adjoining public thoroughfare has legal right to make reasonable user of thoroughfare along its length and breadth for himself, his cattle and his conveyance leading from his door to any part of highway—Width of thoroughfare encroached upon by defendant—Plaintiff unable to utilize highway in same manner as he used to do before and to turn his cart round the road—Special damage held to have arisen to plaintiff and matter held actionable **767***c*
——Defamation—Suits for damages for tort are to be decided according to justice, equity and good conscience **214***a*
*——Defamation — Every infringement upon a man's reputation affords good cause of action **214***b*

Tort

——Defamation — Imputation of dishonesty made against tradesman is actionable per se and action lies without any regard to intent or bona fides **214***c*

——Defamation — Slander — Malicious intent is not essential element **214***d*

*——Defamation — Counsel of a company asking witness whether that company was not biggest in that town—Counsel on opposite side remarking that it was also the most dishonest—Remark being defamatory and uncalled for counsel cannot plead privilege **214***e*

Transfer of Property Act (4 of 1882)

——Construction—Transfer of Property Act is to be read in the light of the Contract Act **394***a*

——**S. 2**—S. 53 does not infringe rule of substantive Mahomedan Law—Wakf executed as device to defeat creditors is therefore invalid **277**

——**S. 3**—Registered agreement not to alienate property is not notice to vendee, if agreement makes no mention of specific property **85(2)***a*

——**S. 6**—Scope—S. 6 does not prohibit assignment of pension not granted by Government on political or other considerations **781***c*

——**S. 6**—Widow's right of retention may be sold **326***a*

——S. 6 (d)**—Right to future maintenance restricted to owner personally cannot be transferred — Intention of parties is the test and not whether a charge is created for the same **281***c*

——**S. 6 (d)** — Kharch-i-pandan is personal allowance **281***e*

——**S. 6 (e)**—Right to mesne profits is not "mere right to sue" **63(1)**

——**S. 7**—Mortgage in favour of minor can be enforced by him **604***a*

——**S. 8**—(Per *Mukerji, J.*) "Property," does not mean mere title — (*Niamatullah, J.* contra) **(FB) 465***c*

——**S. 8** — (Per *Mukerji* and *Kendall, JJ.*)—Object of S. 8 is to stabilise title—*M* selling property to *R* his heir under contract,to spend price in charities —*R* creating wakf of the properties—Sale in favour of *R* set aside—*R* selling property to defendants—*R's* share as heir was dedicated and could not be sold (*Niamatullah, J.* contra) **(FB) 465***d*

——**S. 8** — Presumably existing joint right in the sehdaries and a gateway in a mohalla passes with transfer of individual house **371**

Transfer of Property Act

——**S. 10**—Hindu of Mitakshara school executing tamliknama making his two wives along with himself joint owners of his property—Tamliknama providing that neither he nor his wives could transfer share without consent of all—Shares not specified—Subsequently he executing another document purporting to cancel tamliknama — Tamliknama created tenancy-in-common and each was to get one-third share—It could not be cancelled by subsequent document—Provision prohibiting transfer was absolute restraint on alienation within S. 10 **492**

——**S. 10**—Transfer—Deed transferring property but by subsequent clause imposing condition restraining transferee from transferring interest to any person except transferrer — Condition amounts to absolute restraint on right of transfer **381**

*——**Ss. 41** and **52**—S. 52 becomes operative from institution of suit—Institution of suit is strong proof that consent as required by S. 41 did not subsist—Estoppel arising under S. 41 cannot override imperative provisions of S. 52 **943***a*

*——**S. 41**—Auction sale is transfer by law and not by any person conveying property—Auction purchaser therefore does not come under S. 41 **800**

——**S. 41**—Person pleading equitable estoppel must prove that he took reasonable care to ascertain that his transferer had power and that he acted in good faith **737***d*

——**S. 41**—Scope—(*Queary*)—It is open to question whether, if the vendor possessed lesser interest than what he sold, the vendee's position would be better only because he was ignorant of the real state of his vendor's title. It is likewise open to question whether S. 41, T. P. Act, in terms applies to a case of this kind **737***e*

——**S. 43**—One brother ostensibly selling property vested in another—On date of transfer brother having already disappeared and not known to be alive—Brother dying and property subsequently vesting in vendor—In a suit by transferee S. 43 applies **589(2)**

——**S. 44 (2)** — Words — Undivided family in Partition Act, S. 4 is used not in technical sense—It means same thing as "undivided family" in S. 44 (2) **414***c*

Transfer of Property Act.
——**S. 45**—In absence of specification shares are presumed to be equal **817***a*
——**S. 51** — Transferee of immovable property making improvements in good faith is entitled to compensation on eviction **854***b*
** ——**S. 51**—Prior simple mortgage—Property subsequently sold Purchaser a bona fide one without notice of mortgage—Purchaser rebuilding and improving property which was in ruinous condition—In suit by mortgagee for sale of property, purchaser is entitled to claim expenses of improvements though not under S. 51 still on equitable principles **12**
* —**S. 52** — S. 52 becomes operative from institution of suit—Institution of suit is strong proof that consent as required by S. 41 did not subsist—Estoppel arising under S. 41 cannot override imperative provisions of S. 52 **943***a*
——**S. 52** - Subsequent mortgagee paying off prior incumbrance is entitled to claim charge - Doctrine of lis pendens does not apply to such case (*obiter*) **943***b*
——**S. 52** - S. 52 does not apply to execution proceedings of money decree **846***a*
—— **S. 52** —Doctrine applies even to involuntary sales **601***a*
——**S. 52**—Notice of pending suit is not necessary **601***b*
* ——**S. 52**—Purchaser during pendency of pre-emption suit, if a preferential claimant to pre-emptor, can retain property purchased by him because pre-emptor need not bring suit but may acquire property from vendee at private sale **440**
——**S. 53**—Transfer by judgment-debtor subsequent to decree of only property in possession to uncle for half of actual value can be concluded to be fraudulent **872***b*
——**S. 53**—S. 53 applies even where debtor has other property to meet the decree **458***a*
** ——**S. 53**—S. 53 does not infringe rule of substantive Mahomedan Law—Wakf executed as device to defeat creditors is therefore invalid **277**
* —**S. 53**—Transfer under decree of Court -- Principles should be applied though section does not apply **238**
——**S. 54**—Prior agreement has priority in law over later agreement if there is knowledge of it **817***b*
——**S. 54** — Bona fide settlement of

Transfer of Property Act
doubtful claims is not transfer of property **788***a*
——**S. 54**—Settlement of doubtful claim distinguished from sale **788***b*
——**S. 54** - In the case of tangible property of Rs. 100 or upwards, mere mutation of names is not sale which can be pre-empted **549***b*
——**S. 54**—Sale of mortgagee's interest must be registered **161**
——**S. 54**—Price not paid — Suit for possession by purchaser—Court should decree possession conditionally on payment of the price **85(2)***a*
— **S. 55 (1)** - Sale deed not containing rate of interest on mortgages sold—Omission is not fraudulent concealment **199***c*
——**S. 55 (1)(g)**—To make vendee liable for encumbrances section requires specific contract in sale deed that property is sold subject to encumbrances **791**
——**S. 55 (2)** — Seller professing to transfer interest not subsisting commits breach of implied contract **837***b*
** — **S. 55(2)**—Covenant of indemnity —Pre-emptor's vendee can take benefit —Case it governed by Limitation Act, Art. 116 **293***a*
—— **S. 56** - Provisions of S. 56 have no application to a case of an auction sale **309***c*
——**S. 58**—Security bond not saying that it is mortgage or not mentioning the person to whom security is given cannot be treated as mortgage deed **834***a*
——**S. 58** — (Per *Boys, J.*)—Mortgage with condition as to foreclosure — Suit by mortgagee—Trial Court stiking out condition as to foreclosure and holding that thereupon whole mortgage was destroyed — Appellate Court holding that in spite of striking out that condition mortgage subsisted and remanding suit -- Effect of remand order is to reduce mortgage to simple mortgage (*Ashworth, J.*, contra) **421***a*
—— **S. 58** — Mortgage is transfer of interest in immovable property while a charge is not, though it is a security **281***d*
—— **Ss. 58** and **60**--Usufructuary mortgage—Rs. 150 advanced on the deed—Mortgagee entitled to possession in lieu of Rs. 100—Remaining Rs. 50 to bear interest at Rs. 2 per cent per month—Undertaking to pay entire mortgage money mortgagor suing for redemption on payment of Rs. 100 only - Mortgage

Transfer of Property Act
or is liable to pay also Rs. 50 and the interest—No express provision is necessary **77***b*
——**S. 58 (c)**—Mortgage by conditional sale is voluntary alienation **861***a*
——**S. 58 (c)** — Pre-emption — When transfer falls within definition of mortgage by conditional sale it is pre-emptor's duty to show that it is out and out sale—In absence of circumstances showing that, no pre-emption suit would lie **619**
—— **S. 58 (c)** — Definition is not self-sufficient—Reference to Cl. (a) is necessary for determining if a transaction is mortgage **174***b*
—— **S. 58 (c)**—Scope — Mortgages taking form of ostensible sales on certain conditions are alone mortgages by conditional sale **174***c*
* ——**S. 58 (c)**—Meaning of "ostensible" explained **174***d*
——**S. 58 (c)**—Intention of parties is material for deciding whether transaction is sale or mortgage **174***e*
*——**S. 58 (c)** — Tests to determine whether transaction is sale or mortgage laid down **174***f*
—— **S. 58 (c)**—Document one—Transaction is not necessarily mortgage **174***g*
—— **S. 60**—*See* MORTGAGE—REDEMPTION
—— **S. 60**—Mortgagee becoming heir to mortgagor and inheriting portion of mortgage, it cannot besaid that integrity of mortgage has not been broken **604***b*
——**S. 60** — "Mortgage money" means principal money and interest **411***a*
——**S. 60**—High rate of interest stipulated in mortgage deed is not clog **411***b*
——**S. 60** — Previous redemption suit dismissed for failure to pay sum decreed for redemption does not bar subsequent suit for redemption **409***a*
——**S. 60**—Mortgagee becoming owner of some of the properties mortgaged—Mortgagor can claim redemption of remaining properties for proportionate amount **409***c*
*—— **S. 60**—Mortgage deed providing that, if mortgage was not redeemed on expiry of mortgage period it would not be redeemable for further 20 years—No material to show design to make redemption very difficult—Condition was held not clog on redemption **388**
——**S. 60**—Mortgage bond — Stipulation to the effect that the mortgagor would not be entitled to possession without redeeming prior mortgages, is unavailing after a considerable lapse of time when the property referred to in the prior mortgages is not definitely specifiable specially when no previous claim for specific enforcement of the deed was made **384***a*
——**S. 60**—Suit for redeeming usufructuary mortgage—Plaintiff alleging mortgage to be under two deeds—Admission of defendant that property is held by him as a mortgagee under 12 mortgages—Court can allow plaintiff to succeed on defendant's admission **305***a*
——**S. 60**—Decree for redemption of portions — Mortgagors to pay proportionate amount—Integrity of mortgage is broken **260 (2)***a*
——**S. 60** - Right of redemption exists until mortgage is extinguished **231***a*
——**S. 60**—Date of oral mortgage not being particularly known to mortgagee—No burden lies on him to prove date **209***a*
——**Ss. 60** and **58**—Usufructuary mortgage—Rs. 150 advanced on the deed—Mortgagee entitled to possession in lieu of Rs. 100—Remaining Rs. 50 to bear interest at Rs. 2 per cent per month—Undertaking to pay entire mortgage money—Mortgagor suing for redemption on payment of Rs. 100 only—Mortgagor is liable to pay also Rs. 50 and interest—No express provision is necessary **77***b*
——**S. 62**—Mortgagee cannot claim for repairs or rebuilding **348***a*
——**S. 63**—Re-building fallen house is not accession under S. 63—Remedy of usufructuary mortgagee is under S. 68 if it applies to him **348***c*
——**S. 63**—Redemption suit — Mortgagee claiming compensation for guava grove of 75 trees from 7 to 11 years old—Lower Court finding it impracticable to remove trees with roots and allowing neither compensation nor removal of trees — Question being one of fact, High Court did not interfere **330***a*
——**S. 63**—Meaning of accession **330***b*
——**S. 65 (a)**—Estoppel in Cl. (a) operates not only against mortgagor but also against his transferee **483**
——**S. 67**—Mere oral evidence regarding arrears is inconclusive **384***b*
——**S. 67** — Either of two properties mortgaged is ordinarily liable for whole

Transfer of Property Act
debt and mortgagee can proceed either against whole property mortgaged or any part of it **380***b*
*——**S. 67**—Rights of mortgagee—Profits in lieu of interest—Deficiency to be supplied by mortgagor—Deficiency due to mortgagee's default need not be paid **260(2)***b*
——**S. 68**—Rebuilding fallen house is not accession under S. 63—Remedy of usufructuary mortgagee is under S. 68 if it applies to him **348***c*
——**S. 68 (c)** — Deed of usufructuary mortgage requiring mortgagee to pay off prior mortgagee in possession—He failing to do so and not getting possession —He cannot require mortgagor to redeem his mortgage before obtaining possession **126***c*
——**S. 72 (b)**—Money spent for preservation of property from destruction can be added to principal — No interest is allowed where parties do not intend it should be paid **777***a*
——**S. 74** — Where mortgage debt is paid off out of money left with subsequent mortgagee, S. 74 is inapplicable —Intention to keep previous mortgage debt alive must exist **943***c*
——**S. 74**—Subsequent mortgagee paying prior mortgagee — Suit by puisne mortgagee - Subsequent mortgagee cannot insist on prior mortgage being paid —Property can be sold subject to prior mortgage **296***a*
——**S. 76** — S. 76 does not apply to usufructuary mortgagee—Section applies only when possession is taken during mortgage and not at inception **348***b*
——**S. 76 (d)**—Mortgagee cannot claim repayment of money spent on necessary repairs **777***b*
——**S. 80**—Subsequent mortgagee and subsequent purchaser together paying off entire prior mortgage — Subsequent mortgagee gets priority over intermediate mortgagee to the extent of money contributed by him **621**
——**S. 81**—Subsequent mortgagee purchasing portion of mortgage security—He cannot throw whole burden of prior mortgage on mortgagor — He is only entitled to contribution **309***b*
——**S. 82**—Mortgage—Confining claim to certain property of head of joint family does not amount to release of property so as to reduce money on mortgage by proportionate amount **889***b*

Transfer of Property Act
*——**S. 82**—Rateable contribution is charge on property mortgaged and cannot be enforced against person **696***c*
——**S. 83**—Money deposited to credit of two mortgagees—One of them dead—Court has jurisdiction to consider who was mortgagee at time of application for withdrawal of deposit — Refusing inquiry is failure of exercise of jurisdiction **754**
——S. 95** — Redemption decree in favour of all mortgagors — Only some paying entire mortgage money—Dying mortgagors recorded in revenue papers as proprietors as to portion and mortgagees as to rest — Other suing them within 60 years from original mortgage for recovery on payment of their shares —Suit is not barred by limitation—Mortgagors are to be paid on behalf of others and they became mortgagees while others remained as mortgagors **100**
——**S. 100**—Charge—Beneficiary must be specifically named as person in whose favour charge exists **834***b*
——**S. 100** — Deed — Construction—Where a fund is indicated for payment of a certain allowance, the latter must be deemed to be a charge on the former **737***c*
——**S. 100**—Mortgage is transfer of interest in immovable property while a charge is not though it is a security **281***d*
——**S. 106**—Representatives of tenant holding over—Notice to quit is not necessary **610***b*
*——**S. 107**.— Equitable doctrine of part performance cannot override provisions of S. 107 or of Registration Act, S. 17 **831***b*
——**S. 118**—Exchange complete—Suit is not for recovery of possession **63 (2)***b*
——**S. 118**—Two separate deeds are not necessary **63 (2)***c*
——**S. 119**—Defect in title of one party (e. g., Hindu manager)—Exchange is not inoperative **63 (2)***a*

Transfer of Property (Validating Act (3 of 1917)
——Attesting witness need not see executant sign it, provided executant personally acknowledges his signature to him **680***c*

Trusts
——Line of succession to trusteeship to be according to terms of wakf deed—

Trusts
Legal heir of last trustee cannot acquire trusteeship by adverse possession against person legally entitled—Even if so acquired trustee would be bound by terms of the deed **404***a*

U

U. P. Arbitration Act (1 of 1912)
——Act does not apply in cases where the contract provides for arbitration in Calcutta **455***b*

U. P. Court of Wards Act (4 of 1912)
——**S.16**—After person's estate is taken over by Court of Wards he cannot contract debt **759(2)***a*
——**S. 16**—S. 16 is imperative **759 (2)***b*
——**S. 16**—Notification regarding assumption of superintendence relating to entire estate—Superintendence of only part of minor's property cannot be assumed **759 (2)***c*

U. P. Excise Act (4 of 1910)
——**Ss. 40** and **41**—Rules under—Rules made in accordance with the provisions of Ss. 40 and 41 have the force of law **210***a*
——**Ss. 40** and **41**—Rules under—R. 82—Licensee taking partner does not amount to transfer or sublease of contract—Contract Act, S. 23 **210***b*
——**S. 53**—Search in absence of two or more respectable men and without recording grounds of belief that house contains prohibited liquor is irregular **901 (2)***b*
——**S. 60 (a)**—Conviction under S. 60 (a) cannot be sustained when contents of bottle found in accused's possession could have been changed **901 (2)***a*
——**S. 60 (a)** — Not ownership but nature of occupation of house is of importance in estimating whether particular accused possessed excisable article—Cocaine discovered by police in house occupied by three men, two of whom were brothers and third their cousin—All carrying on same business and setting up same defence—Each of them comes within S. 60 (a) **705***a*
——**Ss. 71** and **60 (a)**—Proviso in S. 71 that no person other than actual offender shall be punished with imprisonment does not modify S. 60 (a) which makes possession of cocaine punishable with imprisonment **705***b*
——**S. 71, Proviso** — Applicability—Proviso as to punishment by fine applies only to that person who is able to show that he is employer or principal, that he did not personally commit act complained of, and that he took all due and reasonable precaution to prevent commission of such act **705***c*

U. P. Land Revenue Act (3 of 1901)
—— **S. 2 (12)**—Grove recorded in Record-of-Rights of 1901 as "sir" and continued to be so recorded since, is "sir" **335***a*
——**Ss. 40 (3)** and **44**—Scope—It is open to any one to go to the civil Court who is aggrieved by an order of the revenue Court in mutation **126***a*
——**S. 41**—S. 41 includes boundary disputes between zamindar and tenant **442***a*
——**S. 42**—Decision in proceedings amounting to decision in suit under S. 95, Agra Tenancy Act (2 of 1901) is final **165**
— **S. 106**—Division of a village into six complete pattis and one joint patti is not a perfect partition, and there being only one mahal an exproprietary tenant in any patti can resist a suit for pre-emption against him **448**
——**Ss. 111** and **233 (k)**—Sale taking place after preparation of tarz taqsim—Suit to set aside such sale will not be barred by res judicata nor would it be barred by S. 233 (k) provided suit does not disturb partition **463**
——**S. 118**—Buildings belonging to one cosharer before partition can be sold by him though site on which they stood was assigned to other's share after partition **578 (1)**
——**S. 143**—Assignee cannot claim interest **29***c*
——**S. 175**—Suit to set aside sale for fraud is maintainable in case of taxes such as income tax and tax under Canal and Drainage Act **592***b*
——**S. 233**—Liability of land to be assessed separately or jointly; so also questions regarding validity of engagement with Government and assessment and distribution of revenue do not come within jurisdiction of civil Court **798**
——**S. 233 (k)**—By compromise made after preliminary decree, *S* becoming entitled to whole suit land—Compromise not incorporated in final decree—*S* trying to get decree amended—Partition proceedings beginning—*S* applying for postponement until decree was amended—Partition officer passing partition decree—*S* then getting decree in

U. P. Land Revenue Act
his favour amended—S. 233 (k) should not be applied **168**
——**S 233 (m)**—Cl. (m) shuts out claim to set aside sale for want of jurisdiction of revenue authorities **592*a***
U. P. Municipal Account Code
——**S. 132 (14)** and **(16)**—Machine of motor car and its component parts, such as cylinder head will be exempted from octroi duty **278**
U.P. Municipalities Act (2 of 1916)
——**Ss. 112 (3)** and **318** - Order granting or refusing sanction by Municipal Board is passed under S. 318 and not under S. 112 (3) **912*c***
——**Ss. 116 (g)** and **223**—Land on either side of road belongs to municipality **382*a***
——**S. 178**—Powers of Board—Board has controlling voice also in cases where building was sought to be re-erected or material alteration was to be made **756 (2)*b***
——**S. 193**—Notice not served on obstructor—Contract by Municipality is contrary to Act **16*b***
——**S. 228 (b)**—It is duty of Board to allow owner to connect his house with the main pipe—Disconnexion amounts to continuous breach giving rise to continuous cause of action **870**
——**S. 295**—Contract given by municipality in contravention of the Act—Obstructor does not incur penalty **16*a***
——**S. 314**—Court can take cognizance of complaint made by person authorized by Board **901 (1)**
——**S. 318** - It is not necessary that "aggrieved person" should be party to order appealed against—It is sufficient if order affects him prejudicially **912*a***
——**Ss. 318** and **321**—Municipal Board—Act of, can be questioned by a civil Court if power not given by law is assumed **756 (2)*a***
——**S. 321 (1)**—Order under S. 318 is final and cannot be questioned in a civil Court **912*b***
U. P. Prevention of Adulteration Act (6 of 1912)
——**S. 15**—Person accused under S. 4—Summons not issued within one month from consent obtained but accused appearing—S. 15 does not deprive Court of jurisdiction **157**
U.P. Public Gambling Act (3 of 1867)
——**Ss. 3** and **4**—Ss. 3 and 4, are complements of one another—Persons accused under Ss. 3 and 4 can be tried together **937*a***
——**Ss. 3** and **4**—Conviction of accused under Ss. 3 and 4 separately is not illegal **937*b***
——**S. 5**—S. 183, Criminal P. C., does not apply to search warrant under S. 5 **937*c***
U. P. Tenancy Act (2 of 1901)
——**S. 13 (b)**—Tenant ejected and re-admitted—Tenancy is continuous only for S. 11—When ejected tenant is re-admitted, agreement changing rent need not be registered **78**
——**S. 34**—Landlord cannot eject tenant holding by adverse possession **211*c***
——**S. 201 (3)**—Presumption is unrebuttable if person is recorded cosharer at the date of the suit **32**
Usurious Loans Act (10 of 1918)
——Act is not retrospective **59*b***
——**S. 3**—Scope—Mortgagor indebted and in urgent need of money—It cannot be inferred that mortgagees were in a position to dominate his will, and interest at Rs. 2-8-0 per cent per mensem compoundable quarterly held not unconcionable **680*d***

W

Wager
——*See* CONTRACT ACT, S. 30
Wajibularz
——Wazibularz of 1873 used as piece of evidence - Its genuineness not in dispute—It not being repeated in subsequent wazibularz does not detract from its value **737*b***
Whipping Act (4 of 1909)
——**Ss. 4** and **5** — Juvenile can be punished with imprisonment in addition to whipping and High Court can award imprisonment even if whipping is already carried out **322*b***
——**S. 5, Expl.**—Court — The word 'Court" does not exclude the appellate Court **322*a***
Will
——Construction—Property bequeathed to widows and subsequently to *R*—*R* to be owner after testator's .death after *R*, *R*'s sons to be owners—But in case *R* died without son *D* was to get—Widows did not get Hindu widow's estate but only life interest—*R*'s son did not get vested interest in *R*'s lifetime ·but was to succeed only after *R*'s death—Bequests in favour of *R*'s unborn son and *D* were not successive but alternative **102*a***

Words

——"Deterioration" does not cover loss due to fall in market value **597 (2)***b*

——Title—Meaning of—Word "Title" has nothing to do with the particular cause of action on which party sues or is sued—It refers to capacity or interest of party **400***a*

Words and Phrases

——"la aulad" means issueless **963***e*

Workmen's Compensation Act (8 of 1923)

——**S. 8**—Compensation is payable only to dependents and not to distant relation though not next-of-kin **707 (1)**

THE
ALL INDIA REPORTER
1929 ALLAHABAD
COMPARATIVE TABLES
(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

Table No. III—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER for 1929 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of INDIAN LAW REPORTS, ALLAHABAD SERIES, for the year 1929 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 51 ALLAHABAD.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 51 Allahabad=All India Reporter

I.L.R.	A. I. R.			I.L.R.	A. I. R.			I.L.R.	A. I. R.			I.L.R.	A. I. R.			I.L.R.	A. I. R.		
1	1928	*A*	422	382	1928	*A*	765	530	1929	*A*	254	765	1929	*A*	525	910	1929	*A*	593
30	"	"	660	386	"	"	582	540	"	"	349	771	"	*PC*	269	920	"	"	621
40	"	"	516	399	"	"	670	544	"	"	202	780	"	*A*	421	926	"	"	669
54	"	"	505	402	"	"	607	550	"	"	105	799	"	"	503	932	"	"	726
61	1930	"	22	405	"	"	675	575	"	"	243	802	"	"	483	957	"	"	581
63	1928	"	746	408	"	"	755	589	"	"	250	805	"	"	506	968	"	"	663
76	"	"	439	411	1929	"	53	594	"	"	385	820	"	"	531	971	"	"	618
79	"	"	641	430	"	*PC*	143	595	"	"	238	827	"	"	536	974	1930	"	286
101	"	"	467	439	"	"	166	603	"	"	320	842	"	"	462	977	1929	"	899
114	"	"	538	454	"	*A*	12	604	"	"	379	845	"	"	417	981	"	"	592
136	"	"	596	459	1928	"	682	606	"	"	309	850	1930	"	287	983	"	"	586
164	"	"	440	463	"	"	696	612	"	"	281	853	1929	"	571	986	"	"	676
182	1929	*PC*	11	465	"	"	745	621	"	"	315	864	1930	"	38	990	"	"	703
188	1928	*A*	561	467	"	"	752	629	"	"	300	872	1929	"	419	994	"	"	668
237	"	"	629	470	"	"	754	634	"	"	279	874	"	"	455	996	"	"	750
267	1929	*PC*	58	473	1929	"	139	640	"	"	287	878	"	"	602	998	"	"	953
275	"	*A*	650	478	"	"	71	651	"	"	293	882	"	"	551	1010	"	"	743
285	1928	"	617	480	"	"	124	658	"	"	366	885	"	"	600	1016	"	"	754
291	"	"	735	483	"	"	84	659	"	"	365	886	"	"	577	1017	"	"	805
303	"	"	472	485	"	"	201	663	"	"	273	888	"	"	585	1020	"	"	735
313	1929	"	1	487	"	"	127	672	"	"	337	890	"	"	709	1023	"	"	793
338	1928	"	588	489	"	"	114	675	"	*PC*	228	892	"	"	367	1025	"	"	833
341	1929	"	449	494	"	"	161	686	"	"	243	895	"	"	597	1027	"	"	890
344	"	"	774	501	"	"	144	695	"	*A*	353	897	1930	"	302	1039	"	"	789
346	1928	"	527	506	"	"	210	747	"	"	705	899	1929	"	597	1042	"	"	753
359	1929	*PC*	75	509	"	"	214	752	"	"	291	901	"	"	721	1046	1930	"	77
367	"	"	158	519	"	"	170	758	"	"	399	903	"	"	747	1053	1929	"	791
377	1928	*A*	756	527	"	"	207	760	"	"	493	908	"	"	599				

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

1929 Allahabad Law Journal=All India Reporter

ALJ	A.I.R.	ALJ	A.I.R.	ALJ	A.I.R.	ALJ	A.I.R.	ALJ	A.I.R.	ALJ	A.I.R.
1	1929 *PC* 11	254	1929 *PC* 103	517	1929 *A* 329	798	1929 *A* 597	1070	1929 *PC* 222		
4	" " 8	261	" " 95	518	" *Notes*16*b*	800	" " 585	1075	1930 " 7		
9	" " 1	262	" *A* 134	520	" *A* 347	801	" " 659	1079	1929 *A* 721		
13	1928 *A* 538	267	" " 341	522	" " 525	805	" " 602	1081	1930 " 302		
28	1929 " 68	274	" " 102	526	" " 503	808	" " 747	1082	1929 " 624		
31	1928 " 674	279	" " 161	528	" " 453	811	" " 353	1083	" " 519		
33	1929 *PC* 19	284	" " 142	531	" " 459	846	" " 380	1087	" " 589		
41	" " 24	286	" " 207	536	" *Notes*36*c*	849	" " 571	1091	" " 680		
47	" " 34	289	1928 " 764	537	" *A* 440	854	" " 419	1095	" " 759		
53	" " 33	290	1929 " 53	540	" " 521	856	" *IC* 217	1097	" " 551		
55	" *A* 774	303	" " 214	547	" " 308	857	" *A* 556	1098	" " 668		
57	1928 " 756	309	" " 223	549	" " 493	859	" " 597	1100	" " 910		
60	" " 753	323	" " 127	553	" " 390	861	" " 551	1103	1930 " 168		
62	" " 583	324	" " 302	559	" " 399	863	" " 560	1105	" " 22		
65	" " 677	329	" " 202	561	" *PC* 143	864	" " 756	1106	1929 " 753		
68	" " 765	333	" " 254	566	" " 158	866	" *Notes*16*e*	1109	" " 663		
72	1929 " 267	340	" " 349	571	" " 149	868	" *A* 559	1111	" " 703		
73	1928 *Notes*86*e*	342	" " 213	577	" " 126	869	" " 689	1114	" " 604		
78	" *A* 670	344	" " 243	579	" " 132	873	" " 481	1118	" *Notes*17*b*		
80	1929 " 266	355	" " 250	581	" " 139	877	" " 455	1120	" *A* 779		
81	" *PC* 75	358	" " 238	585	" *A* 320	880	" " 492	1122	" " 837		
85	" " 58	361	" " 273	586	" " 413	883	1930 " 287	1127	" " 662		
90	1928 *A* 696	367	" " 281	588	" " 389	885	1929 " 586	1129	" " 592		
92	" *Notes*73*c*	376	" " 279	589	" " 393	887	" " 619	1131	" " 750		
93	" *A* 682	379	" " 379	592	" " 393	889	" " 549	1132	" " 657		
96	" " 607	380	" " 233	595	" *Notes*25*c*	890	" " 669	1134	" " 831		
99	1929 " 16	385	" " 220	597	" *A* 513	894	" " 558	1137	" " 664		
100	" " 259	389	1928 " 615	605	" " 454	897	" " 483	1140	" " 890		
101	1928 *Notes*89*e*	391	1929 *Notes*30*a*	606	" " 388	899	" " 658	1149	" " 789		
103	" *A* 675	393	" *A* 365	609	" " 705	901	" " 586	1151	" " 578		
105	1929 " 12	395	" " 278	612	" " 553	902	" " 834	1153	" " 721		
110	" " 139	397	" " 270	614	" " 512	903	" " 814	1157	1930 " 158		
114	" " 82	398	" " 366	615	" " 550	911	" " 581	1162	1929 " 696		
115	" " 170	400	" " 260	616	1930 " 262	918	" " 743	1166	" " 618		
127	1928 " 754	401	" *PC* 27	618	1929 " 347	921	" " 444	1169	" " 960		
129	1929 *PC* 84	406	" " 77	619	" " 704	924	" " 615	1174	1930 " 76		
137	" " 45	411	" " 113	620	" " 465	927	" " 614	1178	" " 77		
146	1928 *A* 755	414	" " 65	641	" " 536	929	" " 542	1183	1929 " 811		
148	1929 " 299	419	" *A* 309	651	" " 443	930	" *PC* 228	1184	" " 808		
150	" " 71	423	" " 237	653	" " 506	935	" *A* 589	1186	" " 769		
153	1928 " 752	425	" " 252	665	" " 531	936	" " 600	1195	1930 " 91		
155	1929 " 105	427	" " 253	670	" " 417	938	" " 599	1196	1929 " 817		
170	" *PC* 69	429	" " 335	674	" " 801	940	" *Notes*38*a*	1201	" " 974		
175	1928 *A* 745	430	" " 300	685	" " 448	941	" *A* 726	1208	" " 950		
177	1929 " 114	433	" " 293	686	" *PC* 121	958	" " 580	1212	" " 977		
180	" " 201	438	" " 433	695	" " 128	960	" " 623	1216	" " 850		
182	" " 144	448	" " 421	702	" " 152	961	" " 683				
185	" " 124	460	" " 277	707	" " 163	968	" " 666	1223	1930 " 73		
187	" " 158	463	" " 271	713	" *A* 403	970	" " 739	1228	1929 " 948		
188	" " 84	465	" *PC* 135	716	" *PC* 166	976	" " 677	1233	" " 963		
189	" " 404	471	" " 119	724	" *A* 781	981	" " 813	1248	" " 879		
199	" " 72	473	" *A* 315	735	" *Notes*38*e*	983	" " 625				
204	" " 148	479	" *Notes*11*c*	741	1930 *A* 9	1024	" " 577	1251	" " 887		
212	" " 210	480	" *A* 287	750	1929 " 621	1026	" " 613	1255	" " 667		
214	" " 115	487	" *Notes* 9*f*	754	" " 327	1028	" " 676	1257	1930 " 305		
215	" " 69	492	" *A* 306	757	" " 291	1031	" *PC* 231	1261	" " 24		
217	" " 260	496	" *Notes*13*b*	761	" " 409	1042	" *A* 655				
224	" " 322	499	" *A* 296	766	" " 462	1044	" " 750	1265	1929 *PC* 283		
227	" " 321	505	" " 337	769	" " 593	1045	1930 " 286	1270	" *A* 765		
229	1928 " 689	507	" " 432	775	" " 587	1047	" " 309	1273	" " 840		
241	1929 " 339	508	" " 535	777	" *PC* 174	1049	1929 " 953	1279	" " 930		
243	" " 266	509	" " 338	780	" " 190	1056	" " 899				
244	" " 160	512	" " 374	787	" " 176	1059	" *Notes*33*d*	1285	1930 " 87		
246	" *PC* 99	514	" " 272	791	" " 179	1060	" *PC* 269	1289	1929 *PC* 256		
249	" " 92	515	" " 381	794	" *A* 529	1065	" " 185	1294	1930 *A* 69		

Law Reporter 10 Allahabad (Criminal)=All India Reporter

LRA)	A. I. R.			LRA)	A. I. R.			LRA)	A. I. R.			LRA)	A. I. R.			LRA)	A. I. R.		
1	1929	*A*	1	41	1929	*A*	84	78	1929	*A*	535	102	1929	*A*	588	138	1929	*A*	707
17	"	"	68	42	"	"	201	80	"	"	338	103	"	"	585	141	"	"	855
19	1928	"	765	44	"	"	114	82	"	"	320	104	"	"	709	143	"	"	709
22	"	*Notes*	73*c*	47	"	"	160	83	"	"	364	105	"	"	587	144	"	"	707
23	"	*A*	752	49	"	"	220	84	"	"	347	106	"	"	599	145	"	"	720
25	"	"	745	53	"	"	202	86	"	"	336	108	"	"	710	146	"	"	709
27	"	"	696	57	"	"	349	89	"	"	271	121	"	"	774	147	"	"	898
29	"	"	754	59	"	"	260	90	"	"	374	122	"	"	899	149	"	"	914
31	1929	"	299	60	"	"	322	92	"	"	705	125	1928	"	588	150	"	"	905
33	"	"	81	64	"	"	321	95	1930	"	262	127	1929	"	813	151	"	"	904
34	1928	"	682	66	"	"	273	97	1929	"	272	129	1928	*PC*	254	153	"	"	950
37	1929	"	16	71	"	"	278	98	"	"	614	135	1929	*A*	157	156	"	"	917
38	"	"	69	73	"	"	267	99	"	"	608	136	"	"	833				
40	"	"	82	76	"	"	270	100	"	"	575	137	"	"	750				

Law Reporter 10 Allahabad (Revenue)=All India Reporter

LRA)	A. I. R.			LRA)	A. I. R.			LRA)	A. I. R.			LRA)	A. I. R.			LRA)	A. I. R.		
2	1928	*O*	153	78	1928	*O*	369	175	1929	*A*	159	230	1929	*O*	67	295	1929	*A*	463
7	"	"	146	85	"	"	442	177	"	*O*	414	236	"	*PC*	75	300	"		756
15	"	"	152	95	"	"	463	179	"	*A*	211	258	"	*A*	576	329	"	*O*	427
18	"	"	219	96	"	*Notes*	85*e*	181	"	*O*	380	261	"	"	232	342	"	*A*	577
19	"	"	240	97	"	*A*	764	183	"	*A*	165	262	"	"	335	346	"	"	616
21	"	"	229	98	"	*O*	406	185	"	*O*	376	264	"	"	231	348	"	*Notes*	23*d*
23	"	"	223	101	1929	*A*	78	189	"	*A*	164	266	"	"	498	351	"	*O*	433
24	"	"	230	134	"	"	67	190	"	*O*	334	269	"	"	394	353	1927	"	239
27	"	"	265	138	"	"	223	194	"	"	384	272	"	"	557	356	1929	*A*	613
29	"	"	336	151	1930	"	89	196	"	*A*	241	277	"	"	512	358	"	*O*	447
30	"	"	266	155	1928	*Notes*	91*a*	198	"	*O*	378	278	"	"	442	360	"	*A*	612
38	"	"	344	156	1929	*A*	83	201	"	*A*	218	280	"	"	544	361	"	"	668
44	"	"	353	158	"	"	76	204	"	*O*	383	282	"	"	439	363	"	"	669
63	"	*A*	472	159	"	"	155	207	1928	*Notes*	18*f*	284	"	"	548	367	"	"	656
69	"	"	534	163	"	"	167	208	"	*O*	406	287	"	"	378	368	"	*O*	528
73	"	"	698	165	"	*Notes*	14*a*	211	"	"	503	289	"	"	305				
75	"	*Notes*	80*d*	166	"	*A*	341	216	1929	"	12	291	"	"	326				
77	"	"	81*e*	173	"	"	132	220	"	"	60	293	"	"	387				

(Board of Revenue cases are not included.)

11 All India Criminal Reports=All India Reporter

AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.			AICrR)	A. I. R.		
1	1929	*L*	382	119	1928	*B*	240	226	1928	*O*	277	302	1929	*N*	36	422	1929	*A*	260
5	1928	"	921	120	"	*L*	245	233	"	*B*	221	308	1928	*B*	348	423	1928	*R*	299
8	"	*Notes*	54*d*	123	"	*Notes*	56*d*	237	"	"	290	310	"	*L*	540	424	1929	*A*	322
9	"	*L*	637	126	"	*R*	200	240	"	*P*	466	312	1929	"	32	428	"	*L*	210
11	1929	"	520	137	1929	*L*	378	241	"	*B*	220	317	1928	*R*	295	431	1928	*Notes*	91*b*
13	1928	"	946	142	1928	*M*	1195	243	"	"	241	318	"	*Notes*	60*b*	433	"	*C*	610
15	"	"	951	143	"	*P*	473	247	"	"	200	323	"	*M*	1087	483	1929	*A*	321
18	"	"	567	149	1929	*A*	68	249	1929	*A*	81	324	"	*B*	390	484	1928	*C*	359
25	"	*P*	506	152	1928	"	765	250	1928	"	682	350	1929	*A*	220	486	1929	*A*	273
29	"	"	577	154	"	*Notes*	73*c*	253	"	*Notes*	51*d*	354	5928	*Notes*	55*d*	492	"	"	278
32	"	*O*	401	156	"	"	83*c*	254	1929	*A*	16	355	1929	*A*	202	493	1928	*Notes*	76*e*
35	"	*L*	898	162	"	*C*	653	255	"	"	69	359	1928	*M*	1135	500	"	*B*	532
36	"	"	925	164	1929	*L*	59	257	"	"	82	360	1929	*S*	50	503	1929	*A*	267
39	1929	*O*	369	166	1928	*N*	284	258	"	"	299	362	"	*M*	188	506	"	*Notes*	18*a*
41	1928	"	373	171	"	*L*	681	260	1928	*B*	433	363	"	*L*	840	510	1928	*B*	530
43	1929	*P*	64	181	"	*Notes*	82*e*	262	1929	*L*	67	364	1928	*P*	481	513	1929	*A*	270
44	1928	*L*	818	182	"	*L*	953	263	1928	*M*	1157	366	1929	*S*	61	515	1928	*B*	550
48	"	*C*	569	183	"	"	694	265	"	"	1172	368	"	*N*	42	520	"	*O*	393
49	1929	*A*	1	185	"	"	880	267	"	*Notes*	55*a*	371	1928	*P*	497	526	1929	*N*	43
65	1928	*Notes*	69*e*	194	"	*N*	325	270	"	*P*	193	379	"	*M*	1198	537	"	*A*	535
66	"	*C*	645	198	"	*Notes*	52*d*	271	"	*B*	247	380	"	*L*	759	538	1928	*S*	191
68	"	"	381	200	"	*L*	757	272	"	*R*	243	384	"	*Notes*	74*a*	540	"	*B*	528
75	"	*M*	651	202	"	*Notes*	50*e*	273	"	*O*	430	385	"	*M*	1049	543	1929	*L*	64
76	"	*B*	244	205	"	*A*	752	284	"	*L*	476	387	"	*C*	357	547	"	*A*	338
78	"	*L*	357	207	"	"	745	288	"	*B*	418	391	"	*Notes*	54*a*	550	1928	*M*	1267
79	"	*Notes*	57*c*	209	"	*P*	585	290	1929	*A*	84	392	"	*S*	166	551	1929	"	198
82	"	*B*	205	213	"	*A*	696	292	1928	*Notes*	82*c*	395	1929	*L*	111	553	"	*L*	29
87	"	"	208	215	"	"	754	294	1929	*A*	201	397	1928	*L*	928	554	"	*A*	320
91	"	*P*	420	217	"	*R*	240	296	"	"	114	398	"	*Notes*	73*b*	556	1928	*M*	1158
100	"	*C*	438	218	"	*O*	285	298	1928	*M*	1171	400	"	*C*	324	567	1929	*P*	4
103	"	*B*	224	221	"	*B*	336	299	1929	*A*	160	402	1929	*A*	349	576	"	*A*	364
106	"	*L*	308	224	"	"	231	301	1928	*O*	464	405	1928	*L*	382	577	"	*L*	194

12 All India Criminal Reports=All India Reporter

AICrR)	A. I. R.	AICrR)	A. I. R.	AICrR)	A. I. R.	AICrR)	A. I. R.	AICrR)	A. I. R.
1	1929 *A* 347	92	1929 *A* 585	208	1929 *A* 813	303	1928 *B* 286	378	1929 *L* 508
2	1928 *O* 282	93	" *O* 87	210	1928 *L* 917	304	1929 *C* 99	380	" *A* 709
6	1929 *P* 11	94	" *A* 588	212	1929 *P* 93	307	" *R* 75	381	" " 707
14	" *A* 396	95	1928 *Notes* 88*f*	213	" *Notes* 21*e*	309	" *P* 415	382	" *L* 344
17	1928 *M* 1108	96	" *L* 975	214	1928 *C* 853	311	" " 86	410	" " 615
19	1929 *A* 271	102	1929 *A* 709	215	1929 *M* 226	320	1928 *C* 775	413	" " 217
21	1928 *Notes* 90*f*	103	" *M* 8	216	1930 *N* 145	323	1929 *A* 855	420	" *O* 190
22	1929 *A* 374	107	" *A* 587	222	1929 *L* 614	325	" *P* 406	424	" *S* 52
24	1928 *P* 550	108	" *L* 9	223	" " 680	327	" *R* 87	425	" " 113
27	1929 *A* 705	110	" *P* 10	229	1928 *Notes* 35*a*	329	" *P* 121	427	1930 *P* 30
30	1928 *B* 413	112	" *Notes* 10*a*	234	" *L* 961	334	" *C* 406	431	1929 *O* 256
36	" *PC* 300	113	" *L* 315	236	1929 *P* 60	336	" *M* 489	432	" *Notes* 19*b*
41	" *P* 630	114	" *A* 599	241	1928 *PC* 254	337	" *A* 750	433	" *L* 670
47	1930 *A* 262	116	" *L* 403	247*a*	1929 *M* 200	339	" " 707	437	" *O* 151
49	1928 *B* 475	118	" *A* 710	247*b*	" *A* 157	341	" *Notes* 15*e*	440	1930 *L* 62
50	" *R* 280	131	1928 *C* 817	248	" *L* 28	342	" *R* 14	441	1929 *P* 113
51	" *M* 1147	134	" " 484	249	" *C* 62	343	" *C* 336	442	" *O* 280
53	" *Notes* 85*d*	136	" " 495	252	1928 *O* 507	345	" *N* 97	444	" *Notes* 22*d*
57	1929 *A* 272	138	" *M* 1136	256	1929 *M* 303	347	" *L* 658	446*a*	1928 *L* 813
58	1928 *C* 815	142	" *C* 862	258	1928 *L* 935	350	" *R* 97	446*b*	" " 868
62	" *M* 1174	143	" " 320	259	" *Notes* 52*c*	353	" *Notes* 11*a*	448	1929 *C* 257
65	1929 *A* 614	144	" *R* 167	260	1929 *S* 50	354	1928 " 87*e*	451	" *P* 67
66	1928 *Notes* 63*d*	145	" *C* 367	262	" *C* 92	357	1929 *O* 157	453	1928 *L* 913
67	1929 *B* 12	147	" " 336	264	" *Notes* 21*a*	359	" " 150	456	1929 *C* 169
69	" *N* 96	150	1929 *P* 65	265	" *C* 57	360	" *P* 429	458	" " 287
70	" *Notes* 34*d*	154	1928 *B* 352	271	" " 191	363	" " 92	460	1928 " 745
71	" *M* 496	175	" *N* 343	273	" *L* 28	365	" *S* 90	463	1929 " 189
72	" *A* 603	177	1929 " 17	274	" *S* 121	368	" *N* 237	464	" *A* 720
73	1928 *B* 557	199	" *A* 774	291	" *Notes* 30*e*	370	" *M* 256	466	" *B* 157
80	1929 *A* 575	200	1928 *S* 176	292	" *A* 833	371	" " 260	494	" *A* 709
83	1928 *M* 1261	202	1929 *A* 809	294	1928 *Notes* 83*b*	372	" *S* 17	496	" " 905
85	" *L* 945	204	1928 *C* 483	297	1929 *N* 87	373	" *C* 204		
87	1929 " 157	206	" *A* 583	299	" *M* 115	375	" *L* 223		

For **30 Cr. L. J., 113 to 120 I. C. & I. R. 1929 Allahabad=A. I. R.**

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Lahore.**

For **1929 Criminal Cases=All India Reporter.**

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Nagpur.**

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1929, Allahabad Section, with corresponding references of other REPORTS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1929 Allahabad.
Column No. 2 denotes corresponding references of other JOURNALS.

A. I. R. 1929 Allahabad=Other Journals.

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
1	26 *A L J* 1334	18	26 *A L J* 705	53	1929 *A L J* 290	69	117 *I C* 822		
	10 *L R A Cr* 1		113 *I C* 434	FB	113 *I C* 442		30 *Cr L J* 856		
	113 *I C* 213	25	26 *A L J* 1203		51 *All* 411	70	26 *A L J* 1319		
	30 *Cr L J* 101		111 *I C* 165	59	111 *I C* 694		114 *I C* 897		
	51 *All* 313	29	113 *I C* 758	62	113 *I C* 747	71	1929 *A L J* 150		
	11 *A I Cr R* 49		9 *L R A Rev* 306	63(1)	113 *I C* 767		113 *I C* 765		
12	51 *All* 454	31	111 *I C* 816	63(2)	113 *I C* 753		51 *All* 478		
	1929 *A L J* 105	32	9 *L R A Rev* 125	65	26 *A L J* 1370	72	1929 *A L J* 199		
	112 *I C* 765		113 *I C* 732		111 *I C* 713		119 *I C* 86		
15	111 *I C* 221	33	26 *A L J* 1257	67	10 *L R A Rev* 134	75	26 *A L J* 1199		
	26 *A L J* 1374	FB	10 *A I Cr R* 531		113 *I C* 748		50 *All* 980		
16	1929 *A L J* 90		9 *L R A Cr* 140	68	1929 *A L J* 28		118 *I C* 228		
	10 *L R A Cr* 37		59 *All* 909		10 *L R A Cr* 17	76	113 *I C* 756		
	11 *A I Cr R* 254		113 *I C* 417		11 *A I Cr R* 149		10 *L R A Rev* 158		
	116 *I C* 793		30 *Cr L J* 145		116 *I C* 29	77	113 *I C* 750		
	30 *Cr L J* 691	50	50 *All* 810		30 *Cr L J* 566	78	111 *I C* 742		
17	9 *L R A Rev* 289		26 *A L J* 772	69	1929 *A L J* 215		10 *L R A Rev* 101		
	115 *I C* 454		115 *I C* 127		10 *L R A Cr* 38	79	113 *I C* 760		
	59 *All* 733	52	111 *I C* 790		11 *A I Cr R* 255	81	26 *A L J* 1307		

A. I. R. 1929 Allahabad=Other Journals—(*Contd*).

A.I.R.	Other Journals
81	10 *L R A Cr* 33
	113 *I C* 754
	30 *Cr L J* 217
	11 *A I CrR* 249
82	1929*A L J* 114
	10 *L R A Cr* 40
	113 *I C* 765
	30 *Cr L J* 218
	11 *A I CrR* 257
83	10 *LRARev* 156
	115 *I C* 464
84	51 *All* 483
	1929*A L J* 188
	10 *L R A Cr* 41
	113 *I C* 764
	30 *Cr L J* 218
	11 *A I CrR* 290
85 (1)	26 *A L J* 1325
	112 *I C* 620
85 (2)	111 *I C* 761
87	26 *A L J* 1119
	119 *I C* 837
99	116 *I C* 483
100	113 *I C* 832
101	112 *I C* 246
102	1929*A L J* 274
	116 *I C* 30
105	1929*A L J* 155
FB	113 *I C* 819
	51 *All* 550
114	1929*A L J* 177
	10 *L R ACr* 44
	11 *AICrR* 296
	116 *I C* 21
	30 *Cr L J* 561
	51 *All* 489
115	1929*A L J* 214
	116 *I C* 794
116	113 *I C* 762
118	26 *A L J* 1329
	114 *I C* 865
121	26 *A L J* 53
	107 *I C* 679
123	26 *A L J* 1395
	112 *I C* 380
124	1929*A L J* 185
	113 *I C* 752
	51 *All* 480
125	114 *I C* 40
126	112 *I C* 702
127	1929*A L J* 323
	113 *I C* 767
	51 *All* 487
128	50 *All* 823
	114 *I C* 868
131	50 *All* 837
	26 *A L J* 776
	115 *I C* 118
132	10 *LRARev* 173
133	50 *All* 835
	26 *A L J* 774
	115 *I C* 124
134	112 *I C* 791
	1929*A L J* 262
139	1929*A L J* 110
	116 *I C* 488
	51 *All* 473
142	1929*A L J* 284
	116 *I C* 481
144	1929*A L J* 182

A.I.R.	Other Journals
144	115 *I C* 611
	51 *All* 501
146	114 *I C* 750
147	50 *All* 859
	114 *I C* 867
148	1929*A L J* 204
	114 *I C* 881
155	10 *LRARev* 159
	116 I C 742
157	50 *All* 853
	114 *I C* 870
	30 *Cr L J* 369
	10 *LRA Cr* 135
	12 *AI Cr R* 247
158	1929*A L J* 187
	115 *I C* 463
159	10 *LRA Rev* 175
	116 *I C* 792
160	1929*A L J* 244
	10 *L R A Cr* 47
	11 *A I Cr R* 299
	116 *I C* 19
	30 *Cr L J* 559
161	1929*A L J* 279
	51 *All* 494
	119 *I C* 241
164	10 *LRARev* 189
	116 *I C* 789
165	10 *L RARev* 183
	116 *I C* 791
167	10 *LRARev* 163
	115 *I C* 635
168	115 *I C* 133
170	1929*A L J* 115
	116 *I C* 285
	51 *All* 519
174	116 *I C* 807
180	112 *I C* 623
195	107 *I C* 569
196	9 *LRARev* 180
	114 *I C* 908
199	107 *I C* 576
201	1929*A L J* 180
	10 *L R A Cr* 42
	11 *AICr R* 294
	116 *I C* 814
	30 *Cr L J* 696
	51 *All* 485
202	1929*A L J* 329
	10 *L R A Cr* 53
	11 *AI Cr R* 355
	116 *I C* 794
	30 *Cr L J* 687
	51 *All* 544
205	114 *I C* 185
207	1929*A L J* 286
	115 *I C* 796
	51 *All* 527
208	116 *I C* 785
209	115 *I C* 451
210	1929*A L J* 212
	116 *I C* 89
	51 *All* 506
211	10 *LRARev* 179
	114 *I C* 890
213	1929*A L J* 342
	115 *I C* 798
214	1929*A L J* 303
	115 *I C* 458
	51 *All* 509

A.I.R.	Other Journals
218	113 *I C* 817
	10 *L RARev* 201
220	1929*A L J* 385
	10 *L R A Cr* 49
	11 *A I Cr R* 350
	116 *I C* 786
	30 *Cr L J* 670
223	1929*A L J* 309
	10 *LRLRev* 138
	119 *I C* 514
231	114 *I C* 186
	10 *LRARev* 264
232	116 *I C* 855
	10 *LRARev* 261
233	1929*A L J* 380
	116 *I C* 300
236	117 *I C* 824
237	1929*A L J* 423
	115 *I C* 113
238	1929*A L J* 358
	116 *I C* 445
	51 *All* 595
241	113 *I C* 831
	10 *LRARev* 196
242	115 *I C* 627
243	1929*A L J* 344
	116 *I C* 436
	51 *All* 575
250	1929*A L J* 355
	115 *I C* 646
	51 *All* 589
252	1929*A L J* 425
	115 *I C* 462
253	1929*A L J* 427
	115 *I C* 118
254	1929*A L J* 333
	116 *I C* 293
	51 *All* 530
258	9 *LRARev* 127
	114 *I C* 870
259	1929*A L J* 100
	113 *I C* 749
260 (1)	1929*A L J* 400
	10 *L R A Cr* 59
	30 *Cr L J* 340
	114 *I C* 733
	11 *A I Cr R* 422
260 (2)	1929*A L J* 217
	114 *I C* 876
265	116 *I C* 852
266 (1)	1929*A L J* 243
	118 *I C* 378
266 (2)	1929*A L J* 80
	113 *I C* 751
267 (1)	1929*A L J* 72
	118 *I C* 229
267 (2)	10 *LRACr* 73
	11 *A I CrR* 503
	115 *I C* 614
	30 *Cr L J* 505
270	1929*A L J* 397
	10 *L R A Cr* 76
	11 *AICr R* 513
	115 *I C* 868
	30 *Cr L J* 529
271	1929*A L J* 463
	10 *L R A Cr* 89
	116 *I C* 785
	30 *Cr L J* 669
	12 *A I Cr R* 19

A.I.R.	Other Journals
272	1929*A L J* 514
	10 *L R A Cr* 97
	30 *Cr L J* 1079
	119 *I C* 444
	12 *A I Cr R* 57
273	1929*A L J* 361
	10 *L R A Cr* 66
	11 *A I Cr R* 486
	116 *I C* 25
	30 *Cr L J* 562
	51 *All* 663
277	1929*A L J* 460
	117 *I C* 97
278	1929*A L J* 395
	10 *L R A Cr* 71
	11 *A I Cr R* 492
	115 *I C* 452
	30 *Cr L J* 468
279	1929*A L J* 376
	51 *All* 634
	119 *I C* 246
281	1929*A L J* 367
	116 *I C* 855
	51 *All* 612
287	1929*A L J* 480
	51 *All* 640
	119 *I C* 510
291	1929*A L J* 757
	119 *I C* 440
	51 *All* 752
293	1929*A L J* 433
	51 *All* 651
	119 *I C* 243
296	1929*A L J* 499
	119 *I C* 507
299	1929*A L J* 148
	10 *L R A Cr* 31
	11 *A I Cr R* 258
	115 *I C* 609
	30 *Cr L J* 504
300	1929*A L J* 430
	51 *All* 629
	119 *I C* 503
302	1929*A L J* 324
	116 *I C* 849
305	10 *LRARev* 289
	119 *I C* 568
306	1929*A L J* 492
	119 *I C* 562
308	1929*A L J* 547
	116 *I C* 82
309	1929*A L J* 419
	116 *I C* 297
	51 *All* 606
312	115 *I C* 129
315	1929*A L J* 473
	116 *I C* 433
	51 *All* 621
319	115 *I C* 610
320	1929*A L J* 585
	10 *L R A Cr* 82
	11 *A I Cr R* 554
	116 *I C* 748
	30 *Cr L J* 697
	51 *All* 603
321	1929*A L J* 227
	10 *L R A Cr* 64
	11 *A I Cr R* 483
	30 *Cr L J* 1157

A. I. R. 1929 Allahabad=Other Journals—(*Contd.*)

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
321	120 *I C* 126	377	119 *I C* 500	440	1929 *A L J* 537	529	1929 *A L J* 794
322	1929 *A L J* 224	378	10 *L R A Rev* 287		118 *I C* 43		121 *I C* 209
	10 *L R A Cr* 60		119 *I C* 433	442	116 *I C* 870	531	1929 *A L J* 665
	11 *A I Cr R* 424	379	1929 *A L J* 379		10 *L R A Rev* 278		51 *All* 820
	30 *Cr L J* 1087		115 *I C* 455	443	1929 *A L J* 651		121 *I C* 241
	119 *I C* 572		51 *All* 604		116 *I C* 851	535	1929 *A L J* 508
324	115 *I C* 449	380	1929 *A L J* 846	444	1929 *A L J* 921		10 *L R A Cr* 78
326	10 *L R A Rev* 291		119 *I C* 437		121 *I C* 689		11 *A I Cr R* 537
	119 *I C* 445	381	1929 *A L J* 515	446	118 *I C* 166		115 *I C* 144
327	1929 *A L J* 754		116 *I C* 96	448	1929 *A L J* 685		30 *Cr L J* 410
	116 *I C* 879	382	116 *I C* 806		116 *I C* 443		1929 *Cr C* 77
329	1929 *A L J* 517	384	115 *I C* 137	449	113 *I C* 266	536	1929 *A L J* 641
	116 *I C* 18	385	1929 *A L J* 429		51 *All* 341		118 *I C* 145
330	113 *I C* 405		115 *I C* 800	453	1929 *A L J* 528		51 *All* 827
331	119 *I C* 502		51 *All* 594		118 *I C* 170	541	114 *I C* 893
332	119 *I C* 565	386	115 *I C* 628	454	1929 *A L J* 605	542	1929 *A L J* 929
334	117 *I C* 111	387	10 *L R A Rev* 293		117 *I C* 99		117 *I C* 108
335	10 *L R A Rev* 262		119 *I C* 436	455	1929 *A L J* 877	543	117 *I C* 105
	119 *I C* 286	388	1929 *A L J* 606		116 *I C* 444	544	115 *I C* 637
337	51 *All* 672		116 *I C* 876		51 *All* 874		10 *L R A Rev* 280
	119 *I C* 287	389	1929 *A L J* 588	456	116 *I C* 749	545	119 *I C* 99
	1929 *A L J* 505		115 *I C* 450	458	116 *I C* 815	548	10 *L R A Rev* 284
338	1929 *A L J* 509	390	1929 *A L J* 553	459	1929 *A L J* 531		118 *I C* 379
	10 *L R A Cr* 80		115 *I C* 865		121 *I C* 218	549	1929 *A L J* 889
	11 *A I Cr R* 547	393	119 *I C* 434	462	1929 *A L J* 766		115 *I C* 642
	30 *Cr L J* 1078	394	10 *L R A Rev* 269		116 *I C* 495	550	1929 *A L J* 615
	119 *I C* 443		119 *I C* 505		51 *All* 842		117 *I C* 832
339	1929 *A L J* 241	396	1929 *A L J* 592	463	10 *L R A Rev* 295	551 (1)	117 *I C* 102
341	1929 *A L J* 267		10 *L R A Cr* 86		118 *I C* 45		1929 *A L J* 1097
	10 *L R A Rev* 166		115 *I C* 135	465	1929 *A L J* 620	551 (2)	1929 *A L J* 861
346	119 *I C* 567		30 *Cr L J* 408	**FB**	116 *I C* 1		118 *I C* 527
347 (1)	1929 *A L J* 618		12 *A I Cr R* 14	479	117 *I C* 609		51 *All* 882
	116 *I C* 746		1929 *Cr C* 6	481	1929 *A L J* 873	553 (1)	115 *I C* 636
347 (2)	1929 *A L J* 520	398	1929 *A L J* 589		118 *I C* 372	553 (2)	1929 *A L J* 612
	10 *L R A Cr* 84		116 *I C* 16	483	1929 *A L J* 897		118 *I C* 383
	30 *Cr L J* 1083	399	1929 *A L J* 559		51 *All* 802	555	118 *I C* 381
	119 *I C* 527		119 *I C* 435		121 *I C* 111	556	1929 *A L J* 857
	12 *A I Cr R* 1		51 *All* 758	485	121 *I C* 552		115 *I C* 643
348	116 *I C* 747	400	116 *I C* 738	492	1929 *A L J* 880	557	117 *I C* 616
349	1929 *A L J* 340	403	1929 *A L J* 713		118 *I C* 152		10 *L R A Rev* 272
	10 *L R A Cr* 57		116 *I C* 23	494	117 *I C* 365	558	1929 *A L J* 894
	11 *A I Cr R* 402	404	1929 *A L J* 189	497	118 *I C* 521		115 *I C* 639
	116 *I C* 789		116 *I C* 278	498	1929 *A L J* 549	559	1929 *A L J* 868
	30 *Cr L J* 686	409	1929 *A L J* 761		117 *I C* 620		117 *I C* 344
	51 *All* 520		119 *I C* 525		10 *L R A Rev* 266	560	1929 *A L J* 863
351	119 *I C* 447	411	119 *I C* 439		51 *All* 760		115 *I C* 644
353	1929 *A L J* 811	413	1929 *A L J* 586	500	...		11 *L R A Rev* 13
FB	119 *I C* 273		115 *I C* 799	502	117 *I C* 103	561	118 *I C* 154
	51 *All* 695	414	119 *I C* 523	503	1929 *A L J* 526	571	1929 *A L J* 849
364	10 *L R A Cr* 83	415	116 *I C* 853		51 *All* 799	**SB**	117 *I C* 337
	11 *A I Cr R* 576	417	1929 *A L J* 670		121 *I C* 221		51 *All* 853
	116 *I C* 297		117 *I C* 622	504	118 *I C* 520	575	10 *L R A Cr* 100
	30 *Cr L J* 622		51 *All* 845	506	1929 *A L J* 653		118 *I C* 369
365	1929 *A L J* 393	419 (1)	1929 *A L J* 854		118 *I C* 513		30 *Cr L J* 903
	116 *I C* 875		121 *I C* 224		51 *All* 805		12 *A I Cr R* 80
	51 *All* 659		51 *All* 872	511	115 *I C* 638		1929 *Cr C* 163
366	1929 *A L J* 398	419 (2)	116 *I C* 740	512	1929 *A L J* 614	576	115 *I C* 127
	116 *I C* 874	421	1929 *A L J* 448		115 *I C* 638		10 *L R A Rev* 258
	51 *All* 658		51 *All* 780		10 *L R A Rev* 277	577	117 *I C* 107
367	51 *All* 892		121 *I C* 211	513	1929 *A L J* 597		1929 *A L J* 1024
369	115 *I C* 132	428	116 *I C* 816		121 *I C* 243		51 *All* 886
371	116 *I C* 737	429	117 *I C* 619	518	118 *I C* 382	578 (1)	116 *I C* 869
372	115 *I C* 457	430	117 *I C* 618	519	116 *I C* 302		1929 *A L J* 1151
374	1929 *A L J* 512	432	1929 *A L J* 507		1929 *A L J* 1083		10 *L R A Rev* 342
	10 *L R A Cr* 90		119 *I C* 560	521	1929 *A L J* 540	578 (2)	118 *I C* 589
	118 *I C* 232	433	1929 *A L J* 438		117 *I C* 361	580	1929 *A L J* 958
	30 *Cr L J* 874		117 *I C* 828	525	1929 *A L J* 522		118 *I C* 590
	12 *A I Cr R* 22	437	117 *I C* 614		117 *I C* 612	581	1929 *A L J* 911
	1929 *Cr C* 1	439	116 *I C* 813		51 *All* 765		121 *I C* 267
375	119 *I C* 561		10 *L R A Rev* 282	527	118 *I C* 519		51 *All* 957

A. I. R. 1929 Allahabad=Other Journals—(*Contd.*)

A.I.R.	Other Journals
585	1929 *A L J* 800
	10 *L R ACr* 103
	118 *I C* 384
	30 *Cr L J* 904
	12 *A I Cr R* 92
	51 *All* 888
	1929 *Cr C* 175
586 (1)	1929 *A L J* 901
	119 *I C* 109
	51 *All* 983
586 (2)	1929 *A L J* 885
	117 *I C* 110
	11 *LRARev* 2
587	1929 *A L J* 775
	10 *L R ACr* 105
	117 *I C* 346
	30 *Cr L J* 756
	12 *A I Cr R* 107
	1929 *Cr C* 176
588	10 *L R ACr* 102
	117 *I C* 345
	30 *Cr L J* 755
	12 *A I CrR* 94
	1929 *Cr C* 176
589 (1)	1929 *A L J* 935
	117 *I C* 345
589 (2)	118 *I C* 705
	1929 *A L J* 1087
592	1929 *A L J* 1129
	119 *I C* 98
	51 *All* 981
593	1929 *A L J* 769
	119 *I C* 103
	51 *All* 910
597 (1)	1929 *A L J* 798
	117 *I C* 98
	51 *All* 899
597 (2)	1929 *A L J* 859
	119 *I C* 95
	51 *All* 895
599 (1)	117 *I C* 111
	51 *All* 903
599 (2)	10 *L R ACr* 106
	116 *I C* 801
	30 *Cr L J* 693
	1929 *A L J* 938
	12 *A I CrR* 114
	1929 *Cr C* 174
600	1929 *A L J* 936
	117 *I C* 347
	51 *All* 885
601	118 *I C* 660
602	1929 *A L J* 805
	118 *I C* 164
	51 *All* 878
604	1929 *A L J* 1114
	121 *I C* 393
606	114 *I C* 894
608	10 *L R ACr* 99
	117 *I C* 346
	30 *Cr L J* 756
	12 *A I CrR* 72
	1929 *Cr C* 174
609	117 *I C* 330
	11 *LRARev* 7
	11 *LRARev* 85
610	114 *I C* 725
612	118 *I C* 527
	10 *LRARev* 360
613	1929 *A L J* 1026
613	118 *I C* 583
	10 *LRARev* 356
614	10 *L R ACr* 98
	1929 *A L J* 927
	117 *I C* 99
	30 *Cr L J* 718
	12 *A I CrR* 65
	1929 *Cr C* 193
615	1929 *A L J* 924
	119 *I C* 107
616	10 *LRARev* 346
	121 *I C* 223
618	118 *I C* 667
	1929 *A L J* 1166
	51 *All* 971
619	1929 *A L J* 887
	119 *I C* 108
620	118 *I C* 662
621	1929 *A L J* 750
	119 *I C* 84
	51 *All* 920
623	1929 *A L J* 960
	117 *I C* 103
624	118 *I C* 669
	1929 *A L J* 1082
625	1929 *A L J* 983
FB	118 *I C* 17
650	51 *All* 275
	1929 *Cr C* 346
654	...
655	1929 *A L J* 1042
FB	118 *I C* 712
	30 *Cr L J* 966
	1929 *Cr C* 242
656	10 *LRARev* 367
	119 *I C* 252
657	1929 *A L J* 1132
658	1929 *A L J* 899
	118 *I C* 719
659	1929 *A L J* 801
	117 *I C* 341
662	118 *I C* 661
	1929 *A L J* 1127
663	1929 *A L J* 1109
	119 *I C* 850
	51 *All* 968
664	1929 *A L J* 1137
666	1929 *A L J* 968
	118 *I C* 591
667	1929 *A L J* 1255
	119 *I C* 836
668	1929 *A L J* 1098
	10 *LRARev* 361
	51 *All* 994
669	1929 *A L J* 890
	116 *I C* 802
	10 *LRARev* 363
	51 *All* 926
671	121 *I C* 270
673	119 *I C* 852
674	115 *I C* 139
676	1929 *A L J* 1028
	119 *I C* 833
	51 *All* 986
677	1929 *A L J* 976
	118 *I C* 670
680	118 *I C* 663
	1929 *A L J* 1091
683	1929 *A L J* 961
	119 *I C* 859
687	115 *I C* 138
689	1929 *A L J* 869
	119 *I C* 93
691	121 *I C* 386
692	118 *I C* 584
696	1929 *A L J* 1162
699 (1)	119 *I C* 256
609 (2)	...
702	11 *LRARev* 16
	119 *I C* 499
703	1929 *A L J* 1111
	51 *All* 990
704	1929 *A L J* 619
	116 *I C* 448
705	1929 *A L J* 609
	10 *L R ACr* 92
	30 *Cr L J* 523
	115 *I C* 648
	1929 *Cr C* 289
	51 *All* 747
	12 *A I CrR* 27
707 (1)	118 *I C* 719
	10 *L R ACr* 144
	12 *A I CrR* 381
	1929 *Cr C* 291
707 (2)	10 *L R ACr* 138
	1929 *Cr C* 291
	118 *I C* 190
	30 *Cr L J* 890
	12 *A I CrR* 339
709 (1)	10 *L R ACr* 104
	1929 *Cr C* 293
	12 *A I CrR* 102
	51 *All* 890
709 (2)	30 *Cr L J* 985
	10 *L R ACr* 143
	10 *L R ACr* 146
	119 *I C* 14
	12 *A I CrR* 380
	12 *A I CrR* 494
	1929 *Cr C* 293
710	10 *L R ACr* 108
	1929 *Cr C* 294
	12 *A I CrR* 118
	121 *I C* 248
720	30 *Cr L J* 984
	10 *L R ACr* 145
	119 *I C* 13
	1930 *A L J* 201
	12 *A I CrR* 464
	1929 *Cr C* 304
721 (1)	1929 *A L J* 1079
	119 *I C* 851
	51 *All* 901
721 (2)	1929 *A L J* 1153
724	119 *I C* 497
726	1929 *A L J* 941
	51 *All* 932
	121 *I C* 257
735	118 *I C* 227
	51 *All* 1020
737	...
739	1929 *A L J* 970
	119 *I C* 855
743	1929 *A L J* 918
	51 *All* 1010
745	119 *I C* 251
747	1929 *A L J* 808
	117 *I C* 610
	51 *All* 903
749	...
750 (1)	1929 *A L J* 1044
	10 *L R ACr* 137
	30 *Cr L J* 1085
	119 *I C* 570
	51 *All* 996
	12 *A I CrR* 337
	1929 *Cr C* 355
750 (2)	1929 *A L J* 1131
	119 *I C* 90
751	119 *I C* 253
753	1929 *A L J* 1106
	119 *I C* 6
	51 *All* 1042
754	118 *I C* 188
	51 *All* 1016
755	118 *I C* 657
756 (1)	1929 *A L J* 864
	118 *I C* 380
	10 *LRARev* 300
756 (2)	119 *I C* 248
759 (1)	118 *I C* 188
	1929 *A L J* 1095
759 (2)	1930 *A L J* 92
761 (1)	1930 *A L J* 223
761 (2)	...
763	1930 *A L J* 239
765	1929 *A L J* 1270
767	...
769	1929 *A L J* 1186
774	51 *All* 344
	1929 *A L J* 55
	10 *LRACr* 121
	111 *I C* 595
	12 *AICrR* 199
775	...
777	118 *I C* 186
779	118 *I C* 42
	1929 *A L J* 1120
780	118 *I C* 229
781	1929 *A L J* 724
	11 *LRARev* 65
788	118 *I C* 239
789	1929 *A L J* 1149
	51 *All* 1039
790	...
791	119 *I C* 1
	51 *All* 1053
792	...
793	118 *I C* 189
	51 *All* 1023
	1930 *A L J* 97
794	119 *I C* 5
795	118 *I C* 237
797	119 *I C* 837
798	118 *I C* 234
799 (1)	118 *I C* 236
799 (2)	119 *I C* 110
800	118 *I C* 718
801	1929 *A L J* 674
	119 *I C* 853
803	1930 *A L J* 65
805	51 *All* 1017
	1930 *A L J* 284
806	1930 *A L J* 197
808	118 *I C* 709
	1929 *A L J* 1184
809	119 *I C* 834
810	120 *I C* 558
811	1929 *A L J* 1183
	119 *I C* 15
812	121 *I C* 272

A. I. R. 1929 Allahabad=Other Journals—(*Concld.*)

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
813	10 *LRACr* 127	872	...	905 (1)	12 *AICrR* 496	931	1929*Cr C* 659
	1929*A L J* 981	873	118 *I C* 230		1929*Cr C* 509	932	120 *I C* 261
	30 *Cr L J* 1086	875	119 *I C* 111	905 (2)	118 *I O* 191		31 *Cr L J* 30
	119 *I C* 571	877	...	906	120 *I C* 559		1930*A L J* 148
	12 *AICrR* 208	878	...	907	118 *I C* 667		1929*Cr C* 660
	1929*Cr C* 449	879	...	908	1930*A L J* 40		11 *LRACr* 48
814	1929*A L J* 908	881	1929*A L J* 1248		120 *I C* 552	935	11 *LRACr* 8
	119 *I C* 97	883	...	910	1929*A L J* 1100		120 *I C* 205
815	119 *I C* 13	885	...		121 *I C* 102		31 *Cr L J* 12
816	119 *I C* 285		118 *I C* 715	912	118 *I C* 710		1930*A L J* 242
817	1929*A L J* 1196		1930*A L J* 340	914 (1)	10 *LRACr* 149		13 *AICrR* 126
819	...	887	1929*A L J* 1251		120 *I C* 194		1929*Cr C* 663
824	121 *I C* 99	889	...		31 *Cr L J* 2	936	120 *I C* 122
826	121 *I C* 693	890	1929*A L J* 1140		1930*A L J* 199		30 *Cr L J* 1154
831	1929*A L J* 1134		51 *All* 1027		13 *AICrR* 2		1930*A L J* 251
833	1929*Cr C* 358	896	119 *I C* 96		1929*Cr C* 642		1929*Cr C* .664
	10 *LRACr* 136	897	1929*Cr C* 489	914 (2)	11 *LRACr* 11	937	120 *I C* 266
	51 *All* 1025	898	10 *LRACr* 147		120 *I C* 123		31 *Cr L J* 35
	12 *AICrR* 292		120 *I C* 116		30 *Cr L J* 1155		1930*A L J* 229
	121 *I C* 560		30 *Cr L J* 1148		1930*A L J* 226		13 *AICrR* 138
834	1929*A L J* 902		13 *AICrR* 1		13 *AICrR* 117		11 *LRACr* 21
	119 *I C* 81		1929*Cr C* 490		1929*Cr C* 642		1929*Cr C* 665
837	1929*A L J* 1122	899 (1)	120 *I C* 113	916	11 *LRACr* 6	940	120 *I C* 121
840	1929*A L J* 1273		1930*A L J* 203		120 *I C* 199		30 *Cr L J* 1153
843	119 *I C* 16		1929*Cr C* 491		31 *Cr L J* 7		1930*A L J* 218
844	118 *I C* 711	899 (2)	1929*Cr C* 491		13 *AICrR* 56		11 *LRACr* 25
845 (1)	119 *I C* 284		10 *LRACr* 122		1929*Cr C* 644		1929*Cr C* 668
845 (2)	119 *I C* 3		1929*A L J* 1056	917	10 *LRACr* 156	941	121 *I C* 106
	1930*A L J* 215		119 *I C* 575		119 *I C* 863	943	1930*A L J* 57
846	...		30 *Cr L J* 1089		30 *Cr L J* 1133	948	1929*A L J* 1228
847	118 *I C* 240		51 *All* 977		1930*A L J* 220		120 *I C* 545
848	1930*A L J* 206		12 *AICrR* 202		13 *A I Cr R* 30	950	1929*A L J* 1208
849	1930*A L J* 205	901 (1)	120 *I C* 207		192)*Cr C* 645		10 *LRACr* 153
850	1929*A L J* 1216		31 *Cr L J* 13	919	1930*A L J* 26		31 *Cr L J* 3
	1929*Cr C* 404		1930*A L J* 202		120 *I C* 435		120 *I C* 195
854	118 *I C* 235		1929*Cr C* 493		31 *Cr L J* 88		13 *AICrR* 17
855	1929*Cr C* 408	901 (2)	120 *I C* 204		1929*Cr C* 647		1929*Cr C* 593
	118 *I C* 46		31 *Cr L J* 10	928	11 *LRACr* 1	953	1929*A L J* 1049
	10 *LRACr* 141		1929*Cr C* 493		13 *AICrR* 52		51 *All* 998
	30 *Cr L J* 867		11 *LRACr* 18		121 *I C* 103	957	1930*A L J* 235
	12 *AICr R* 323		13 *AICrR* 131		1929*Cr C* 656		121 *I C* 97
857	...	903	120 *I C* 113		31 *Cr L J* 206	960	1929*A L J* 1169
858	119 *I C* 4		30 *Cr L J* 1145	930	120 *I C* 257	963	1929*A L J* 1233
859	...		1929*Cr C* 495		31 *Cr L J* 25	972	118 *I C* 657
861	...		13 *AICrR* 142		11 *LRACr* 15	974	1929*A L J* 1201
862	118 *I C* 225	904	10 *LRACr* 151		13 *AICrR* 122		120 *I C* 443
864	...		120 *I C* 208		1929*Cr C* 658	977**FB**	1929*A L J* 1212
865	117 *I C* 826		31 *Cr L J* 14	931	120 *I C* 128	980	1929*A L J* 1279
868	118 *I C* 47		1929*Cr C* 496		30 *Cr L J* 1159		121 *I C* 108
869	...		13 *AICrR* 15		11 *LRACr* 27	984	119 *I C* 255
870	118 *I C* 713	905 (1)	10 *LRACr* 150		13 *AICrR* 137		
	1930*A L J* 94		120 *I C* 127		1930*A L J* 216		
			30 *Cr L J* 1158				

Note—*Cases not bearing parallel references against them are not reported elsewhere.*

THE

ALL INDIA REPORTER

1929 ALLAHABAD

I. L. R. ALPHABETICAL INDEX

of cases reported in

I. L. R. 51 ALLAHABAD

WITH REFERENCES TO THE PAGES OF

The All India Reporter

[139 Cases]

Names of Parties	I. L. R.		pp.	A. I. R.		pp.
Abdul Aziz v. Abdul Rahim	...		752	1929	A	291
Abdul Jalil Khan v. Obaidullah Khan ...	...	PC	675	"	PC	228
Abdul Wahid Khan v. Radha Kishen ...	...		957	"	A	581
Achhaibar Singh v. Rajmati	...		802	"	"	483
Akramunnissa Bibi v. Mustafaunnissa Bibi ...	...		595	"	"	238
Altaf Begam v. Brij Narain	...		612	"	"	281
Amarjit Upadhiya v. Algu Chaube ...	...		478	"	"	71
Angan Lal v. Saran Bihari	...		799	"	"	503
Anrup Misir v. Ram Harakh	...		998	"	"	953
Anwar Khan v Muhammad Khan ...	...	FB	550	"	"	105
Asa Ram v. Karam Singh	...		983	"	"	586
Awadh Bihari v. Fahiman	...		634	"	"	279
Bachchi Lal v. Debi Din	...		629	1929	A	300
Baijnath v. Dhani Ram	...		886	"	"	577
Baijnath v. Dhani Ram	...		903	"	"	747
Baikunth Nath v. Jai Kishun	...		341	"	"	449
Balbhaddar Prasad v. Bitto	...		1016	"	"	754
Banke Bihari v. Brij Bihari	...		519	"	"	170
Bank of Upper India Limited (in Liquidation) v. Fanny Skinner	...		494	"	"	161
Banky Lal v. Raghunath Sahai ...	...	FB	188	1928	A	561
Bansi Ram v. B. N. W. Railway ...	...		480	1929	A	124
Basdeo Narain v. Muhammad Yusuf	...		285	1928	A	617
Bhagwan Das v. Zamurrad Husain	...		986	1929	A	676
Bhagwan Das Lachmi Narain v B. N. Ry. ...	...		895	"	"	597
Bhola Nath v. Raghunath Das Mithan Lal ...	...		1010	"	"	743
Chandrika Rai v. Srikant Rai ...	...		899	1929	A	597
Chandu Mal v. Darbari Lal ...	...		981	"	"	592
Dasami Sahu v. Param Shameshwar	...		621	1929	A	315
Dip Chand v. Sheo Prasad ...	...		910	"	"	593

Names of Parties		I. L. R.	pp.	A. I. R.		pp.
Ejaz Ahmad v. Saghir Bano			850	1930	A	287
Emperor v. Ajudhia Prasad			467	1928	A	752
——— v. Banarsi Das			483	1929	A	84
——— v. Bhagat Ram			489	"	"	114
——— v. Bhairon Prasad			377	1928	A	756
——— v. Bhan Deb			463	"	"	696
——— v. Bihari Lal			338	"	"	588
——— v. Col. Bholanath			313	1929	A	1
——— v. Duli Chand			1025	"	"	833
——— v. Fateh Singh			603	"	"	320
——— v. Gaya Prasad			465	1928	A	745
——— v. Ismail			747	1929	A	705
——— v. Janeshar Das			544	"	"	202
——— v. Jwala			470	1928	A	754
——— v. Kumera			275	1929	A	650
——— v. Manni Lal Awasthi			459	1928	A	682
——— v. Mansa Singh			996	1929	A	750
——— v. Mewa Lal			540	"	"	349
——— v. Narbada Prasad			864	1930	A	38
——— v. Neur Ahir			408	1928	A	755
——— v. Prag Datt			382	"	"	765
——— v. Ram Lal			663	1929	A	273
——— v. Shanker Singh			485	"	"	201
——— v. Sis Ram			888	"	"	585
Faqir Chand v. Harkishun Das			908	1929	A	599
Gargi Din v. Debi Charan			1017	1929	A	805
Ghamandi Nath v. Babu Lal			977	"	"	899
Govind Singh v. Manglu			990	"	"	703
Gurdial Singh v. Arjun Singh			882	"	"	551
Hansraj v. Official Liquidators, Dehra Dun Mussoorie Electric Tramway Co., Ltd.		**FB**	695	1929	A	353
Hanuman Prasad Singh v. Mathura Prasad Singh ...		**FB**	303	1928	A	472
Hanwant Rai v. Chandi Prasad			651	1929	A	293
Hira Lal v. Piari Lal			54	1928	A	505
Hukum Singh v. Surajpal Singh			672	1929	A	337
Imtiaz Bibi v. Kabia Bibi			878	1929	A	602
Jagannath Sahu v. Chhedi Sahu			501	1929	A	144
Jagdeo Singh v. Kesho Prasad Singh			1020	"	"	735
Jagdish Prasad v. Hoshyar Singh		**FB**	136	1928	A	596
Jaggo Bai v. Utsava Lal		**PC**	439	1929	PC	166
James Skinner v. R. H. Skinner		**PC**	771	"	PC	269
Jamna Prasad v. Muhammad Zahiruddin			658	"	A	366
Johari Mal v. Balmakund			926	"	"	669
Joti Prasad v. Sri Chand			237	1928	A	629
Juggi Lal Kamalapat v. Swadeshi Mills Company, Ltd....		**PC**	182	1929	PC	11
Jugul Kishore v. Banwari Lal			1053	"	A	791
Kalika Prasad v. Ajudhia Prasad			780	1929	A	421
Kali Prasad v. Parmeshwar Prasad			487	"	"	127
Kalyan Das v. Jan Bibi			454	"	"	12
Kanhaiya Lal v. Girwar			1042	"	"	753
Karimullah v. Rameshwar Prasad			344	"	"	774
Khairunnissa Bibi v. Oudh Commercial Bank, Ltd. ...			640	"	"	287

Names of Parties	I. L. R.	pp.	A. I. R.		pp.
Kiran Koomar Banerji v. Baij Nath	...	402	1928	A	607
Kishan Sarup v. Brijraj Singh	...	932	1929	A	726
Kishen Sahai v. Raghunath Singh	...	473	"	"	139
Kundan Lal v. Bhikari Das, Ishwar Das	...	530	"	"	251
Kunj Bihari v. Bindeshri Prasad	...	527	"	"	207
Lal Chand v. Ram Chandar	...	842	1929	A	462
Lalta Prasad v. Chunni Singh	...	594	"	"	385
Lalta Prasad v. Puran Lal	...	974	1930	A	286
Madan Lal v. Gajendrapal Singh	...	575	1929	A	243
Mahadeo Bharthi v. Mahadeo Rai	...	805	"	"	506
Mahadeo Prasad v. Khubi Ram	...	1023	"	"	793
Mangali Prasad v. Babu Ram	...	659	"	"	365
Mauji v. Bhagole	...	872	"	"	419
Mirza Mal Bhagwan Das v. Rameshar	...	827	"	"	536
Misri Lal v. Gopi Charan	...	114	1928	A	538
Muhammad Inayat Ali v. Emperor	...	892	1929	A	367
Muhammad Shafiq Ahmad v. Muhammad Mujtaba ...	...	30	1928	A	660
Murli v. Ghammar	...	61	1930	A	22
Musharraf Begam v. Sikandar Jahan Begam	...	40	1928	A	516
Nathu v. Babu Ram	...	758	1929	A	399
Naubat Lal v. Mahadeo Prasad	...	606	"	"	309
Paras Ram Singh v. Raj Kumar Singh	...	760	1929	A	498
Piare Lal v. Jhabba Lal	...	994	"	"	668
Pokhpal v. Lal Madho Ram	...	897	1930	A	302
Punjab Sugar Mills. Co. v. Lachhman Prasad ...		1046	"	"	77
Radhey Shiam v. Mewa Lal	...	506	1929	A	210
Rahim Bakhsh v. Bachcha Lal	...	509	"	"	214
Ram Autar v. Ghulam Dastgir	...	589	"	"	250
Ramdin Hazari Lal v. Mansaram Murlidhar... ...	...	1027	"	"	890
Rameshar Prasad v. Ghisiawan Prasad	...	820	"	"	531
Ram Gopal v. Tulshi Ram	FB	79	1928	A	641
Ram Kali v. Khamman Lal	...	1	"	"	422
Ram Kishun v. Lalta Singh	...	346	"	"	527
Ram Raj Tewari v. Sheoraj Saithwar	...	968	1929	A	663
Ram Saran Das v. Bhagwat Prasad	FB	411	"	"	53
Ram Sarup v. Ram Richhpal	...	920	"	"	621
Ram Sunder Lal v. Lachhmi Narain	PC	430	"	PC	143
Rikhab Kumar v. Trivedi & Co.	...	874	"	A	455
Risal Singh v. Baljit Singh	...	890	"	"	709
Rohan Lal v. Collector of Etah	...	765	"	"	525
Rukia v. Mewa Lal	...	63	1928	A	746
Rustam Khan v. Janki	...	101	"	"	467
Sahdeo v. Budhai	FB	853	1929	A	571
Sakina Begam v. Harnam Singh	...	971	"	"	618
Saraswati Trading Corporation, Ltd., *In the matter of* ...		406	1928	A	675
Secretary of State for India v. Alladin	...	291	"	"	735
Secretary of State for India v. Har Charan Das ...		845	1929	A	417
Secretary of State for India v. Murli Manohar ...		399	1928	A	670
Shib Chandra v. Lachmi Narain	PC	686	1929	PC	243
Shyam Lal v. Badri Prasad	...	1039	"	A	789
Skinner v. Naunihal Singh	PC	367	"	C	158
Suraj Mal v. Shankar	...	885	"	A	600

Names of Parties			I. L. R.	pp.	A. I. R.		pp.
Suraj Narain v. Sukhu Ahir	...	...	...	164	1928	A	440
Toshanpal Singh v. District Judge of Agra	...		...	386	1928	A	582
Udit Narayan Singh, Raja v. Mubarak Ali	...		... PC	359	1929	PC	75
Vakil of Azamgarh, *In the matter of*	...		... FB	76	1928	A	439
Wajid Ali Khan v. Puran Singh ...	...		... PC	267	1929	PC	58
Yudhishter Lal v. Fateh Singh ...	...		...	901	1929	A	721
Zalim Singh v. Raghunandan ...	...		...	604	1929	A	379

LIST OF CASES OVERRULED AND REVERSED 1929 ALLAHABAD

Abdul Jalil Khan v. Obedullah Khan, (1921) 43 All. 416=19 A.L.J. 227 =A. I. R. 1921 All. 165=62 I. C. 725.	Reversed in	A. I. R. 1929 P. C. 228.
Emperor v. Bhairon, (1927) 49 All. 240=25 A. L. J. 94=7 L. R. A. Cr. 183=A. I. R. 1927 All. 50=27 Cr. L. J 1116=97 I. C. 428.	Overruled in	A. I. R. 1929 All. 33 (F.B.).
Emperor v. Himayathullah, (1927) 49 All. 844=25 A. L. J. 679=8 A. I. Cr. R. 102=8 L. R. A. Cr. 106=A. I. R. 1927 All. 592=28 Cr. L. J. 567=102 I. C. 503.	„	A. I. R. 1929 All. 33 (F.B.).

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ALLAHABAD HIGH COURT

** A. I. R. 1929 Allahabad 1

MUKERJI AND KING, JJ.

Bhola Nath—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 306 of 1928, Decided on 12th July 1928, from an order of Sess. Judge, Bareilly, D/- 18th Feb. 1928.

*** * (a) Penal Code, S. 499 — (*Per Mukerji, J.*) To prove that certain words were defamatory, Court must be put in possession of actual words used and context in which they were used—Court cannot accept mere impression of witnesses** (*King, J. contra*).

Per Mukerji, J.,—Where the question arises as to whether the words used were intended to harm or had the effect of harming the reputation, the Court must be put in possession not only of the words used but also of the context in which they were used, in order to find the intention and the effect of the words. If the Court would accept instead of the words and the context, the "impression left on the minds of the witnesses" it will be yielding its duty to witnesses with the result that the accused person will have no benefit of the opinion of the Court itself : *Rainy* v. *Bravo*, (1872) 4 *P. C.* 287, *Rel. on.* [P 3 C 2]

(b) Criminal Trial — Evidence — Court should not supplement prosecution evidence by selecting passages from accused's statement corroborating prosecution evidence, and by rejecting others exonerating him—Criminal P. C., S. 342.

Per Mukerji, J.—If there be no sufficient evidence for the conviction or if from the vagueness of the prosecution evidence the Court is not prepared to act on it, it should not be open to the Court to supplement the prosecution evidence by selecting, out of the statement of the accused person, passages which might corroborate the prosecution evidence and to reject those passages which go to exonerate the accused person. [P 5 C 1]

(c) Penal Code, S. 499, Excep. 9—A European lady living with *S* as wife and subsequently marrying him—She making attempts to murder her husband—Her father-in-law making statements that she was insane and likely to cause danger to her husband and that she was 'man-mad'—Father-in-law was protected by Excep. 9, so far as 1st statement was concerned but not for his second statement regarding her immorality.

Wife of certain Mr. Thomson became an intimate friend of certain military officer *S*, Rajput by caste, while he was at Allahabad, and afterwards in the lifetime of her husband the two met secretly. On the death of Mr. Thomson the two met openly and began to live as husband and wife. One illegitimate child also was born. When the officer was posted at Quetta she too followed him there. Thereafter *S* was sent to Moradabad for his training, having been transferred to the political department. Then the two were married secretly. The head of the training institution having come to know that *S* was living with a European lady who was reputed not to be his wife pressed for disclosure of their relationship and the fact of marriage was at last disclosed. Thereupon *S* was reverted to regular military department. In the meantime the couple was not living a happy life and it was found that the wife had made several attempts either for suicide or for murder of her husband. The couple then went to Delhi where the father of *S* was living, and then again returned to Moradabad. The father of *S* then went to Moradabad and interviewed the head of the training institution and also the District Magistrate. During the interview he defamed wife of *S* firstly by saying that she was of unsound mind and, therefore, likely to murder her husband, and secondly that she was of loose moral character and the word used was a "man-mad". She then complained for defamation :

Held : that the first statement though defamatory was covered by Excep. 9 to S. 499 inasmuch as the statement was made in good faith and for the prosecution of his son's interest. While the second statement was not meant to serve any useful purpose and there was no justification for charging the complainant with sexual immorality. It did

not, therefore, come within the operation of Excep. 9. [P 7 C 1]

(d) Penal Code, S. 499, Excep. 9—Person claiming protection under this exception must have made imputation in good faith for protecting interest—Merely believing in good faith that imputation is for protection of interest of himself or of some one else is not covered by the exception.

Exception 9, S. 499 only means that a man who makes an imputation in good faith and makes that imputation for the protection of the interest of himself or of any other person is outside the operation of S. 499, I. P. C. There is no justification for reading the exception as meaning that if the person making the imputation believes in good faith that he has been acting for the protection of the interest of himself or any other person, he is not liable : 3 *All.* 815, *Appr.* [P 8 C 1]

Motilal Nehru and *Nehal Chand*—for Appellant.

Sailanath Mukerji and *Surendra Nath Varma*—for Respondent.

Mukerji, J. — The appellant, Col. Bholanath, has been convicted of the offence of defamation under S. 500, I. P. C., and has been sentenced to pay a fine of Rs. 500. The prosecution was started on two complaints filed by his own daughter-in-law, Mrs. Bishesharnath, in the following circumstances. The complainant was married to one Mr. Thomson, a well-known and wealthy manufacturer of tiles etc. carrying on business at Allahabad and Cawnpore. She came to be introduced to the family of the appellant, while he was stationed at Allahabad, and there, at Allahabad, she met the son of the appellant, Lt. Bishesharnath. According to the complaint filed on 26th June 1927 (the first complaint) the complainant and Bisheshernath grew to be intimate friends. Mr. Thomson removed to Cawnpore permanently and then the complainant and Bishesharnath often met secretly. On the death of Mr. Thomson the parties met openly, and according to the complainant herself the two began to live as husband and wife from December 1924. Bisheshar Nath was posted to Quetta, and, at his request, the complainant went to live with him there, with her illegitimate baby, of whom Bishesharnath was the father. The baby died in Quetta, and thereafter Bishesharnath was sent to Moradabad for his training, having been transferred to the Political Department. The complainant lived with Bishesharnath there and passed for a friend of Bishesharnath's mother. The Roman Catholic priest at Moradabad to whom the complainant used to pay visits deprecated her living with Bisheshar-nath without her being married to him. Bishesharnath changed his religion, and adopted the Roman Catholic Christian faith. Then, the two were married, secretly, at Moradabad in August 1926. The fact of the marriage was kept secret, the reason being, according to the complainant this. It was feared that the disclosure of the fact of the marriage would affect adversely the employment of Bishesharnath in the Political Department. It is, however, a fact that according to either a will or a deed executed by the late Mr. Thomson, his widow could enjoy the income of the estate, amounting to Rs. 4000 to 6000 a month, for her life, subject to loss of the income, on remarriage. The marriage was kept secret, and the income from the estate of Mr. Thomson was enjoyed by the complainant. In December 1926 Mr. Stewart, I. C. S., the head of the Training Institution, having come to know that Bishesharnath was living with a European lady, who was reputed not to be his wife, pressed Bishesharnath to disclose the nature of relationship that existed between the two. In spite of further attempts at concealment, the fact of the marriage was disclosed in December 1926. On 14th March 1926, a telegram was received from the Government, by the Training College authorities, directing the reversion of Bishesharnath to the regular Military Department. This seems to have upset him considerably. Frantic efforts were made by him to obtain intercession of friends and high officers.

The appellant and his son were not on good terms, yet Bishesharnath and his wife went to Delhi, where Bisheshar-nath's father was, in order to see him. This was on or about 19th March 1927. There, at Delhi, Bishesharnath obtained an interview with the Viceroy, but nothing came out of it. The couple then returned to Moradabad. On 27th March 1927, Col. Bholanath arrived at Moradabad, and stopped at the dak bungalow. The previous day he had wired to Mr. Abu Mohammad, an officer of the Provincial Service, who was then in charge of the Training Institution, Mr. Stewart having, in the meantime, left Moradabad, on leave. Mr. Abu Mohammad brought Col. Bholanath to his own house, and sent for

Bishesharnath. The latter and his wife both came. They had a talk with Mr. Abu Mohammad, and they left. Mr. Abu Mohammad then took the appellant to the house of Mr. Collett, the District Magistrate. Col. Bholanath had some talk with him, and then on his way back to the house of Mr. Abu Mohammad Col. Bholanath saw the Superintendent of Police Mr. Field and then left for Delhi the next day.

It is said for the prosecution that during his interview with Mr. Abu Mohammad and Mr. Collett the appellant defamed the complainant by stating that she was of unsound mind and likely to murder her husband, that she was of loose character, 'man-mad' and had a very bad reputation for being immoral at Cawnpore and at Allahabad.

It is on these two charges that the prosecution was based. For the prosecution Mr. A. P. Collett and Mr. Abu Mohammad and a few more witnesses were examined, as also the complainant. The appellant made his statement before the Committing Magistrate and the Sessions Judge. He examined two witnesses.

The learned Sessions Judge found that the prosecution witnesses failed to give the exact words, which, it is said, defamed the complainant. This, he thought, did not affect the prosecution, adversely, because, he thought, Col. Bholanath

"to all intents and purposes, admitted the offences with which he had been charged."

Then the learned Judge discussed the statement of the appellant and arrived at the conclusion that Col. Bholanath did make a statement as to the want of sanity of the complainant to the extent of alleging that his son's life was not safe at her hands. Then the Judge expressed his belief that the statement was made "in good faith" but not within the meaning of the definition of that expression as given in the Indian Penal Code, that he acted on the statement of his son and that he was not justified in doing so, without further inquiry. The Judge accordingly convicted the appellant on the first count.

On the second count the learned Judge found that whatever might be the character of the complainant, the imputation after the marriage, could serve nobody's purpose and the information given to Messrs. Collett and Abu Mohammad brought the appellant outside Excep. 9, S. 499, I. P. C.

While I am not prepared to lay down, as a universal proposition, that in no case where the actual words used have not been proved, a conviction for defamation, by word of mouth, cannot be maintained, it must be conceded that in majority of cases it should be so. Defamation is defined as follows :

"Whoever by words ..... makes or publishes any imputation concerning any person intended to harm, or knowing or having reason to believe that some such imputation will harm, the reputation ..... is said ..... to defame that person."

When the question arises as to whether the words used were intended to harm or had the effect of harming the reputation, the Court must be put in possession not only of the words used, but also of the context in which they were used, in order to find the intention and the effect of the words. If the Court should accept, instead of the words and the context, the "impression" (of the words used, and of the general conversation) "left on the minds of the witness", it will be yielding its own duty to witnesses with the result that the accused person will have no benefit of the opinion of the Court itself. The observations of their Lordships of the Privy Council, in the case of *Rainy* v. *Bravo* (1), at p. 295 and subsequent pages are highly relevant to this case. In the case itself, a retrial was ordered on the ground that the principal witness Metzer, attempted to state the words used in the note destroyed (containing the libel), and not merely his impression of the purport.

In this particular case, it will be remembered, the conversation between the appellant and the two witnesses took place on 27th March 1927. No record of the conversation was made at the time, nay, no notes were ever made. None of the witnesses say that they made an entry of the substance of the conversation in their diary. The witnesses were examined on 19th July 1927, some 4 months after the conversation. It would, therefore, be difficult for the witnesses to give any coherent and cogent narrative of the interview. Let us compare the evidence actually given by the two witnesses whose honesty and independence is above suspicion.

(1) [1872] 4 P. C. 287 = 20 W. R. 873 = 27 L. T. 249.

Mr. Collett's statement, in the examination-in-chief, is very short. The reason evidently is that he did not remember, as he himself says, most of the conversation that passed between him and the appellant. In his examination-in-chief he said :

"He (the appellant) said she (the complainant) was not in her senses or words to that effect and spoke of her as a woman of loose character."

In cross-examination he said, "that was the purport of his conversation." He could not give the sequence of the conversation, what preceded and what followed these statements. After this I may safely say that his evidence affords little assistance to the Court. That Mr. Collett has a poor recollection of what passed in the interview will be clear from the following facts. Col. Bholanath's whole case is that he was anxious for the safety of his son at the hands of his wife, and that was why he sought assistance of the witnesses Messrs. Abu Mohammad and Collett, the authorities at the place, although they were utter strangers to him. While he said that that was the object of his visit and while Mr. Abu Mohammad supports him on this point, Mr. Collett has not the slightest recollection, on this important subject. He says,

"I cannot say whether he (the appellant) was anxious for his son's safety."

According to Mr. Abu Mohammad when the appellant saw, at the witness' request, Mr. Collett, he (the appellant)

"repeated almost the same allegations against the complainant and said he was anxious about his son's safety."

As to the complainant's moral character, Mr. Collett simply remembers that Col. Bholanath mentioned her as a woman of loose character. He, however, has a definite recollection that Col. Bholanath mentioned that his son had been living with the complainant before their marriage. The complainant, however, charges the appellant with having said something more or less definite and mre serious.

Coming to Mr. Abu Mohammad, the witness says not a word about the appellant having spoken to him about the mental condition of his daughter-in-law. On the other hand, he says that he does no remember that the appellant ever mentioned that the complainant was insane. As to her moral character Mr. Abu Mohammad certainly gives his own impression of the interview and not the words used, except the word "man-mad" as having been used by the appellant. The witness does say that he understood Col. Bholanath as having said that the complainant was of a bad character and that her bad character was wellknown at Cawnpore and at Allahabad. We have to remember that the second complaint, which complained of the attack said to have been made on her character was filed on 28th October 1927 after the complainant had seen Mr. Abu Mohammad at Bijnor. It was on an information supplied by the witness himself, several months after the occurrence that the complaint is based. In the circumstances, it would be unsafe to base a conviction on the unaided memory of the witness.

I am of opinion that there was ample justification for the Court below for discarding the prosecution evidence and for considering whether there were sufficient materials on the admission of the appellant to justify a conviction.

This brings me to a consideration of the law relating to the statement of the accused person, viz,, how far it can be used against him.

It is established law that when a previous statement of a party is put into the evidence against him, as an admission made by him, you must tender into evidence the whole of it, including the portion which goes in his favour. In order to understand what the person meant, you must consider the whole of that statement. This will not preclude you from finding, on the basis of evidence on the record, how far the statement is correct and how far it is untrue ; see Phipson's Manual of Evidence, 3rd edn. p. 79. The same principle will apply where the statement is made in the course of the trial, whether it be a civil or criminal trial. I need hardly point out that the statement under discussion, is not the same thing as a "deposition" given in the case, by a party, for the purpose of furnishing evidence in it. Such being the genral law, let us consider the law as laid down by the Criminal Procedure Code as regards the statement of an accused person.

There is no provision, in the Indian law, by which an accused person may give his sworn testimony in support of

his case. Indeed, the S. 342, Criminal P. C. prohibits the swearing of an accused person. The purpose and use of the examination of the accused person is laid down in the Criminal Procedure Code and no one has a right to travel outside it. The rule says that the accused person may be questioned, from time to time, by the Court, during the progress of the inquiry or trial for the purpose of enabling him to explain the circumstances appearing in the evidence against him. It further lays down that, for the same purpose, the Court shall examine him after the evidence for the prosecution has been closed. It is clear that the examination of the accused person is not meant to supply any deficiency that there may exist in the prosecution evidence.

As to the use of the statement the S. 342 simply says the Court, "may take the same into consideration." This is purposely wide. The Court is invited to come to the proper conclusion by taking into consideration not only the evidence adduced for the prosecution and defence (if any) but also the statement of the accused person. If the statement of the accused person satisfactorily explains the prosecution evidence, there can be no conviction. If the statement as also the defence evidence (if any) do not rebut the prosecution evidence, and the Court feels justified in acting on the latter, it will convict. It is clear and follows from what has gone before that, if there be no sufficient evidence for the conviction, or, if from the vagueness of the prosecution evidence, the Court is not prepared to act on it, it should not be open to the Court to supplement the prosecution evidence by selecting, out of the statement of the accused person, passages, which might corroborate the prosecution evidence and to reject those passages, which go to exonerate the accused person. Cases on the principle enunciated above are numerous and the following may be usefully read : *King-Emperor* v. *Bhutanath Ghosh* (2) *Abibullah Ravuthan, In re* (3) and the cases cited there.

If, on the whole of the statement of the accused person, taken together, his guilt is established, and his plea, say, of acting in self-defence or of the case falling within any of the general or special exceptions are not made out on the facts admitted, there cannot be any bar to a conviction, simply because the prosecution evidence, by itself, would not have secured a conviction. Let us take this example :

A is charged with murder. The prosecution evidence is vague and not conclusive. *A* on being questioned makes the following statement :.

"The deceased, two days before the murder, insulted me, in open market, by abusing me and by beating me with a shoe. On the day of occurrence, I found him returning to his house alone and I struck him with a lathi, he fell from the high ground on which he stood and thereby broke his head."

The medical evidence, let us suppose, points to only one lathi blow on the back of the deceased and is consistent with the accused's statement. Can the accused person be convicted of murder ? Let us assume, there is no eye-witness worthy of belief and the Court is bound to disbelieve the witnesses. I suppose it would be impossible to convict *A* of murder. But *A* may surely be held guilty of causing simple hurt, on his own statement. He has nothing to complain of, if his whole statement be accepted and he is convicted on it. He need not have made a statement, but having made one, he may be held guilty, on it.

In this view of the law, I proceed to examine the statement of the appellant.

The appellant was examined by the Committing Magistrate on 22nd December 1927. He was again examined before the Court of Session. On 22nd December 1927, the appellant stated that he never described the complainant as a woman of unsound or unbalanced mind, that he did say that his son's life was in danger at her hands, and that he criticized the moral character of the complainant adversely, but only in so far as it affected him and his family. He denied that he used the words "man-mad."

So far as the complaint is that the appellant stated that the complainant was insane, fit for a lunatic asylum, we have already shown that the exact words used are not known. Mr. Collett. gives only his "impression," and Mr. Abu Mohammad does not remember anything like that as having been mentioned before him. The appellant denies that he ever made any such statement. In the cir-

(2) [1908] 7 C. W. N. 345.
(3) [1916] 39 Mad. 770=2 M. L. W. 939=30 I. C. 447=(1915) M. W. N. 413.

cumstances there can be no conviction for defamation on the ground that the appellant called the complainant as a woman of unsound mind, etc.

The second imputation, which is really connected with the earlier charge of having called the complainant of unsound mind, is that the life of her husband was not safe in the hands of the complainant, and that she was likely to murder her husband. For this, there is ample reason to suppose that the appellant believed in good faith that such was the case. In bringing this matter before the two witnesses Messrs. Abu Mohammad and Collett the appellant acted in the protection of his son's interest, and therefore did not commit the offence of defamation.

The complainant would make us believe that before the telegram arrived on 14th March 1927, reverting her husband to the military career and before she and her husband went to Delhi on 19th or 20th March she and her husband were on the best of terms. This is not true. Her suggestion that it was the parents of her husband, who alienated her husband's affection from her, is not true. Bisheshar Nath has not given his evidence, and we cannot expect others to know much about the domestic affairs of the complainant and her husband. Still there is ample material on the record to establish that the complainant's story about her and her husband's living a peaceful and happy life is not true. The complainant and her husband returned from Delhi on 20th March or thereabout, and the latter left the former, finally, on 12th April. According to the complainant the trouble arose between the two dates, and the final separation came on 12th April. Let us see if it is so. According to the appellant, when his son visited Delhi on or about 20th March 1927, Bisheshar Nath told him that he and his wife had been living a " cat and dog life. " This statement receives support from several sources. The complainant herself says :

" My husband's behaviour between January and March 1927 almost killed me."

If this was so, it is not right and true that Bishesharnath and his wife were living happily till their visit to Delhi on 19th March or 20th March 1927. Mr. Collett says that at one time he gave advice to the complainant to go to Cawnpore and she did go. From Cawnpore she brought a nurse or an old servant, and Mr. Collett told Bishesharnath that as there was then a third party, it would be easier for them to live together. According to the complainant he did not go to Cawnpore, after 20th March 1927, till 13th April, the day after her husband had left her. Thereafter, she and her husband did not live together. It follows, the incident, Mr. Collett speaks of, must have taken place before 19th March. Further, Mr. Collett tells us that before Col. Bholanath saw him, Mr. Beatty, the District Judge, came to him and told him that there was a row at the house of the complainant, and Mr. Collett understood, from what Mr. Beatty told him, that the row was because either the complainant was going to commit suicide or was going to murder her husband. Again, Mr. Collett says, he wrote one or two letters to Mr. Shakespeare (said to be a son-in-law of the complainant) about the affairs of the complainant and her husband, and Mr. Shakespeare wrote back that the officials at Moradabad were interfering too much in the matter. This would go to show that the trouble between the complainant and her husband was of a longer standing than the former would make out. Lastly, Col. Bholanath says that his son told him that the complainant had once borrowed a razor from a barbar. The complainant admits that she did borrow one, but she says that she did so later, in April 1927. If so, how could the appellant come to know of the episode of the razor from his son on or about 19th March ? There cannot be any manner of doubt that about 19th March 1927 the couple were living a very unhappy life and Bishesharnath did tell his father that he apprehended danger to his life.

The learned Sessions Judge thinks that Col. Bholanath should not have believed Bishesharnath for he was an undutiful son. Bishesharnath fell into the bad graces of his father owing to his intimacy with the complainant, and, if it was against her that he was then complaining there would be every reason for Col. Bholanath to accept his son's story as true. We have already shown that Bishesharnath's story about the unhappy life was, as a matter of fact, true. Thereafter, the appellant learnt from his bearer that while at Delhi, the complainant has tried to purchase a revolver. This fact is

now admitted and the explanation of the complainant that the husband wanted the revolver is untrustworthy. Col. Bholanath says that his wife was entirely upset, and this fact is amply proved by the incident that Col. Bholanath made an inquiry and found that the story of the attempt at purchase of a revolver was true. He made a report to the police-station. The report is on the record and is Ex. F. It was made on 22nd March 1927. In it, Col. Bholanath stated that the complainant, on account of her bad temper, had several times threatened to kill his son. The man who took down the report states, in cross-examination, that the appellant was at the time of making the report "much disturbed". Thereafter Col. Bholanath saw Mr. Stewart, who was then at Delhi, on his way home. Mr. Stewart told him that he did not see his son when leaving Moradabad. He (Mr. Stewart) then wired to Moradabad inquiring if Bishesharnath was there. No reply having been received from Moradabad, Col. Bholanath wired to Mr. Abu Mohammad that he was leaving for Moradabad. All this is ample evidence of honest behaviour and good faith on the part of Col. Bholanath. No further inquiry was needed ; see *Abdul Hakim* v. *Tej Chander* (4).

Col. Bholanath's anxiety was only to take away his son from his wife and to place him out of danger. If this was so he was bound to tell Mr. Abu Mohammad, the head of the institution in which the son was being trained and to tell the District Magisrate all his fears and to seek his and Mr. Abu Mohammad's aid. At about the end of his cross-examination, Mr. Collett realized and admitted that the visit of the appellant to him could have been only as a District Magistrate, and not as a mere third party. Col. Bholanath's visit to the Superintendent of Police points to the same conclusion. The imputation complained of, in the circumstances, namely the life of Bishesharnath was not safe in the hands of his wife, was amply protected by Excep. 9, to S. 499, I. P. C.

Next comes, what is, virtually, the second charge. The complaint is that the appellant told the witnesses Messrs. Collet and Abu Mohammad that the complainant was of loose character, "man-mad" and had very bad reputation for being immoral at Cawnpore and at Allahabad. Col. Bholanath states :

"I criticized the complainant's character so far as such character affected me adversely as a father-in-law. What I said was that we were Rajputs, whose chief pride was that we never mixed our blood. That I belonged to the old school and that I did not approve of mixed marriages, that the complainant was older than my son, that she had been married twice before and had two lots of children, the eldest of whom was that older than my boy, that she had lived in adultery with my son during the lifetime of her second husband, the late Mr. Thomson and in open immorality at Allahabad, Cawnpore and Quetta with my son. That a woman of that character cannot be tolerated in a Rajput and Hindu family as a daughter-in-law. I made these remarks as this affected me adversely as a father-in-law, and as far as it affected my son and my family generally".

This statement there can be no doubt, is a clear and honest statement of what was actually said by the appellant to the witnesses Messrs. Abu Mohammad and Collett. This speaks before the Court a good deal more than the witnesses could possibly do from their memory. Undoubtedly, the statement made by Col. Bholanath to the witnesses was a defamatory statement and came within the purview of S. 499, I.P.C.

If the case came within any of the Exceptions of the S. 499, I.P.C., it would be for the appellant to show that it did come. No doubt if the evidence for the prosecution afforded any assistance to the appellant, in proving that he came within one of the exceptions to S. 499, he was welcome to take advantage of any such evidence. Their is, however, not much to be found in the prosecution evidence which can be of assistance to the appellant.

It was argued on behalf of the appellant by Pandit Moti Lal Nehru that the statement came within the Exception. 9 to S. 499, I. P. C., and he asked us to read the exception as bearing the following meaning. An imputation which would be otherwise defamatory would not be defamation if it was made in good faith, and the person making the imputation believed that he was making it for the protection of his own interest or the interest of any other person. He referred to S. 79, I. P. C., as supporting his argument. I have considered the point carefully, and I am of opinion that the contention is not sound.

The expression "good faith" is defined in S. 52, I. P. C., as follows :

"Nothing is said to be done or believed in good faith which is done or believed without due care and attention."

(4) [1881] 3 All. 815=(1881) A. W. N. 81.

It will be noticed that the expression "good faith" can be used both in connexion with something 'done' and in connexion with something 'believed.' For example in S. 300, Excep. 3, the expression "good faith" has been used in connexion with a belief. The expression is found in Excep. 9, in connexion with an 'act'. Further, the expression "good faith" has been used only once. I can, therefore, read the Excep. 9, as meaning only this, that a man who makes an imputation in good faith and makes that imputation for the protection of the interest of himself or any other person is outside the operation of S. 499, I. P. C. There is no justification, in my opinion,for reading the Exception as meaning that if the person making the imputation believes in good faith that he has been acting for the protection of the interest of himself or any other person, he is not liable. It will be a question of law, and not of fact for decision, in a particular case, by the Court, whether the man making the imputation in good faith was or was not acting for the protection of the interest of himself or any other person. This view in no way militates against the view taken in the case in *Abdul Hakim* v. *Tej Chander* (4), cited above.

That being my reading of the law, the question is whether Col. Bholanath had any interest of himself or of his son to protect, in making the imputation against the complainant. It will be noticed that Col. Bholanath himself gives no explanation as to the circumstances in which he made the imputation, quoted at length above. In the statement of Mr. Abu Mohammad, we have got a single sentence, which might or might not furnish us with a clue as to what led Col. Bholanath to make the imputation. Mr Abu Mohammad says :

"It was to justify this refusal that he attacked her character."

The refusal referred to was as to Mrs. Bishesharnath being received by the appellant as his daughter-in-law. It may be that there was some suggestion on behalf of the witnesses Messrs. Collett and Abu Mohommad or of one of them that the appellant should accept the complainant as his doughter-in-law, the marriage being a hard fact. Or it may be that Col. Bholanath, in stating how he was afraid of the complainant's possible violence towards her husband, could not restrain himself and came out with a story as to the complainant's past life. If we take the most charitable view of the appellant's case (as to which, however, there is no evidence) the appellant gave out the past history or supposed past history of the complainant's life to satisfy what must be taken as idle curiosities of the witnesses, Messrs. Collett and Abu Mohammad. It was enough to tell those gentlemen that the appellant's son's life was in danger at the complainant's hand. The alleged past history of the complainant's life could not, in any way, justify a conclusion that she was of a violent temperament, and it was unsafe for Bishesharnath to live with her. As it turns out, the imputation made by the appellant served nobody's purpose, and the appellant is not entitled to come within Excep. 9, S. 499, Penal Code.

The result of my deliberations, therefore, is that while the first charge cannot be sustained, the second charge cannot be refuted.

Like the learned Session Judge, who tried the case, I have every sympathy for Col. Bholanath, in his distress, but I have to administer the law, and he has, certainly, been found having done something which the law did not permit him to do.

For the appellant, his counsel has not urged anything about the sentence. The reason is perfectly clear. The appellant cares little for the amount of fine inflicted on him. What he cares for is a conviction. Having regard, however, to the circumstances of the case, and to the fact, that on one of the two counts the appellant has been acquitted, I think it right and proper, though unasked, to reduce the sentence to the sum of Rs. 250.

King, J.—I concur in the proposed, order, which is the outcome of our previous consultations, but consider it desirable to state my reasons independently.

The accused is charged with having made certain defamatory statements to Mr. Collett, the District Magistrate and to Khan Bahadur Syed Abu Mohammad, Deputy Collector, on 27th March 1927. It is convenient to split up the charge into two separate parts or charges.

The first charge is that the accused stated that the complainant was of unsound mind and likely to murder her husband. If the accused spoke of the complainant as a lunatic with homicidal ten-

dencies, his remarks were obviously highly defamatory.

There is no evidence that the accused described the complainant as positively insane in the sense of being a fit subject for detention in a lunatic asylum. The accused never suggested that any action should be taken against her under the Indian Lunacy Act. Mr. Collett deposes briefly, without any amplification or explanatory details, that the accused stated that the lady was "not in her senses." The accused admits making this statement and explains that in referring to the lady's eccentric conduct in jumping into a river, and trying to buy a revolver, and so forth, he stated that this was not the conduct of a woman in her senses. I am prepared to accept this explanation, as Syed Abu Mohammad who was present at the interview, deposes that he has no recollection of any allegation of insanity against the lady. Evidently the accused made no imputation of insanity in sufficiently definite terms to justify a conviction for defamation on that ground alone. He did, however, mention that the lady had on certain occasions behaved like a person out of her senses, so much so that he feared that his son's life was in danger at her hands.

I may here remark that in my opinion it is unnecessary to prove the exact words used by the accused for the purpose of supporting a conviction for oral defamation. It is sufficient to prove the purport or substance of the defamatory imputations. No honest witness would profess to remember the exact words used by a person who has been speaking for even 15 minutes. At the most he may remember some striking phrase or expression. But a witness' failure to recall the exact words used, or the exact context in which they were spoken, is immaterial, provided that he can give a sufficiently clear account of the purport of the defamatory remarks. Although the learned counsel for the appellant argued that no conviction could be sustained unless the exact words were proved, he was unable to quote any authority for his proposition, and I am not prepared to accept it. English rulings on the English law of libel seem beside the point when the task before us is to apply the provisions of S. 499, I. P. C., to a case of alleged defamation by spoken words.

The next question is whether the accused represented that the lady was likely to murder her husband. According to Syed Abu Mohemmad the accused stated that he was anxious about his son's safety, and that the complainant was "a dangerous woman," and it was a source of great anxiety to his parents that Bisheshar Nath should continue to live with her. The accused represented the dangerous position his son was in, and requested Mr. Collett's help as District Magistrate. Mr. Collett does not remember whether the accused said that the complainant was likely to commit murder or suicide or whether the accused was anxious about his son's safety, but says that the accused came to see him in his capacity as District Magistrate. In view of the explanations given by the accused it is clear that Mr. Collett's memory is at fault, and that Syed Abu Mohammad is right in stating that the accused represented that the complainant was a dangerous woman and that he was anxious for his son's safety if he continued to live with the complainant. The accused frankly admits :

"I did say to Mr. Collect that my son's life was in danger at the complaint's hands. The reason I went to Mr. Collect was that I feared for my son's safety, and I must have made some statement of that kind though I do not remember the exact words."

The accused explains that he had good reason to fear for his son's safety. His son saw him at Delhi on 20th March 1927, and stated that he and the complainant had been leading 'a cat and dog life' for some time, and he was always in fear of some sort of violence at her hands. He mentioned that the lady had tried to throw herself into a river at Moradabad. He also mentioned that she had roused his suspicions by getting possession of a razor. After hearing all this, the accused got information that the complainant had tried to buy a revolver from Manton's at Delhi. He verified this fact by personal inquiry at Manton's establishment. Then for the first time he became seriously alarmed. He made a report at the police station on 22nd March that the complainant had several times threatened to kill his son, and that she had tried to buy a revolver from Manton's. His son and the complainant had meanwhile returned to Moradabad, but the accused failed to get any news of his son for several days. Even a reply paid telegram failed to bring an answer. The accused and his wife

were by this time in a state of frantic anxiety about their son's safety, and on 26th March the accused went to Moradabad, and on the following day he poured forth his worries and apprehensions firstly to the Khan Bahadur and then to Mr. Collett, the District Magistrate.

I believe this explanation to be substantially correct. Bisheshar Nath made similar statements about his wife's eccentric and suspicious behaviour, and about his fears for his own safety, both to Mr. Collett and to the Khan Bahadur. It is certain that the accused was genuinely anxious for his son's safety and that was the reason why he approached the District Magistrate. The learned Sessions Judge also accepts this view but holds that the accused did not make the imputations against the complainant "in good faith" (in the technical sense of those words), because he should not have acted upon information given by his son without verification.

I think this is putting an unreasonably strict interpretation upon the requirements of "good faith." Bishesharnath had no doubt tried to conceal his immoral connexion and subsequent marriage with the complainant from his father. He is no George Washington but after all he is a commissioned officer, and I do not understand why his father should be expected to disbelieve every word he says. Evidently he had convinced his father that his life was in some danger. But it was the complainant's attempted purchase of the revolver that brought things to a climax. The accused verified this fact for himself and took it as a striking confirmation of his darkest suspicions. In all the circumstances was his belief unreasonable? I am not at all satisfied with the complainant's explanation of the revolver incident. When an officer wants a service revolver he would not usually ask his wife, who is utterly ignorant of fire-arms, to write and order it. Without Bishesharnath's evidence this point cannot be cleared up, but I am doubtful whether the complainant did not try to get a revolver on her own account. The complainant is shown to be liable to outbursts of hysterical excitement. Mr. Beatty speaks of seeing her in a state of great excitement and talking incoherently, and the Khan Bahadur describes her as "not of unsound mind but excitable." She had a miscarriage in March 1927 which may have affected her mental condition at about that time. The morbid sentimentality which she displayed with regard to this miscarriage suggests a temporary loss of mental balance. If a woman in that state of mind tries to get possession of a revolver one might reasonably fear that she is contemplating some desperate act of violence.

The mere fact that the accused interviewed the head of the training school, and the District Magistrate, and the Superintendent of Police at Moradabad raises an inference of his sincerity and his genuine fear for his son's safety. He undoubtedly made the imputation, which we are now considering, for the protection of his interests and his son's interests.

If one puts a very strict construction upon "good faith," one might well hold that Father Jucundus and Mr. Beatty were also guilty of defamation. Father Jucundus had been present at some quarrel between Bisheshar Nath and his wife and was so frightened that he rushed to implore Mr. Beatty's help, representing that Bisheshar Nath's murder at his wife's hands was imminent. Mr. Beatty went and told Mr. Collett as District Magistrate that the complainant was reported to be likely to murder her husband. No one doubts that Father Jucundus and Mr. Beatty acted honestly and for the sole purpose of averting an anticipated murder. But did they act "with due care and attention?" Did not Father Jucundus at least act somewhat precipitately? One must not exact a standard of caution and attention higher than could be reasonably expected of an average person placed in the same situation.

Having regard to all the facts of this case I hold that the accused did state that the complainant was likely to murder her husband, or words to that effect, but the accused is entitled to the protection of Excep. 9, S. 499.

Lastly we have to consider the second charge, namely the imputation that the complainant was of loose character, "manmad" and had a very bad reputation for being immoral at Cawnpore and Allahabad.

Mr. Collett says the accused spoke of the lady as a woman of loose character and mentioned that his son had been living with her before their marriage. The Khan Bahadur deposes that the

accused spoke of her as a woman of a very bad character and stated that she was wellknown for her bad reputation in Cawnpore and Allahabad. The accused certainly called her "man-mad". I take this expression as a popular rendering of the technical term nymphomaniac.

The accused admits stating that the lady had lived in adultery with his son during the lifetime of her second husband and in open immorality with him at Allahabad, Cawnpore and Quetta. He does not admit that he called her "man-mad" or that he charged her with immoral conduct with other men.

I have no hesitation in accepting the Khan Bahadur's evidence that the accused used the expression "man-mad". It is a very unusual expression, and that is probably the reason why the witness remembered it.

The charge is, therefore, proved and partly admitted. There is no clear proof that the accused spoke of the complainant's misconduct with men other than Bisheshar Nath. So we must take it that he referred only to her ante-nuptial misconduct with his son although the expression "man-mad" would seem to have a wider significance, and the defence made an ill-advised attempt to prove the complainant's misconduct with other men.

The complainant denies adultery with Bishesharnath during Mr. Thomson's lifetime, although they were admittedly intimate friends and she admittedly behaved in a manner likely to rouse suspicion. Soon after Mr. Thomson's death in 1924, the couple admittedly lived as husband and wife, and she bore at least one illegitimate child to him although they were not married until August 1926 when the complainant behaved in this way. I do not think she had much cause for complaint if her father-in-law told the District Magistrate the truth about her i. e. that she was guilty of ante-nuptial misconduct with her husband. Although the statement is defamatory, its publication would at the most, amount only to a very petty offence. The expression "man-mad" however, is highly defamatory, and this greately aggravates the offence.

I agree with my learned brother that the accused cannot claim the benefit of Excep. 9, with reference to this charge. The accused, when speaking to the District Magistrate, had no justification for charging the complainant with sexual immorality. The District Magistrate could only take action for the purpose of averting an apprehended murder or suicide. For that purpose he might use his influence to effect a temporary separation between husband and wife. From the District Magistrate's point of view it was quite irrelevant whether the complainant was sexually moral or immoral. The imputation of immorality cannot be held to have been made for the protection of any one's interest. The conviction on the second charge must, therefore, be upheld. I agree that a fine of Rs. 250 will meet the case.

Although my learned brother and I have arrived at the same conclusion, we have done so on somewhat different grounds, and for that reason I have thought it necessary to write a separate judgment.

He holds that

> "there was ample justification for the Court below for discarding the prosecution evidence and for considering whether there were sufficient materials on the admission of the appellant to justify a conviction."

I must respectfully dissent from this view since in my opinion the prosecution evidence established a prima facie case on both charges.

If the prosecution evidence is to be discarded, as not making out even a prima facie case, then I am doubtful whether the appellant could be rightly convicted merely on his own admissions, as my learned brother seems to have done. He laid emphasis on the well-known statutory provision that an accused person should only be questioned for the purpose of enabling him to explain any circumstances appearing in the evidence against him. But if the prosecution evidence is discarded as worthless, then there was no justification for questioning him at all. There was nothing calling for an explanation. I quite agree that

> "the examination of an accused person is not meant to supply any deficiency that may exist in the prosecution evidence".

Bearing this in mind, I have not been able to follow the line of reasoning adopted by my learned brother in finding both charges proved, merely on the strength of admissions elicited by questions which, ex hypothesi, should never have been put to the accused. The ruling in *Abibullah Ravuthan, In re* (3), which he has cited seems to be an authority for holding that a conviction based on such grounds would

not be justified. Nevertheless he agrees in acquitting on the first charge, not because the defamatory satements are not proved, but because they are covered by Excep. 9. He agrees in convicting on the second charge because the defamatory statements are proved and are not covered by Excep. 9. I may remark that I accept his interpretation of that exception.

The appellant's case was argued before us for about two days by a most able and eminent counsel, yet he made no suggestion that any questions had been improperly put to the accused on the ground that there was no prima facie case for him to answer. In my opinion there would have been no justification for making such a suggestion.

Regarding the use which is to be made of the statement of an accused person in Court, I think it is difficult to make any useful general observations. Due consideration must of course be given to every part of the statement, but the Court must exercise its judgment and common sense in accepting or rejecting any part of the statement as true or untrue.

S.N./R.K. *Order accordingly.*

** A. I. R. 1929 Allahabad 12

SEN AND WEIR, JJ.

Kalyan Das—Plaintiff—Appellant.

v.

Jan Bibi and *another*—Defendants—Respondents.

Second Appeal No. 151 of 1926, Decided on 8th August 1928, from a decree of District Judge,, Benares, D/- 28th March 1925.

**** Transfer of Property Act, S. 51—Prior simple mortgage — Property subsequently sold — Purchaser a bona fide one without notice of mortgage—Purchaser rebuilding and improving property which was in ruinous condition—In suit by mortgagee for sale of property, purchaser is entitled to claim expenses of improvements though not under S. 51 still on equitable principles.**

The Transfer of Property Act is not exhaustive and does not exclude any equitable principle such as may regulate the rights and liabilities of the parties in a case not specially provided by the legislature. [P 14 C 2]

One *F* mortgaged his property (a katcha house in a dilapidated condition) to one *K* in August 1914. It was subsequently mortgaged to *A*. In *A's* deed there was no mention of *K's* mortgage. In 1915 after *F's* death, his sons sold the house to *J*. *J's* deed also made no mention of *K's* mortgage. *J* took with his sale-deed all previous title-deeds of *F* and *A's* mortgage. *K's* mortgage deed was not delivered. *J* subsequently rebuilt the house, which was in a collapsed condition at an expense of Rs. 800. In 1925 *K* brought a suit on his mortgage. *J*, who was also made a defendant, contended that under S. 51, T. P. Act, the house could not be sold without paying him Rs. 800.

Held: that *J* not being a person evicted and *K* as prior simple mortgagee, having only a right to sell the property for the recovery of his mortgage dues, not being a person having a better title, S. 51 did not in terms apply, but the rule of equity upon which S. 51 is based should be extended to the case of *J* and upon that basis the house should be sold conditionally on payment of Rs. 800 to *J*. [P 14 C 2]

Peary Lal Banerji—for Appellant.

Kailas Nath Katju—for Respondents.

Sen, J.—This is a plaintiff's appeal which arises out of a suit for recovery of Rs. 1,080 by enforcement of a mortgage, dated 28th August 1914, executed by one Faqire Lohar in favour of the appellant.

The mortgage was to secure a debt of Rs. 135. The mortgagor was indebted to the plaintiff under two earlier bonds, dated 22nd January 1911, and 18th April 1912, and the amount due to the mortgagee under these prior mortgage bonds together with interest amounted to Rs. 119. Rs. 6 were paid for expenses relating to the completion and registration of the document in suit and Rs. 10 were received before the Sub-Registrar. A tiled katcha house was mortgaged to secure this debt.

The stipulated rate of interest was Rs. 2 per mensem with monthly rests. The suit was instituted on 30th June 1925. The plaintiff claimed interest at Rs. 2 per mensem with annual rests.

The property mortgaged originally belonged to Bhano and Manohar, who had purchased the same from one Mahesh Shukul under a sale-deed, dated 20th January 1908. Bhano and Manohar sold the house to Faqire under an instrument, dated 20th November 1909 (Ex. A) for Rs. 150. Faqire mortgaged this property in favour of Kalyan Das on 28th August 1914 (Ex. 4). He next mortgaged the property to Arjan Sahu on 12th January 1915 for Rs. 138 (Ex. E). Faqire having died his sons Sheo Japat and Ram Japat sold the house to one Sri Kishun on 22nd October 1915 for Rs. 99. The sale-deed recites that the house has collapsed and is in ruins, that there is no person will-

ing to pay more than Rs. 99, that the vendors are hard pressed for money and that therefore they execute the sale deed in favour of Sri Kishun for this amount. On 1st December 1916 Sri Kishun sold the house to Mt. Jan Bibi for Rs. 200. He handed over to the vendee some of the earlier title-deeds, namely, his own sale-deed, dated 22nd October 1915 (Ex. B) and the sale-deed dated 20th November 1909 under which Faqire had purchased this property from Bhano and Manohar, as also the mortgage in favour of Arjun Sahu, dated 12th January 1915.

There were two defendants in the suit, of whom Ram Japat, the son of the mortgagor, did not contest the suit. The suit was registered by Mt. Jan Bibi, defendant 2, upon a variety of grounds. It was pleaded that the mortgage was not genuine ; that it was without consideration ; that the interest charged was penal and excessive ; that the contending defendant was a bona fide purchaser for value ; that she had rebuilt the house at a cost of Rs. 1,000 and that the plaintiff was not entitled to have the property sold in enforcement of his mortgage without paying to the vendee Rs. 1,000 as compensation for improvements made by her which she was well entitled to under S. 51, T. P. Act.

The trial Court held that the execution and consideration of the mortgage bond were duly proved ; that no neglect was brought home to the plaintiff for not having asked for all the title-deeds relating to the house from Faqire ; that the defendant believed in good faith that she was the absolute owner of the house ; that she spent, at least, Rs. 800 in rebuilding and improving the house and was entitled to the protection afforded by S. 51, T. P. Act ; that the rate of interest was exorbitant and that the plaintiff was not entitled to more than Rs. 2 per mensem simple interest. The trial Court gave the plaintiff a decree for Rs. 460 and provided that defendant 2 was entitled to recover Rs. 800 from the sale proceeds and the balance, if any, was to be paid to the plaintiff.

The defendant submitted to the decree. The plaintiff preferred an appeal. The learned District Judge affirmed the finding of the trial Court that the defendant had spent about Rs. 800 in reconstructing the house ; that she belived in good faith that she was absolutely entitled to the property and that she was therefore entited to the benefit of S. 51, T. P. Act. The Court further held that :

"the question of interest lay solely between the plaintiff and defendant 1, the mortgagor and the mortgagee. No third party had any right whatever to come in and urge that the rate of interest was excessive or penal. This finding must, therefore, be reversed, and the rate of interest will stand as claimed."

The defendant not havig filed any cross-appeal or cross-objection, the finding of the Court below as regards the rate of interest must stand.

The lower appellate Court further provided that the plaintiff was entitled to sell the property conditionally on payment of Rs. 800 to Jan Bibi.

The present case illustrates one of the grossest forms of usury. The principal sum secured by the mortgage was Rs. 135. Out of it Rs. 119 represented the principal and interest due on the prior bonds, dated 22nd January 1911 and 18th April 1912. The rate of interest due under the earlier bonds was Rs. 2 per mensem. There was a stipulation in the mortgage bond in suit that the mortgage was not redeemable before the expiry of six years. The plaintiff now claims to recover Rs. 1,080 by a sale of the mortgaged property.

In 1914 when the mortgage was executed in favour of the plaintiff, his security was limited to a katcha tiled house presumably in a dilapidated condition. After the purchase by defendant 2 the property has been improved and its value considerably enhanced. No attempt whatsoever was made by the plaintiff mortgagee to secure to himself the title-deeds relating to the house. The defendant on the other hand, had secured the original sale-deed dated 20th November 1909, and the subsequent title-deeds. It is significant that there is no mention of the plaintiff's mortgage in the subsequent mortgage-deed executed by Faqire in favour of Arjun on 12th January 1915. Nor is there any allusion to it in the sale deed in favour of Sri Kishun dated 22nd December 1915. S. 51, T. P. Act provides that :

"when the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction, either to have the value of the improvement estimated and paid or secured to the transferee, or to sell

his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement."

Section 51 is based upon the principle that he who seeks equity must do equity. It must distinctly be kept in view that cases founded upon the equitable rule of estoppel are beyond the purview of S. 51. The rule of estoppel referred to above has been stated by Mr. Justice Storey in his Equity Jurisprudence, First English Edition, para. 1237 at p. 861 :

"If the true owner stands by and suffers improvements to be made on estate, without notice of his title he will not be permitted in equity to enrich himself by the loss of another; but the improvements will constitute a lien on the estate."

It cannot be said that the prior mortgagee is the true owner who has stood by and it is doubtful if the rule of equitable estoppel can be extended to his case. Assuming that S. 51, T. P. Act, applies to the case of simple mortgagee seeking to enforce his mortgage, no question arises as to whether he has been sufficiently vigilant in safeguarding his own title or in asserting his right with reference to the property covered by the mortgage security. It is the subsequent transferee who has put up improvements and has to prove her good faith. The true rule has been stated by Dart to be that:

"when a purchaser for value is evicted in equity, under a prior title, he will be credited with all moneys expended by him in necessary repairs or permanent improvements except improvements made after he has discovered the defect of title and will be debited with the rent which he has received" (Dart 7th Edn., p. 944).

This view seems to be in accord with the rule of law enunciated in *Mill* v. *Hill* (1). In the case of *Thakur Chunder Paramanick* v. *Ramdhone Bhuttacharji* (2). Sir Barnes Peacock, C. J., is reported to have observed as follows:

"We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil and we think it should be laid down as a general rule that, if he, who makes the improvement, is not a mere trespasser, but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking the building or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."

(1) [1851]3 H. L. C. 828.
(2) 6 W. R. 228.

The defendant does not appear to have acted either on the assumption of a risk or under circumstances of doubt relating to the security of her title. Registration does not per se amount to notice. There are no circumstances disclosed by the present case which entail an obligation upon the defendant to search the registry. The crucial question in the case is: Did the defendant reasonably and honestly believe that she was absolutely entitled to the property at the time when she put up the new building? If the defendant erroneously but honestly believed that she was absolutely entitled to the property conveyed to her by Sri Kishun and that she was not a trespasser or an assignee from a trespasser and that she had not a limited interest in the property and was not a tenant, she was justified in spending money upon improvements by reason of the principle underlying S. 51, T. P. Act. The Transfer of Property Act is not exhaustive and does not exclude any equitable principle such as may regulate the rights and liabilities of the parties in a case not specifically provided by the legislature. It is doubtful how far S. 51, T. P. Act is in terms applicable to the facts of the present case. Mt. Jan Bibi has not been evicted from the premises by a person having a better title. It cannot be said that a prior simple mortgagee seeking to enforce the mortgage has a better title to the property. Nor can it be said that Mt. Jan Bibi is a person evicted from the premises by reason of the institution of the suit although she might ultimately be evicted at the instance of the auction purchaser. In construing S. 51, T. P. Act, this Court has to adhere to the natural and etymological meaning which can be assigned to the words "evicted therefrom by any person having a better title." Mt. Jan Bibi not being a person evicted and, the plaintiff as prior simple mortgagee, having only a right to sell the property for the recovery of his mortgage dues, not being a person having a better title, S. 51, T. P. Act does not in terms apply, but the rule of equity upon which S. 51 is based, may very well be extended to the case of Mt. Jan Bibi and upon that

basis the decree of the Court below may very well be affirmed.

In view of all the circumstances of the case the learned Judge was justified in ordering the plaintiff to pay the costs of improvements as a condition precedent to bring in the mortgage property to sale. I would therefore dismiss this appeal with costs.

Weir, J.—I agree.

R.K. *Appeal dismissed.*

** A. I. R. 1929 Allahabad 15

SULAIMAN, AG. C. J., AND WEIR, J.

Chotey Lal—Plaintiff—Appellant.

v.

Laiq Singh—Defendant—Respondent.

Letters Patent Appeal No. 58 of 1926, Decided on 25th May 1928, from a judgment of Pullan, J., D/- 4th May 1926.

**** (a) Civil P. C., O. 34, R. 6—Preliminary mortgage decree for certain amount against Hindu father—Sons, not parties to suit, subsequently obtaining declaration that smaller amount was binding on family—Final decree passed for the smaller amount but silent as to balance—Plaintiff applying under R. 6 for recovery of balance after three years after declaratory decree obtained by sons—No application can lie under R. 6 since balance ceased to be mortgage debt as result of declaratory decree—Remedy of plaintiff is by execution of decree for balance as money decree—Since right accrued on date of declaratory decree, application is barred under Limitation Act, Art. 181.**

A suit was brought for sale on the basis of a mortgage-deed executed by a Hindu father, and a preliminary decree was passed on 13th January 1920 for Rs. 573. The sons of the mortgagor were not parties to the suit. They subsequently brought a suit for a declaration that the debt was without legal necessity and was not binding on the family property. Their suit was decreed on 24th July 1920, the Court holding that the mortgage debt was good to the extent of Rs. 429-3-0. After this decree the sons were made parties to the final decree in the mortgage suit which was passed on 7th May 1921 for Rs. 429-3-0 only. There was no reference in this final decree to the plaintiff's right to recover the balance of the amount allowed to him under the preliminary decree. On 15th April 1924, the plaintiff filed an application under O. 34, R. 6, praying for a personal decree for the balance of the amount against the mortgagor.

Held: that the effect of the declaratory decree obtained by the sons was to confine the charge on the family property to Rs. 429-3-0 only and that the balance of the amount ceased to be a mortgage-debt and hence the plaintiff had under O. 34, R. 6, no right to recover the balance of the amount.

[P 15 C 2 P 16 C 1]

Held further: that the right of plaintiff to recover the balance must be by execution of the decree for the balance, treating it as a simple money decree. [P 16 C 1]

Held also: that since the right to recover the balance personally from mortgagor accrued to plaintiff when the declaratory decree in favour of the sons was passed on 24th July 1920, and on that date it must be deemed to have been settled that his remedy for the balance was against the mortgagor personally.

The application which was made more than three years after that date for execution of the personal decree was barred under Art. 181, Lim. Act. [P 16 C 1]

*** (b) Civil P. C., O. 34, R. 6—"Amount due" means amount, to recover which, decree for sale has been passed.**

Rule 6 contemplates the insuffiiciency of the net proceeds of the sale to pay the "amount due" which expression means the amount, to recover which a decree for sale has been previously passed. [P 16 C 1]

M. L. Agarwala—for Appellant.

Judgment.—This is an execution appeal by the plaintiff decree-holder. The suit was brought for sale on the basis of a mortgage-deed executed by a Hindu father, and a preliminary decree was passed on 13th January 1920, for Rs. 573. The sons of the mortgagor were not parties to the suit. They subsequently brought a suit for a declaration that the debt was without legal necessity and was not binding on the family property. Their suit was decreed on 24th July 1920, the Court holding that though the principal sum was for necessity, it was not proved that there was necessity for the high rate of interest charged. Accordingly it held that the mortgage-debt was good to the extent of Rs. 429-3-0. After this decree the sons were made parties to the final decree in the mortgage suit which was passed on 7th May 1921, for Rs. 429-3-0 only. There was no reference in this final decree to the plaintiff's right to recover the balance of the amount allowed to him under the preliminary decree.

On 15th April 1924, the plaintiff filed the present application styling it as one under O. 34, R. 6 praying for a personal decree for the balance of the amount against the mortgagor. This application was contested, and has been dismissed by both the Courts below. Their order has been affirmed by a learned Judge of this Court.

The effect of the declaratory decree obtained by the sons undoubtedly was to confine the charge on the family property

to Rs. 429-3-0 only. The balance of the amount ceased to be a mortgage-debt.

Although, therefore, the original suit had been instituted within six years of the execution of the mortgage-deed, so that the personal remedy had not become barred we cannot hold that the plaintiff has under O. 34, R. 6, a right to recover the balance of the amount. That rule contemplates the insufficiency of the net proceeds of the sale to pay the "amount due," which expression, in our opinion means the amount, to recover which, a decree for sale has been previously passed.

In this view, the application did not lie under O. 34, R. 6 to recover the balance, as this balance ceased to be a charge on the property, and it cannot be said that the sale-proceeds have proved insufficient to pay this amount. The right of the plaintiff to recover the balance must, therefore, be by execution of the decree for the balance, treating it as a simple money-decree.

It is unfortunate for the plaintiff that when the final decree came to be passed, he did not ask the Court to re-affirm his right to recover the balance by incorporating it in this decree also. That such a procedure would not have been improper is patent, as it is possible that the sons' suit may be brought more than three years after the preliminary decree for sale, in which case it would be unjust to hold that the plaintiffs' right to recover the amount personally against a mortgagor would be extinguished by the lapse of three years from the decree. The fact, however, remains that the final decree did not make any provision for the realization of this money. The plaintiff, therefore, cannot in execution of the final decree of 7th May 1921, realize this amount. He can only fall back on his preliminary decree. The right to recover this certainly accrued to him when the declaratory decree in favour of the sons was passed on 24th July 1920, and on that date it must be deemed to have been settled that his remedy for the balance was against the mortgagor personally. The present application is made more than three years after that date, and even treating it as an application for execution of the personal decree under S. 47, Civil P. C., it is barred by the three years' rule under Art. 181, Lim. Act.

The appeal accordingly must be dismissed.

In view of the special circumstances of this case, we direct that the parties should bear their own costs of this appeal.

D.B./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 16

DALAL, J.

Chhitaria and *others*—Applicants.

v.

Municipal Board, Bindraban—Opposite Party.

Criminal Ref. No. 434 of 1928, Decided on 27th August 1928, made by District Magistrate, Muttra, D/- 1st May 1928.

(a) U. P. Municipalities Act, S. 295—Contract given by Municipality in contravention of the Act—Obstruction does not incur penalty.

The words "under this Act" in S. 295 have the significance that the Municipal Board must have acted according to directions given in the Act. No contract arbitrarily given by the Municipality in contravention of the provisions of the Act can render obstruction there- of liable to penalty. [P 17 C 1]

(b) U. P. Municipalities Act, S. 193—Notice not served on obstructor—Contract by Municipality is contrary to Act.

If a person obstructed in constructing a drain over the land of another does not take action under S. 193 of the Act and no notice is issued to the person obstructing, a contract given by the Municipality to construct a drain is contrary to the terms of the Act. [P 17 C 1]

K. N. Laghate—for Applicants.

S. C. Das—for Opposite Party.

M. Waliullah—for the Crown.

Judgment.—The Municipal Board permitted one Gangu to construct a drain in Mohalla Kishoripura within the Municipal limits of Bindraban. While the drain was being constructed by a contractor of the Municipality on the application of Gangu, Gangaram and Mt. Koka prevented the contractor from working on the ground that the land which was being dug up for the construction of the drain belonged to them. These two persons and one Chhitaria were prosecuted under S. 295 for obstructing a person employed in contract with the Board in the performance of his duty. They were convicted by a Magistrate and the District Magistrate has made this reference for the setting aside of the conviction on the ground that the contract was not given

according to the Act. It was argued here on behalf of the Municipality that it is not the business of the Court to enquire into the antecedents of the contract. This argument is incorrect. It is definitely stated in S. 295 that the obstruction should be of a person employed under contract with the Board under this Act. The words "under this Act" have the significance that the Municipal Board must have acted according to directions given in the Act. No contract arbitrarily given by the Municipality in contravention of the provisions of the Act can render obstruction thereof liable to penalty.

The next question is whether the contract was given under the Act. It was argued on behalf of the Municipality that the contract was given under S. 192 and that the provisions of S. 193 did not apply. This argument also is incorrect. It is definitely stated in para. 2 of S. 192 that if a person is obstructed in constructing a drain over the land of another that person should take action under S. 193 of the Act. Gangu was directed to construct a drainage under the land of Ganga Ram and it was his duty to take action under S. 193. No such action was taken. No notice was issued to Ganga Ram. The contract given by the Municipality therefore was contrary to the terms of the Act.

Finally, it was questioned whether Ganga Ram was the owner of the lane through which the drainage was to be constructed. There is a report of the Secretary that the lane was not of the Municipality but the private lane of some persons who objected to the construction of the drain. Having regard to this report the presumption is that the lane by the side of which Ganga Ram's house is situated as is shown in the plan on the record belongs to Ganga Ram.

The reference is accepted. The conviction and sentence of Chhitaria, Ganga Ram and Mt. Koka are set aside, and it is directed that the fine if any recovered shall be refunded.

R.K. *Reference accepted.*

A. I. R. 1929 Allahabad 17

BENNET, J.

Shri Dhar and *another*—Appellants.

v.

Udaibir Singh Judeo—Respondent.

Second Appeal No. 40 of 1926, Decided on 30th April 1928, from decree of Dist. Judge, Jhansi.

Civil P. C., S. 11—Previous suit in revenue Court by malguzar to eject tenant—Tenant claiming possession as servant of a third person who was added as defendant—State of land decided but no issue as to status (groveholder) of third person framed—Ejectment decree passed against tenant — Subsequent suit in civil Court by third person claiming land as grove—Decision in revenue Court does not amount to res judicata, nor does it act as estoppel against third person—Agra Tenancy Act (2 of 1901), S. 193 (2).

U, the malguzar had brought a suit in revenue Court for ejecting his tenant *M*. *S*. was added as a defendant on his own application. *M* resisted the suit on the ground that he was looking after the land on behalf of *S*, who had the right of a grove-holder. No issue was framed as to whether *S* had the rights of a grove-holder. It was found that the land was neither agricultural land nor a grove, and an ejectment decree was passed against *M*. *S* then brought a suit in civil Court against *U* for possession of the grove.

Held : that the finding as to the state of the land in the previous suit could not be res judicata in the subsequent suit (whether *S* had rights of a grove-holder at the time of his suit). [P 18 C 2]

Held further, that the revenue Court not being competent to try the subsequent suit, the finding of the revenue Court could not amount to res judicata. [P 18 C 2]

Held further, that *S* would not be barred by estoppel as the decree granted by revenue Court was merely to eject *M* and a decree in favour of *S* would not in any way affect that decree. [P 18 C 2]

S. N. Gupta for *Bhagwati Shankar*—for Appellants.

K. N. Katju—for Respondent.

Judgment.—This is a second appeal by the plaintiffs-appellants against an order, in appeal, of Mr. Norton, the learned District Judge of Jhansi, dismissing the suit of the plaintiffs for possession of a grove No. 704 of mauza Kuthonda in Jalaun District. The sole ground on which the lower appelate Court has proceeded is that the matter is res judicata between the parties on account of previous litigation in the revenue Courts. The previous litigation consists of a suit for ejectment brought by the present respondent Rao Sahib Udaibir Singh against one Mulu as his non-occupancy tenant of less than 12 years standing. The present respondent granted a lease to Mulu and in the same year in which he granted the lease he brought a suit for ejectment against Mulu. That suit for ejectment was dismissed by the Assistant Collector but was decreed in appeal by the Commissioner on 12th July 1922. During the pendency of the suit

in the Court of the Assistant Collector the present appellant applied to be made a party. The revenue record is not before this Court but it appears to me that the Assistant Collector allowed the name of the present appellant to be added as a defendant on the analogy of the provision of S. 198, Act 2 of 1901. The plea of Mulu was that he was looking after the land as a grove on behalf of the present appellant who was his master. S. 198, Act 2 of 1901, allows a third party to be added if the alleged tenant pleads that he is a tenant of that third party. In the present case the alleged tenant did not plead that he was tenant of the third party but that he was the servant of third party. It would also have been possible for the revenue Court to have added the present appellant as a party under the general provisions of the Civil Procedure Code, O. 1, R. 10. But whether the revenue Court purported to act under S. 198, Act 2 of 1901, or under the general provisions of the Civil Procedure Code, I consider that sub-S. 2, S. 198, would limit the decisions of the revenue Court in so far as such decisions concern the rights of the person added as a defendant. That sub-section states :

"The decision of the Court on such question shall not affect the right of any person entitled to the rent of the holding to establish his title by suit in the civil Court."

The next point to which attention may be invited is that the plea of the present appellants that they have the rights of a grove-holder in this number as against the present respondent who is the zamindar of the entire village was not one of the three issues framed by the Assistant Collector. Those three issues were.

(1) Whether the relation of landlord and tenant exists between the plaintiff and defendant 1 (i. e., Mulu) ?

(2) Whether the land in suit is agricultural land or grove ?

(3) Whether the plaintiff is entitled to eject the defendant (meaning Mulu, defendant 2) ?

The third point to which attention may be invited is that the learned Commissioner specifically states in his judgment in appeal :

"Regarding issue 3 I find that appellant is entitled to eject Mulu, respondent 1 who is his tenant. But he is not entitled under the Tenancy Act to eject Sridhar and Ramdin who appear to be trespassers and not tenants."

It was argued for the respondent that on issue 2 the learned Commissioner found :

"I find that the land in suit is neither agricultural land nor a grove."

But such a finding in regard to the state of No. 704 in the year 1921, cannot possibly be res judicata in the present suit which is whether the appellant had got the rights of a grove holder in No. 704 in 1924.

The fourth point to which attention should be directed is that under S. 11, Civil, P. C. the issue which is res judicata must have been decided "in a Court competent to try such subsequent suit." The revenue Courts are not competent to try the present suit. Therefore the finding of the revenue Court cannot amount to res judicata. The learned counsel for the respondent admitted that the finding of the learned District Judge that this suit was barred by res judicata could not be upheld. He advanced the argument that the suit of the plaintiff appellant might be barred by estoppel because a decree if granted to him would affect the decree granted by the revenue Courts. It appears to me that the decree granted by the revenue Court was merely that Mulu should be ejected from No. 704. A decree granted to the plaintiff in the present suit would not in any way affect the decree granted by the revenue Court on appeal. Accordingly I allow the appeal with costs and remand the suit for decision by the lower appellate Court on the other issues.

D.B./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 18

LINDSAY AND BANERJI, JJ.

Sibt Ahmad and *another*—Defendants—Appellants.

v.

Amina Khatoon — Plaintiff—Respondent.

First Appeal No. 497 of 1926, Decided on 24th February 1928, from decision of Sub-Judge, Budaun.

(a) Evidence—Circumstantial.

Where there is very strong feeling between the parties and direct evidence on both sides is of a partisan character, it is safe to decide the case upon the circumstances and probabilities. [P 22 C 2]

(b) Mahomadan Law—Marriage.

In the case of Shias the age of puberty begins with menstruation and the presumption is that menstruation takes place between the age of nine and ten years: 26 *W.R.Civil Rulings* 26 (*P.C.*), *Ref.* [P 23 C 1]

(c) Mahomedan Law—Marriage—Girl adult—Father's consent to marriage is not substitute for girl's consent.

Where the girl has become adult at the time of the nikah, the consent of her father could not take the place of her own consent which under the Shia law is essential for validity of the marriage. [P 24 C 1]

(d) Civil P. C., O. 32, R. 3—Costs.

There is no authority in the Civil Procedure Code to award costs personally against a guardian ad litem: 3 *Mad.* 263, *Ref.* [P 25 C 2]

R. S. Pandit and *Sarkar Bahadur Johari*—for Appellants.

A. M. Khwaja, T. A. K. Sherwani and *Mahmudullah*—for Respondent.

Lindsay, J.—The suit which has given rise to this appeal was brought by a Muhammadan lady, Bibi Amina Khatun, in order to obtain a declaration that a ceremony of nikah which is said to have taken place on 22nd September 1917, between her and defendant 1, Sibt Ahmad, was not lawful and binding and that the relation of husband and wife did not exist between defendant 1 and herself. Defendant 1, Sibt Ahmad, was impleaded as a minor under the guardianship of his grandfather, Wazir Ahmad.

During the hearing of the appeal some question was raised as to the age of this defendant who is the appellant before us. It was suggested that since the decision of the case in the Court below Sibt Ahmad had become of full age. We thought it proper in these circumstances to send for Sibt Ahmad and to examine him upon oath. He was not examined in the Court below. Sibt Ahmad has not appeared before us and has made a statement which we accept, namely, that he was born in the month of May 1910. This information, he says, he has got from his mother. We hold, therefore, that Sibt Ahmad, not having yet attained the age of 18 years, is still a minor and is properly represented in these proceedings by his legal guardian, his grandfather, Wazir Ahmad. Defendant 2 impleaded in the suit was Maulvi Qasim Hasan, who is the father of the plaintiff. He was a proforma defendant.

In substance the defence to the suit was that the ceremony of nikah which had taken place between the plaintiff and defendant 1 was a valid ceremony, and that the plaintiff was not entitled to the declaration sought. We may notice here that a plea of limitation was raised in the Court below and decided in favour of the plaintiff. This plea has now been abandoned and it is not denied that the suit for declaration was brought within time. The Subordinate Judge gave a decree in favour of the plaintiff and now in appeal we are asked to hold that the judgment and decree of the Court below are wrong, to find that there was a valid and binding ceremony of marriage between the plaintiff and defendant 1 and that, therefore, the suit ought to be dismissed.

Before we go on to discuss the issues which have to be determined in this appeal we think it proper to say something of the history of the family to which the parties belong. Wazir Ahmad, who appears in this litigation as the guardian ad litem of the minor defendant Sibt Ahmad, had two sons, Qasim Hasan the elder, who is the father of the plaintiff, and Ibn Ahmad the younger who is now dead. It is admitted that the plaintiff, Amina Khatun, was born on 24th November, 1904 and consequently at the time this nikah took place in September 1917 she was close on 13 years of age. Amina Khatun had a brother named Abdul Hafiz who is said to have died in or about the year 1919 or 1920.

It is admitted that before September 1917 Wazir Ahmad had totally disinherited his son Qasim Hasan, the father of the plaintiff, by making a gift of all his property to his younger son Ibn Ahmad. According to what is set out in the written statement this gift was made because Wazir Ahmad was displeased with what is called the "misconduct and high-handedness" of his elder son. We have no particulars of this misconduct but we can have little doubt after a perusal of the oral and documentary evidence in this case that Wazir Ahmad was led principally to execute this deed of gift because his son Qasim Hasan was married to a Shia lady. Wazir Ahmad himself is a rigid Sunni to whom the Shia creed is obviously abhorrent. This is made plain from some of the correspondence on record. It is also equally clear that Qasim Hasan's wife, Mt. Ashraf Bano, is a staunch Shia and that she and her father-in-law have never been on good terms. The state of Wazir Ahmad's feelings towards this lady may be gauged from the language of a letter which was dictated by him to one Basit Ali and which was sent to his son Qasim on 8th December 1917. It is alleged in this case and has also been

deposed to by certain witnesses that after Qasim Hasan had been married to this lady his father Wazir Ahmad tried to convert the lady but failed. Wazir Ahmad himself denies this but from the evidence before us we think it highly probable that some attempt was made to bring over Mt. Ashraf Bano to the Sunni faith. However that may be, it is manifest that Ashraf Bano and Wazir Ahmad were hostile to each other.

We have also proof upon the record that Wazir Ahmad was anxious about the faith of the two children of Qasim Hasan. There can, we think, be no doubt that it was his desire that they should be brought up as Sunnis. Abdul Hafiz, the son of Qasim Hasan, disappointed this hope declaring himself to be a Shia some time in 1916 or 1917 at a time while his father Qasim Hasan was employed as a Deputy Collector at Fyzabad.

Having totally deprived Qasim Hasan of his right to inherit any of his property it seems to have occurred to Wazir Ahmad to repair what he had done by arranging two marriages, namely, one between the plaintiff and Sibt Ahmad, the son of Ibn Ahmad, and the other between Qasim Hasan's son, Abdul Hafiz, and Mt. Zohra, the daughter of Ibn Ahmad, and there can be no doubt that proposals to this effect were made both to Qasim Hasan and to Ibn Ahmad. On this point we have the evidence of a witness, Mujtahid Uddin, at p. 18 of the record; moreover, the fact is admitted by Wazir Ahmad himself in his deposition. Certain correspondence which is on the record, bearing date, June 1917, shows how these negotiations went on and also shows that at that time Qasim Hasan was most unwilling to give his daughter in marriage to Sibt Ahmad; it further appears that his wife was very strongly opposed to any such union.

Qasim Hasan has been examined in this case and from his own statement and from what appears from the letters which were written by him he was evidently between two fires at the time mentioned above. He was, we think, anxious about the property, that is to say, he wanted, if he could, to put his children in the way of succeeding to some of the property which had been gifted away by Wazir Ahmad to his younger son, Ibn Ahmad. On the other hand, his letters disclose that he was anxious for the happiness of his daughter. One objection which he had to the marriage was on the ground of disparity of age. He pointed out that the girl was between five and six years older than Sibt Ahmad. This statement regarding the disparity of age seems to have been challenged in the Court below but, as we have said above, it now appears from the sworn statement of Sibt Ahmad that he is, as a matter of fact, some five years and six months younger than the plaintiff.

However reluctant Qasim Hasan was in June 1917, to allow a marriage to take place between his daughter and defendant 1, it appears that before the month of September 1917 he was won over by the solicitations of his father and became willing to allow the double marriage to take place, that is to say, the marriage between the plaintiff and Sibt Ahmad and the other marriage between his son Abdul Hafiz and the daughter of Ibn Ahmad called Mt. Zohra. The result of all this was that in September 1917, the two brothers, Qasim Hasan and Ibn Ahmad, with their families proceeded to the family house at Budaun where they arrived on 22nd September. On the night following their arrival, that is to say, the 23rd (not the 22nd as stated in the pleadings) a ceremony of nikah was performed as between the plaintiff Amina Khatun and Sibt Ahmad. The other proposed nikah for which also preparations seem to have been made at the same time was put off on the allegation that Abdul Hafiz was then not of sufficiently good character.

As regards this part of the case, we have every reason to believe that Ibn Ahmad was not really willing to marry his daughter to Hafiz and was only pretending to consent to this union, and we are satisfied that it was at his instance that the marriage which was fixed to take place simultaneously with the marriage of the plaintiff was postponed at the last moment. We have on record a letter, dated 21st September 1917, written by Ibn Ahmad to his father which indicates to us clearly that Ibn Ahmad intended to get his weaker-minded brother into the presence of his father after the parties had arrived at Budaun and was determined to exert his influence to have the marriage put off as it eventually was. Ibn Ahmad is dead and we cannot have his version of the affair but his letter

speaks for itself as does also a letter written by Wazir Ahmad on 8th December 1917 in which he speaks of Ibn Ahmad holding the feet of Qasim's wife and putting his head on her feet.

After the nikah had been celebrated between the plaintiff and defendant 1 the boy Abdul Hafiz was taken away from his father and made over to the custody of Ibn Ahmad with whom he lived for some time. The object of his being so made over is stated to have been in order that his character might be reformed. It appears that Ibn Ahmad sent him to school and also had religious instruction given to him by a maulvi. This was obviously done with the intention of making Abdul Hafiz a Sunni for, as we have already pointed out, sometime before this he had openly declared himself to be a Shia. The end of this arrangement was that Abdul Hafiz ran away and died at Jubbulpore in 1919 or 1920.

After 23rd September 1917, the plaintiff and her mother remained for a few weeks at Budaun. There is a dispute as to where they were staying all this time. For the defendant it is said that they were staying at the house of Wazir Ahmad. Ashraf Bano, however, and the plaintiff both say that they left the house of Wazir Ahmad and went to the house of Ashraf Bano's brother. Indeed Mt. Ashraf Bano and her daughter both declare that they left the house of Wazir Ahmad on the morning of 23rd September 1917, and were not in Wazir Ahmad's house at the time the ceremony of nikah was performed. According to Ashraf Bano she was utterly opposed to the marriage of her daughter with Sibt Ahmad and she stated in the Court below that having argued with Wazir Ahmad all night and having refused to assent to the marriage she left the house early the next morning with her daughter.

Having left Budaun the plaintiff and her mother joined Qasim Hasan at Mirzapore where he was employed at that time as a Deputy Collector. The correspondence on the record shows that just before Christmas 1917 Ibn Ahmad managed to get the plaintiff and her mother to Allahabad. This was not effected without a great deal of opposition. The letters go to show that the girl and her mother were brought to Ibn Ahmad's house at Allahabad at the instance of Wazir Ahmad who had received some information that a brother of the plaintiff's mother, a Shia, had been staying with the family at Mirzapore. It appears, moreover, that at this time plague was raging in Mirzapore and Qasim Hasan either persuaded or compelled the girl and her mother to go to Ibn Ahmad's house at Allahabad where they remained till early in February 1918. There are certain letters on the record which show that the plaintiff's mother was complaining to her husband that she and her daughter were living very unhappily at the house of Ibn Ahmad and finally Qasim sent a man to Allahabad who took the plaintiff and her mother away.

It may also be mentioned here that during this stay at Allahabad the correspondence shows that the plaintiff Amina Khatun was being taught her prayers with difficulty and that Ibn Ahmad was most unwilling to allow her to go away to Mirzapore because, as he said, her religious instruction would be interrupted. This matter about the religious instruction is important in connexion with another matter presently to be mentioned.

Some time after February 1918, Qasim Hasan gave up service in the United Provinces and went off to take up some employment in the Hyderabad State. The girl went with him and did not return at any time thereafter to the house of Ibn Ahmad. From correspondence which took place between Qasim Hasan and his father after this departure to Hyderabad it appears that efforts were being made to bring the girl Amina Khatun up in the Sunni faith and we think that there can be little doubt that Qasim Hasan, in order to please his father, was trying to get the girl to adopt the Sunni creed. It is plain to us that amongst other things he made her a disciple of a Sunni divine named Maulvi Abdul Bari.

We know very little of what took place between the years 1918 and 1925, but in the latter year Qasim Hasan seems to have got very ill and to have come to Delhi. There he was in poor health and circumstances and required medical attendance. He was trying to get pecuniary assistance from his father or his brother's widow Mt. Ume Khudiaja, out of the profits of some property which belonged to his mother in which he claimed to have a share. The money seems to have been refused and in the end Qasim Hasan exe-

cuted a deed of waqf of his share of this property of his mother's. After this the present suit was lodged on 24th November 1925.

One of the first questions which arose for determination in the Court below was what was the religion of the plaintiff, Amina Khatun. In the plaint she described herself as following the Shia faith. This was denied on behalf of the defence. It was alleged that Mt. Amina before her marriage and after her marriage was a Sunni. Evidence was produced on both sides on this question and the Subordinate Judge eventually came to the conclusion that Amina Khatun was and is a Shia.

The question is vitally important in this case. As regards the validity of the marriage the case of the plaintiff must be decided according to her personal law and on the question of the validity of nikah there is a very marked difference between the Sunni and the Shia law.

We have therefore to examine the finding of the learned Subordinate Judge on this point. The question, as he says, was what was the creed of Mt. Amina Khatun before this ceremony of nikah took place. It is not now questioned that a marriage between a Shia and a Sunni is not invalid. It could not, therefore, be pretended that the nikah which took place in September 1917, between these two parties was for this reason not legally binding. The validity of the nikah however depends both upon the religion and the age of the plaintiff at the time the ceremoney took place. There was before the Subordinate Judge a conflict of evidence regarding the plaintiff's religion. Some ladies were examined to show that Mt. Amina Khatun said her prayers in accordance with the Sunni ritual. This evidence, as the Subordinate Judge remarks, is of a vague nature and the women who professed to have seen the girl at her prayers were not questioned as to the exact difference in ritual. One lady named Mt. Aijaz Batul stated that she knew Amina Khatun was a Sunni because she said her prayers with folded hands but as the learned Subordinate Judge states Shia women can also say their prayers in the same posture and consequently the statement of Aijaz Batul, even if it be taken as true, is by no means conclusive evidence to show that Amina Khatun was at that time a Sunni.

In cases of this kind oral evidence, such as we find on the present record, is of very little value. There can be no doubt that there is very strong feeling between the parties and that the direct evidence on both sides is of a partisan character. We think, we are on safer ground in deciding the case upon the circumstances and probabilities.

We would refer, in the first place, to the letter written by Ibn Ahmad to his father on 4th February 1918. This was written at the time that Qasim Hasan had sent a man from Mirzapore to Allahabad to bring away the girl and her mother. In this letter Ibn Ahmad writes:

> "I had no intention to send them at this time because it was with difficulty that the namaz was taught to her and she had been made to remember the first "para." Now whenever they all will come here subsequently they will be taught from the very beginning. So long as they do not live here permanently (i. e., continuously) for some time all the efforts shall remain fruitless."

We think the Subordinate Judge was entitled to rely very strongly on this passage and to come to the conclusion that the meaning of this passage is that the girl was being taught to say her prayers in some way she had not been accustomed to do before. It would hardly have been possible to write in this way about a girl who had already learned to say her prayers in Sunni fashion and the Subordinate Judge, therefore, concludes that before this time the probabilities are that she said her prayers as a Shia and that at the time of the nikah she was as a matter of fact a Shia. The girl was examined in the course of the trial in the Court below and there she made an admission that she had once said tabarrah. The meaning of tabarrah is well-known. It is the imprecation which the Shias use against the Sunnis and we think it certain that no Mahomedan who was really a Sunni would ever admit having pronounced the tabarrah.

We have referred above to what took place after the girl was taken away to Hyderabad and there seems to be little doubt, as we have already said, that her father Qasim Hasan in order to oblige Wazir Ahmad, was trying to bring the girl up as a Sunni and it was for that purpose that he got her made a murid or disciple of Maulvi Abdul Bari. All these facts indicated to the Subordinate Judge and they indicate to us that if all this

trouble was being taken to teach Amina Khatun the elements of the Sunni faith she must have had another faith before that, namely, the faith of a Shia. If we consider these facts in relation to the probabilities of the case the conclusion that the plaintiff was a Shia at the time of the nikah is strengthened. We have already pointed out that her mother is admittedly a rigid Shia who has clung pertinaciously to her belief. It is not too much to suppose that in her childhood the girl would be much in the company and under the influence of her mother and it is highly probable therefore that Mt. Ashraf Bano would bring up her child in the Shia faith. So far as we can see, Qasim Hasan did not count for anything in this matter. He apparently is a man of weak character and we do not think that he made any attempts at any rate before the nikah, to interfere with the religious bringing up of Mt. Amina Khatun.

Having considered the circumstances of the case and the probabilities we are of opinion that the Subordinate Judge was entitled to find that the plaintiff was a Shia before the nikah. We have no doubt that the Subordinate Judge's finding on this matter is correct. We have, therefore, to apply the Shia law in order to ascertain whether this ceremony of marriage, which was performed in September 1917, is binding on the plaintiff. That the ceremony was performed is a matter which is not denied.

The next matter to be determined is whether at the time of the nikah the girl was of full age, that is to say, had she attained the age of puberty and if she had attained that age what would be the effect of her father representing her as guardian at the ceremony of nikah ? There can be no doubt that Qasim Hasan did give sanction on behalf of the girl to the marriage but the Subordinate Judge has found that no sanction was obtained from the girl herself. There is clear evidence on the record that her permission (Izn) was not asked before the ceremony was carried through. We have therefore to consider what is the Shia law relating to the age of puberty. The Subordinate Judge has stated that in the case of Shias the age of puberty begins with menstruation and under the Shia law the presumption is that menstruation takes place between the age of nine and ten years. There seems to be no doubt that this is the law as laid down in the Sharaya-ul-islam. We might also refer in this connexion to a case which was decided by their Lordships of the Privy Council in the year 1873, the case of *Malka Jahan Saheba* v. *Muhammad Asghari Khan* (1). If, therefore, there were no evidence of age in the case it would under this law be presumed that Mt. Amina Khatun had attained the age of puberty long before this nikah took place. We know the age of the girl definitely. She was, as we have said, born on 24th November 1904, and, therefore, she was all but 13 years of age when the nikah took place.

The Subordinate Judge has made a careful analysis of certain direct evidence bearing upon this point. The plaintiff herself, her father, her mother and a Hakim named Fazal-ul-Rahman all say that menstruation had begun before the year 1917. As against this the defendants put forward the statement of another Hakim named Fuzail Ahmad. We agree with the Subordinate Judge that this man's evidence is of no value. Over and above this, all we think, it is in accordance with probabilities that the girl should have begun to menstruate before September 1917. There is the authority of works on medical jurisprudence. We may refer to the new edition of Lyons jurisprudence edited by Mody in which it is said that the rule in India is that girls begin to mentsruate between the ages of 12 and 14. Having regard therefore to all the circumstances, we are of opinion that this girl had attained puberty before September 1917.

There being no pretence that her consent to the marriage was formally asked for before the ceremony took place, the presumption would be that the nikah was invalid and does not bind the plaintiff. It was argued, however, in the Court below and has been argued here that although the girl may not have given any formal consent to this marriage nevertheless her subsequent conduct amounts to evidence that she accepted the marriage and ought to be deemed a consenting party. In this connexion the Subordinate Judge has entered upon a long discussion regarding the nature of the consent which was given by the girl's father. He has come to the conclusion that Qasim Hasan was deceived into agreement to this marriage by a promise made to him by Wazir Ahmad

(1) 26 W. R. Civil Rulings 26.

that in the event of the marriage taking place half of the property which had been given away to Ibn Ahmad would be restored to him, Qasim Hasan. We think any discussion of this question is really superfluous because if the girl had become adult at the time of the nikah the consent of her father could not take the place of her own consent which under the Shia law is essential.

We have, therefore, to consider whether there is before us any reliable evidence from which it could reasonably be inferred that Amina Khatun assented to this marriage.

In the plaint it was stated that it was only $2\frac{1}{2}$ years before the suit was brought that Amina Khatun came to have knowledge that any ceremony of nikah had been performed. It was admitted, however, in, the plaint that there had been rumours that a nikah had taken place. The story which was put forward in evidence on behalf of the plaintiff was to the effect that her father had kept both the plaintiff and the plaintiff's mother in ignorance of the fact that a ceremony of marriage had been performed and that this matter only came to the knowledge of the plaintiff and her mother by reason of a letter which was written to the plaintiff's mother some $2\frac{1}{2}$ years before the suit by her brother. The Subordinate Judge has disbelieved this part of the case and we disbelieve it too. We have already referred to the conflict regarding what took place on the night of 23rd September 1917. We have on one side the plaintiff and her mother swearing that they were not in Wazir Ahmad's house at the time this ceremony was performed, on the other hand, we have detailed evidence to show that both the plaintiff and her mother were in the house, that the girl was dressed in bridal dress, that her father came in and informed her about the marriage, that the girl did not refuse to agree to the marriage but rather that she conducted herself in a manner to indicate that she was a willing party. The learned Subordinate Judge has characterized this evidence given on behalf of the defence as extravagant and improbable and on this point also we are in agreement with him. We feel that having regard to the relations of the parties we could not accept evidence of this kind which to our minds bears marks of elaboration and fabrication. We are quite prepared to believe that the girl and her mother remained for a few weeks in the house of Wazir Ahmad after this nikah had taken place and we cannot for a moment believe that either the girl or her mother were ignorant that such a ceremony had been performed. But while we are prepared to go so far, we are not prepared to hold that any conduct of the girl can be pointed to so as to justify the conclusion that he ever gave her consent or was willing to be married to defendant 1. The fact that she and her mother remained or were detained in the house of Wazir Ahmad for a fortnight after the ceremony took place is no evidence whatever that she was a willing party to the marriage.

Then we are referred to what took place in Allahabad in the month of December 1917 and January 1918. We have already referred to the events of that time and have stated how it is proved that the plaintiff and her mother were brought to Allahabad to the house of Ibn Ahmad very much against their will. For the defence it is said that the girl was there treated as a bride, that is, as the daughter-in-law of Ibn Ahmad and that some sort of a party was given by way of celebration of the nikah. Here again we feel we cannot rely upon the direct evidence to this effect given on behalf of the defendant. It is impossible to doubt from the correspondence on the record that Mt. Ashraf Bano was most unwilling to come to Allahabad and was most unhappy in the house of Ibn Ahmad and knowing that she was bitterly opposed to any marriage between her daughter and Ibn Ahmad's son we find it difficult to believe that during her stay of five or six weeks in Allahabad this lady would in any way be party to any demonstration intended to indicate that Amina Khatun was the wife of Sibt Ahmad.

In this connexion we would refer to the letter written by Ibn Ahmad to his father on 7th January 1918. In this Ibn Ahmad writes as follows :

> "My Bhabi Jahn Saheba (i.e., sister-in-law), has since the date of her arrival been thinking of going away from this place as early as possible. Accordingly she has been finding out various excuses for this purpose."

We have no doubt therefore that Mt. Ashraf Bano and her daughter were very unwilling to remain at the house of Ibn Ahmad. We have referred already to the attempts which were being made during this period to teach Amina Kha-

tun the Sunni ritual of prayer. Our conclusion is that it is impossible for us to find that any conduct of the plaintiff during the period just referred to affords any indication of her acceptance of the position of being the married wife of Sibt Ahmad.

We have already pointed out that after February 1918, the girl went off with her father to Hyderabad and we have no evidence of any conduct during the period between her going to Hyderabad and the time the suit was brought which would indicate that she was a consenting party to the marriage. It is true of course that the girl did not during this time take any active steps for the purpose of repudiating the validity of a nikah and it has been argued that in view of the great delay in bringing the suit the relief sought by her ought to be refused, it being within the discretion of the Court to withhold such relief. On the other hand, there is the consideration that the girl all this time was living with her father and in the circumstances it is not to be expected that she could have taken any action independent of him.

The letters from Qasim Hasan to his father written from Hyderabad indicate that he was still trying to establish friendly relations between his father and himself and for that purpose he was representing that the plaintiff was being taught the Sunni faith. It would, in our opinion, have been quite impossible for this girl to have taken any active steps at an earlier stage in order to obtain the declaration she is seeking in this suit. It is likely enough that the suit was brought after Qasim Hasan had quarrelled again with his father and had made a wakf of the property to which he claimed to be entitled as an heir of his deceased mother. However that may be, we are of opinion that the record does not afford any reliable evidence to show that Amina Khatun was ever willing to marry defendant 1 or has ever been willing since the ceremony was performed to acknowledge that she is lawfully wedded to him. We have come therefore to the conclusion that the Subordinate Judge's judgment and decree must be maintained except in one particular now to be noticed. The Subordinate Judge in decreeing the plaintiff's suit made Wazir Ahmad, the guardian ad litem of defendant 1 personally liable for the costs of the suit. It is complained in the memorandum of appeal that the Court below was wrong in awarding costs personally against Wazir Ahmad. We think effect must be given to this plea. We cannot find any authority in the Civil Procedure Code to award costs personally against a guardian ad litem and we may refer in this connexion to a decision of the Madras High Court, *Narasimha Rau* v. *Lakshmipati* (2).

The decree of the Court below therefore will be varied by directing that the costs of the suit will be borne by defendant 1. With this modification in the decree of the Court below we dismiss this appeal with costs to the plaintiff-respondent.

D.D. *Appeal dismissed.*

(2) [1881] 3 Mad. 263.

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* A. I. R. 1929 Allahabad 25

KENDALL AND NIAMATULLAH, JJ.

Bhola Ram—Plaintiff—Appellant.

v.

Dhani Ram—Defendant—Respondent.

Second Appeal No. 190 of 1926, Decided on 7th June 1928, from decree of Addl. Dist. Judge, Cawnpore, D/- 6th January 1926.

*** (a) Hindu Law—Stridhan — Immovable property can be sulka stridhan.**

It may be that in ancient days when sulka stridhan was first recognized only articles of comparatively small value were the subject of it but given all other conditions there appears to be no reason why a woman may not acquire immovable property in the same manner and subject to the same conditions as would be annexed to moveable property. [P 27 C 1]

*** (b) Civil P. C., S. 100—Question whether property is sulka stridhan is not question of law pure and simple—Hindu Law.**

The question whether certain property is sulka stridhan or not is not a question of law, pure and simple. Unless evidence is led to show the circumstances under which the gift was made and that it was intended to be the price of the bride or given to the girl for services mentioned in the texts, the property cannot answer the description of Sulka. [P 27 C 2]

(c) Hindu Law—Stridhan—Sulka—Fact of gift being made in contemplation of marriage does not give rise to inference that it was price for marriage—Distinct allegation and cogent evidence that gift was prompted by desire to benefit parents induced thereby to give girl in marriage is necessary to prove character of property—Every antenuptial settlement is not sulka.

The fact that the gift was made in contemplation of marriage does not necessarily give rise to the inference that it was the price for

marriage. To attract the application of special rules of succession to sulka it must be distinctly alleged and proved by cogent evidence that the property given to a Hindu girl was of that character, the gift having been prompted by a desire to confer pecuniary benefit, immediate or ultimate, on the parents who have been thereby induced to give her in marriage .. In the present advanced stage of society every ante-nuptial settlement or gift cannot be classed as sulka. [P 28 C 1, 2]

(d) Hindu Law — Stridhan—Sulka—Inheritance—Children are excluded by parents and maternal relations.

The essential charateristic of sulka is that the lady's own children are absolutely excluded by her parents and other maternal relations, in the matter of inheritance. [P 28 C 1]

K. N. Katju—for Appellant.

Tej Bahadur Sapru and *P. N. Sapru* —for Respondent.

Judgment.—The circumstances which led to the institution of the suit out of which the present second appeal by the plaintiff has arisen are as follows :

Mt. Saro Kunwar who originally owned the property in dispute—shares in two villages in Hamirpur District—made a gift of the same by a deed dated the 12th June 1894, to Mt. Budhia Kuar, then aged 10, about eleven days before the latter's marriage with Baldeo Prasad, a man of fifty and a brother of Mt. Saro Kuar who appears to be a lady possessed of extensive properties. It was due to her position and efforts that an unequal match of that kind was agreed to by the bride's parents who were themselves of limited means. Accordingly the marriage was celebrated and in due course mutation of names was effected in favour of Mt. Budhia Kuar. She died as a childless widow on 16th March 1912, Baldeo having predeceased her. On her death mutation of names was effected in favour of Mt. Saro Kuar, who later on made a gift of it to Dhani Ram, the defendant-respondent by a deed dated 21st August 1913, The plaintiff instituted the present suit on 5th March 1913, claiming the property as the nearest reversioner of her husband Baldeo, and, therefore, heir to her stridhan as the property in dispute is alleged to be.

The defence raised a number of pleas. It was denied that the property in suit was the stridhan of Mt. Budhia Kuar, in which she could have a heritable interest. It was alleged to have been granted to her as maintenance for life, so that on the death of Mt. Budhia Kuar, the grantor Mt. Saro Kuar could take possession as full owner and make a gift of it to the defendant. The plaintiff's relationship with Baldeo was denied. The marriage of Mt. Budhia Kuar with Baldeo was said to have been performed in an unapproved form with the result that her stridhan could not in law devolve on her husband's reversioners. Mt. Budhia Kuar's death was alleged to have occurred on a date more than 12 years before the institution of the suit which was said to be barred by limitation on that account.

Both the lower Courts found against the defendant on all the pleas set out above, holding that the plaintiff was the nearest reversioner of Baldeo when Mt. Budhia Kuar died, that the marriage in question was in the approved form, that the property in dispute was the stridhan of Mt. Budhia Kuar and not a mere maintenance grant for life, and that the plaintiff's suit was within limitation. But the lower appellate Court while agreeing with the first Court, which had decreed the claim, on all the questions in controversy dismissed it on a finding that the property granted to Mt. Budhia Kuar was her sulka stridhan, devolving, according to a rule of descent peculiar to such property, on her mother Mt. Dulari Kuar who survived her daughter. The plaintiff has preferred this second appeal.

Woman's estate technically called stridhan in Hindu Law is of various kinds. The name of each class of stridhan is suggestive of the mode of acquisition or of the motive by which the donor was actuated; one of the classes of stridhan is known as sulka which has been defined to include property given to a woman before or after her marriage by husband's relatives. In his Hindu Law of Marriage and Stridhan, 4th Edition, Sir Guru Das Banerjee quotes the following passage from well-known works :

"The trifle which is received by a woman as the price or reward of household labour, of using household utensils, of keeping beasts of burden, of watching milch cattle, of preserving ornaments of dress, or of superintending servants, is called her perquisite (sulka)." (p. 294).

"The term 'gratuity' (sulka) means that for the receipt of which a girl is given in marriage." (p. 299).

"The term sulka, or fee, is explained as having two meanings. It either means according to the definition of Katyayana. "whatever has been received as a price of workmen on houses, furniture and carriages, milk vessels and ornaments" or it means, according to the text of Vyasa, "what is given to bring the bride to her husband's house." The former of these mean-

ings is thus explained : what is given to a woman by artists constructing a house or executing other work, as a bribe to send her husband or other person (of her family) to labour on such particular work, is her fee. It is the price (of labour) since its purpose is to engage a (labourer)" (pp. 309-310).

Sir E. J. Trevelyan in his work on Hindu Law (E. 2, p. 436) has the following :

"According to the more usual view, this was the gratuity for the receipt of which a girl is given in marriage. It was originally paid to the father as the price of the bride, but when that was forbidden the father received it for the bride, and it became her property as her dowry."

The reason why such property follows a peculiar rule of inheritance is thus given by another learned author :

"The reason is that originally it belonged to the parents, but later on, it was declared to become the bride's stridhan; and this rule of succession appears to be a compromise between the original and the later view." (Sarkar on Hindu law p. 734, edn. 6).

The learned advocate for the appellant has contended that no immovable property given to a girl can be her sulka which is limited to trifling gifts of cash or ornaments such as may be regarded as her 'perquisite.' It may be that in ancient days when this class of stridhan was first recognised only articles of comparatively small value were the subject of it but, given all other conditions, there appears to be no reason why a woman may not acquire immovable property in the same manner and subject to the same conditions as would be annexed to moveable property. No authority has been quoted in support of his contention and we are unable to give effect to it. The main argument addressed to us on behalf of the appellant is, however, based on two grounds, (1) that the learned Additional District Judge has made a new and inconsistent case in dismissing the plaintiff's claim on a finding that the property in dispute was sulka stridhan of Mt. Budhia Kuar and (2) that having regard to the evidence adduced in the case the property in dispute has not been established to be her sulka. We are of opinion that both of these grounds should be upheld for reasons to be presently stated.

That it was put forward for the first time in argument before the lower appellate Court can admit of no doubt. That it is quite inconsistent with the defence pleaded in the written statement and maintained in the petition of appeal before the lower appellate Court is equally clear. The plaintiff's allegation in para. 2 of the plaint that the property in dispute was the stridhan of Mt. Budhia Kuar was denied unreservedly in para. 1 of the written statement. Para. 3 of the latter again emphasized that it was by "no means" stridhan of that lady. If it had been the intention of the defendant to allege it to be sulka, the appropriate reply would have been to admit that it was stridhan with the qualification that it was of the sulka class. On the contrary it was alleged to be held by her as maintenance for life so that it was not heritable at all, either by her husband's collaterals or by her mother. At the trial of the suit a sum of Rs. 2,500 was said to have been paid as price of the bride and, therefore, the marriage was characterized as in the unapproved form. There was no suggestion that the property in dispute had been given as part of the price so as to make it sulka. In the grounds of appeal before the lower appellate Court all the pleas urged at the trial were embodied, maintaining that neither Mt. Saro Kuar, the donor, nor Mt. Budhia Kuar, the donee, had more than a life-interest. Every question raised in the pleadings was decided by the lower appellate Court in favour of the plaintiff. The learned Additional District Judge thought that

"being a point of law, it could be raised in appeal and so I heard the parties on it."

It is not a question of law, pure and simple. Unless evidence is led to show the circumstances under which the gift was made and that it was intended to be the price of the bride or given to the girl for services mentioned in the texts, the property cannot answer the description of sulka. Parties could have adduced oral evidence on the question if it had been raised at a proper stage. The recitals in the deed of gift fall far short of the requirements of the case and on the contrary tend in the opposite direction. We think the appellant's grievance that he has been prejudiced by the introduction of a controversy not warranted by the pleadings is well-founded.

Though the learned Additional District Judge professed to treat the question as one of law he proceeded to refer to some circumstances and even to the oral evidence of Mt. Dulari Kuar in proof of the

fact that there was an agreement between the parents of Mt. Budhia Kuar and Mt. Saro Kuar under which the latter was made to part with the property as price of the bride. He thought that the recitals in the deed of the gift afford

"a clear indication that the property was to be given to Budhia Kuar in consideration of marriage and as an inducement for it."

Ex facie the deed purports to have been executed by Mt. Saro because

"Baldeo Prasad is her own brother who had lived with her from his childhood and was then about to be married to Mt. Budhia Kuar . . . and, therefore, for the maintenance and comforts of the last named who would be the executant's bhawaj (brother's wife)"

the gift in full ownership was made to enable the donee to remain in possession like the executant (*misl mere*) with powers of "sale, mortgage and gifts, etc." In the absence of a clear issue raised and tried it is not permissible to impute an intention to the donor by a resort to speculative theories, however plausible. The recitals of the deed above quoted clearly bear out another theory, viz., that out of regard for Baldeo Prasad a provision was made for his family and children, and as it was expected that in the ordinary course of nature Mt. Budhia Kuar would survive her husband for very long and might have young children to bring up, it was on the whole desirable that deed should be executed in her favour. That Baldeo Prasad would also be supported out of the income of the property must have been present to her mind. It is highly improbable that Mt. Saro Kuar intended the property to be sulka, of which the essential characteristic is that the lady's own children are absolutely excluded by her parents and other maternal relations in the matter of inheritance. Mt. Saro Kuar could not have intended such a result, and could not, therefore, have intended to give the property as sulka. She makes it clear that the donee's estate in the gifted property would be the same as her own. The fact that the gift was made in contemplation of marriage does not necessarily give rise to the inference that it was the price of marriage. To attract the application of special rules of succession to sulka it must be distinctly alleged and proved by cogent evidence that the property given to a Hindu girl was of that character, the gift having been prompted by a desire to confer pecuniary benefit, immediate or ultimate, on the parents who have been thereby induced to give her in marriage. In the present advanced stage of society every ante-nuptial settlement or gift cannot be classed as sulka. The learned Additional District Judge quotes a passage from the evidence of Mt. Dulari, mother of Mt. Budhia Kuar, to support his view that the gift was meant to be in consideration of marriage. It runs thus:

"I had taken Rs. 2,500 from Saro Kuar for the marriage of my daughter; and for the maintenance of Budhia I had got Saro Kuar make a gift of two villages to her (daughter) because her (Budhia's) husband (rather would be husband) was an old man."

It should be borne in mind that this statement was elicited from her to show that the marriage was in an unapproved form. The Court of first instance disbelieved it and the lower appellate Court did the same, observing it in another place of the judgment:

"It was also urged that the marriage was not performed in an approved form in that Mt. Dulari Kuar was paid Rs. 2,500 as consideration of marriage. The lower Court did not believe the evidence on that point and I agree with it."

The only manner in which the two findings of the learned Judge can be reconciled is that the first half of the sentence of Mt. Dulari's evidence previously quoted is to be disbelieved and the second half is to be accepted. Even on this assumption the gift unlike the Rs. 2,500 was not stated to be the consideration of marriage. We have entered at length on a discussion of the circumstances founded on by the learned Judge to demonstrate the injustice resulting to the plaintiff, who himself could not lead evidence on a question of fact not raised but subsequently sought to be established by evidence of a dubious and inconclusive character.

In the view of the case which we have taken the decree of the lower appellate Court cannot be sustained. It is accordingly discharged and that of the Court of first instance is restored. The defendant-respondent shall also pay the costs of the plaintiff-appellant incurred in the lower appellate Court and in this Court.

D.B./R.K. *Decree reversed.*

*A. I. R. 1929 Allahabad 29

NIAMATULLAH, J.

Maharaj Singh and *others* — Appellants.

v.

Sri Raja Suryapal Singh — Respondent.

Second Appeal No. 450 of 1926, Decided on 4th July 1926, from decree of Dist. Judge, Agra.

(a) Civil P. C., O. 2, R. 2 —Government revenue of certain patti assigned to *M* and *V* in respect of 8 and 4 shares respectively —Plaintiff mortgagee of both suing for recovery of revenue in regard to *V's* share— Subsequent suit for recovery of revenue with regard to *M's* share is not barred.

The Government revenue of a village had been assigned to a class of persons who collected it from the landholders liable to pay the same. *M* was an assignee to the extent of 8 shares in patti No. 6. Similarly *V* was entitled to 4 shares. Plaintiff was the mortgagee of both the aforesaid persons entitled in that capacity to collect the revenue of their respective shares. Plaintiff brought a suit for recovery of revenue due in respect of the four shares belonging to *V* and subsequently brought a suit for recovery of revenue due in respect of the 8 shares belonging to *M*.

Held : that the plaintiff, had a separate cause of action for each of the two suits, claiming as he did under two different titles, reliefs in respect of two distinct properties. If *M* and *V* had brought separate suits no question as to relinquishment under O. 2, R. 2, could arise. It cannot likewise arise if their mortgagee who happens to be the same person brings such suits. [P 30 C 1]

(b) Agra Tenancy Act (2 of 1901), S., 161— Interest.

No interest is payable under S. 161. The right of interest depends on contract express or implied or some rule of law allowing it : *A. I. R.* 1918 *P. C.* 53, *Foll.* [P 30 C 1]

(c) U. P. Land Revenue Act, S. 143—Assignee cannot claim interest.

Under S. 143, no interest is to be paid to the Government on arrears of revenue. The assignee of the Government revenue is in no better position : 23 *All.* 5, *Foll.* [P 30 C 1]

***(d) Civil P. C., S. 11—Adjudication in ex-parte proceedings operates as res judicata —Amount claimed as revenue or rent with interest decreed ex parte—Right to receive interest in subsequent suit cannot be res judicata— Unless finding in previous suit decides expressly or by necessary implication question of recurring right to receive interest decision cannot be res judicata so as to entitle plaintiff to interest on arrears accruing due subsequently—Interest claimed as damages in previous suit — Subsequent default in different circumstances cannot entitle plaintiff to damages.**

Where an issue of law or fact is raised and decided ex parte it is settled law that the adjudication will operate as res judicata but where a certain amount is claimed as revenue or rent for certain years with interest and is decreed ex parte in terms of the prayer all the requirements of the rule of res judicata are not necessarily fulfilled in a subsequent contested suit in which the plaintiff's right to receive interest is specifically in question. Unless the finding in the previous suit expressly or by necessary implication decides the question of a recurring right to receive interest as distinguished from a mere award of the interest claimed for the arrears in respect of the years then in suit the previous decision cannot operate as res judicata so as to entitle the plaintiff to receive interest on arrears of revenue or rent accruing due subsequeutly though he is not, apart from res judicata, so entitled. [P 30 C 2]

If in the previous suit the interest was claimed as damages and the Court decreed as such it can have no greater effect than to establish the plaintiff's right to interest by way of damages for the default then in question. A subsequent default under different circumstances will not necessarily entitle the plaintiff to damages. If expressly or by necessary implication the plaintiff's recurring right was affirmed or negatived so as to make such recurring right a matter directly and substantially in issue the decision will operate as res judicata even though the causes of action in the two suits may be different : 16 *Cal.* 300, *(F.B.)* ; *A. I. R.* 1922 *Pat.* 303 ; and 26 *Bom* 25 ; *Foll.* [P 30 C 2 ; P 31 C 1]

***(e) Civil P. C., S. 11—Pleadings and decision in previous suit must be strictly construed.**

A plea in bar of legal rights should be given effect to only on strictly construing the pleadings and the decision in the previous suit. [P 31 C 1]

Panna Lal and *Brajmohan Lal Dave* —for Appellants.

S. K. Dar and *N. P. Asthana* — for Respondent.

Judgment.—This appeal has arisen out of a suit brought by the plaintiff-appellant for recovery from the defendant of the Government revenue of which the plaintiff is the assignee. The Court of first instance, an Honorary Assistant Collector, dismissed it as barred by the provisions of O. 2, R. 2, Civil P. C. The lower appellate Court decreed the claim with interest disagreeing with the first Court ar regards the plea of bar created by O. 2, R. 2, Civil P. C. The defendant has preferred this second appeal which raises two questions viz., (1) whether the, suit is barred by O. 2, R. 2, Civil P. C. as held by the Court of first instance and (2) whether the plaintiff-respondent is entitled to interest on arrears of revenue.

It appears that the Government revenue of the village has been assigned to a class

of persons who collect it from the landholders liable to pay the same. Manohar Lal is an asssignee to the extent of eight shares in patti No. 6. Similarly Venkateshwar is entitled to four shares. Plaintiff is the mortgagee of both the aforesaid persons and entitled inthat capacity to collect the revenue of their respective shares. Plaintiff brought a suit for recovery of revenue due in respect of the four shares belonging to Venkateshwar and subsequently brought the suit giving rise to the present appeal for recovery of revenue due in respect of the eight shares beloging to Manohar Lal. The view taken by the learned District Judge is so manifestly correct that I do not propose to deal with the question at any length. The plaintiff has a separate cause of action for each of the two suits, claiming, as he does under two different titles, reliefs in respect of two distinct properties. If Manohar Lal and Venkateshwar had brought separate suits no question as to relinquishment under O. 2, R. 2, Civil P. C., could arise. It cannot likewise arise if their mortgagee who happens to be the same person brings such suits. This ground of appeal must, therefore fail.

On the second question the appeal must succeed. The learned District Judge concedes that no interest is payable under S. 161, Tenancy Act 2 of 1901. The right to interest depends on contract express or implied or on some rule of law allowing it; *Kalyan Das* v. *Maqbul-Ahmad* (1). S. 143, Land Revenue Act, declares that no interest is to be paid to the Government on arrears of revenue. The assignee of the Government revenue is in no better position : see *Chandi Prasad* v. *Mahendra Singh* (2). It is a debatable question whether an interest by way of damages can be awarded to an assignee of the Government revenue. It is not necessary to decide this question as it was not raised in the lower Court and I have not been asked to award interest as damages. The claim to interest is based on the ground that in a previous suit between the parties relating to the eight shares in respect of which revenue is now claimed, interest had been claimed and an ex-parte decree was passed. The liability of the defendant to pay interest is said to be res judicata. The learned District Judge has upheld the plea of res judicata and decreed interest.

Where an issue of law or fact is raised and decided ex-parte it is now settled law that the adjudication will operate as res judicata but where a certain amount is claimed as revenue or rent for certain years with interest and is decreed ex parte in terms of the prayer all the requirements of the rule of res judicata are not necessarily fulfilled in a subsequent contested suit in which the plaintiff's right to receive interest is specifically in question. Unless the finding in the previous suit expressly or by necessary implication decides the question of a recurring right to receive interest as distinguished from a mere award of the interest claimed for the arrears in respect of the years then in suit the previous decision cannot operate as res judicata so as to entitle the plaintiff to receive interest on arrears of revenue or rent accruing due subsequently though he is not, apart from res judicata, so entitled.

It is not ascertainable from the proceedings of the previous suit whether interest was claimed under some alleged rule of law or as damages. If it was claimed as damages and the Court decreed as such it can have no greater effect than to establish the plaintiffs right to interest by way of damages for the default then in question. A subsequent default under different circumstances will not necessarily entitle the plaintiff to damages.

A Full Bench of the Calcutta High Court had held in *Modhusudan Shaha* v. *Brae* (3) that a mere statement of an alleged rate of rent in a plaint in a rent suit in which an ex-parte decree has been obtained, is not a statement as to which it must be held that an issue within the meaning of S. 13, Civil P. C., was raised between the parties so that the defendant is concluded upon it by such decree.

> "Neither a recital in the decree of the rate of rent alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter a res judicata, assuming that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case."

This has been consistently followed in that Court in numerous subsequent deci-

(1 A. I. R. 1918 P.C. 53=40 All. 497 (P.C.).
(2) [1900] 23 All. 23 All. 5=(1900) A.W. N. 173.
(3) [1889] 16 Cal. 300 (F.B.).

sions. The Patna High Court has taken the same view. In *Pitamber Chowdhri* v. *Rahmat Ali* (4) it was held that:

"a previous decree for cess does not operate as res judicata, inasmuch as a cess is a recurring charge."

The case of *Vishnu Vasudeo* v. *Ramling Bhickling* (5) proceeds on the same principle. In some of the Calcutta cases certain observations have too broadly put the proposition that an ex-parte decree in respect of specified years can in no case operate as res judicata in a subsequent contested claim. It depends largely on the terms of the pleadings and the decision in the previous suit. If expressly or by necessary implication the plaintiff's recurring right was affirmed or negatived so as to make such recurring right a matter directly and substantially in issue the decision will operate as res judicata even though the causes of action in the two suits may be different. A plea in bar of legal rights should be given effect to only on strict construction of the pleadings and the decision in the previous suit. The previous ex-parte decree in question in the case before me does not lead to the conclusion that the plaintiff's recurring right to receive interest was expressly or by necessary implication directly and substantially in issue or that it was finally heard and decided. The decree of the lower appellate Court is modified so as to disallow the plaintiff's claim to interest. It is maintained in all other respects. Under the circumstances of the case parties are directed to pay their own costs of this appeal.

D.B./R.K. *Decree modified.*

(4) A. I. R. 1922 Pat. 303=1 Pat. 218.
(5) [1902] 26 Bom. 25=3 Bom. L. R. 450.

A. I. R. 1929 Allahabad 31

WEIR, J.

Ram Charan Lal and *others* — Defendants—Appellants.

v.

Ghafoor and *others*—Plaintiffs — Respondents.

Second Appeal No. 210 of 1926, Decided on 5th June 1928, from decree of Dist. Judge, Bareilly, D/- 2nd Dec. 1927.

(a) Limitation Act, S. 5—Delay condoned ex parte—The question of condoning can be reconsidered at the hearing.

Where an order admitting an appeal and condoning the delay is made ex parte, a Court has jurisdiction to reconsider the question when the appeal comes for hearing: *A. I. R.* 1917 *P. C.* 179, *Foll.* [P 32 C 1]

(b) Limitation Act, S. 5—Discretion exercised by lower Court — High Court cannot interfere in the discretion.

Where a lower appellate Court has exercised its discretion to extend or refuse to extend the period of time allowed for filing an appeal the High Court has no jurisdiction to decide whether the Court was or was not right in refusing to extend the time: 9 *A. L. J.* 292, *Foll.* [P 32 C 1]

Uma Shankar Bajpai for *Jwala Prosad Bhargava* and *Rama Kant Malaviya* —for Appellants.

Mushtaq Ahmad—for Respondents.

Judgment.—In this case it was objected before the lower appellate Court that the appeal was not in time; and sustaining the objection, the Court dismissed the appeal. The facts are that the judgment in the suit was delivered on 29th May 1925. The month of June was vacation, and the Court did not reopen till the 6th July on which date a memorandum of appeal was filed with a copy of the judgment but without any copy of the decree against which the appeal was taken. On the 10th July an order was passed allowing the appellants time up to the 15th July for obtaining and filing a copy of the decree. On the 11th July the appellants applied for a copy of the decree, which was not delivered to them till the 16th July. In the meantime the appellants had obtained a further extension of time up to the 21st July, on which date they presented a copy of the decree. The next material date is 27th July 1925, on which date the following order was passed:

"As parentage of the parties has been filed in English and a report by the office regarding sufficiency of Court-fees has been made, it is ordered that it be registered in the register of appeals and notice fixing 18th August 1925, be issued to the respondents for filing a vakalatnama, and the lower Court record will be sent for when necessary."

When the case came on for hearing before the District Judge of Bareilly on 2nd December 1925, he dismissed the appeal on a preliminary objection that it was not in time. He held that there was no reason why the appellants should not have obtained a copy of the decree at the same time as they obtained a copy of the judgment of the trial Court. Accordingly he decided that the appellants had failed to show any good cause for their delay, and he refused to exercise the discretion vested in him under S. 5, Lim. Act, to extend the time for filing the appeal.

Two points have been urged before me by counsel for the respondents. First that even if the order of 27th July 1925, be taken as an order admitting the appeal and condoning the delay, that order was made ex parte and the learned District Judge had jurisdiction to reconsider the question when the appeal came before him. In support of this contention the case of *Krishnasami Panikondar* v. *Ramasami Chettiar* (1), is cited. That was a case in which a Division Bench of the High Court of Madras reconsidered, when the case came before it, the decision of the single Judge extending the period of limitation under S. 5, Lim. Act, and their Lordships of the Privy Council observed that:

"the Division Bench had jurisdiction to reconsider the sufficiency of the cause shown and to do this at the hearing of the appeal".

I do not think that the order of 27th July 1925, was intended to be an order extending the period allowed for filing the appeal. I think that it was intended that the question, whether the time should be extended or not, should be decided when the appeal came on for hearing; but, even if the order had been intended to extend the time, I think that the learned District Judge had jurisdiction to decide whether the discretion to extend the period for filing the appeal was or was not rightly exercised, because, if that extension was granted, it was granted ex parte and without giving the respondent any opportunity to state his side of the case. The second point taken by counsel for the respondent was that no appeal lies from an order of a Court exercising its discretion to extend or refuse to extend the period of time allowed for filing an appeal. In support of this he has cited the case of *Bikram Singh* v. *Narain* (2), and two earlier decisions of this Court referred to and followed in that case. The decision is binding on me and I, therefore, hold that I have no jurisdiction to decide whether the learned District Judge was or was not right in refusing to extend the time. This appeal is accordingly dismissed with costs.

If counsel for the appellant desires leave to appeal under the Letters Patent, I shall grant it.

R.K. *Appeal dismissed.*

(1) A. I. R. 1917 P. C. 179=41 Mad. 412=45 I. A. 25 (P.C.).
(2) [1912] 9 A. L. J. 202=14 I. C. 59.

A. I. R. 1929 Allahabad 32

DALAL, J.

Malkhan Singh—Appellant.

v.

Gulab Singh and *another* — Respondents.

Second Appeal No. 925 of 1925, Decided on 15th and 16th December 1927, from a decree of Dist. Judge, Meerut.

U. P. Tenancy Act, S. 201 (3)—Presumption is unrebuttable if person is recorded cosharer at the date of the suit.

The presumption under S. 201 (3) is unrebuttable if a plaintiff is a recorded cosharer on the date of the institution of the suit. But if he is not such a recorded cosharer on the date of the suit he cannot sue for the period during which his name was wrongly recorded. [P 33 C 1]

P. L. Banerji—for Appellant.
N. P. Asthana—for Respondents.

Dalal, J.—I have some difficulty in coming to a decision in this case without further evidence. The plaintiff sued for the recovery of profits for the year 1237 Fasli. It is certain that the basis of his title was unsound and he had really no title to the property. He purchased the property from one Raghubir Singh who was prior to the institution of the suit declared not to be the owner of the property, and the sale in favour of the plaintiffs, was specifically declared to be null and void by a civil Court, The difficulty, however, is that at some time or other the plaintiff Malkhan Singh's name was recorded in the revenue records. I have no information whether such a record existed on the date of the institution of the present suit on 29th July 1923 or not. If the plaintiff's name did exist in the record he was entitled to sue under the presumption enjoined by S. 201 (3), Tenancy Act. It has been held by a Full Bench of this Court in *Durga Prasad* v. *Kuer Hazari Singh* (1) that the presumption is not rebuttable. If so even a previous civil Court decree declaring the transfer in favour of the plaintiff to be void will not deprive him of his right to sue. Of course it will not be necessary to prove that the plaintiff's name did not exist in the record for the year in suit. The information really wanted is whether on the date of the institution of the suit the name existed or not. Having regard to the ruling in the case of *Muba-*

(1) [1911] 33 All. 790=11 I. C. 116=8 A. L. J. 1025.

rak Fatima v. *Muhammad Wuli Khan* (2) what I take the law to be as laid down by the rulings of this Court is that the presumption is unrebuttable if a plaintiff is a recorded cosharer on the date of the institution of the suit. But if he is not such a recorded cosharer on the date of the institution of the suit he cannot sue for the period during which his name was wrongly recorded. It is certain here that all the time that the plaintiff's name was recorded, it was wrongly recorded and not on the basis of a legal title. If on the date of the institution of the suit, 29th July 1923, the plaintiff's name was on the record, my opinion is that the suit will have to be decreed.

An issue is remitted to the Court of the Assistant Collector to report to this Court whether on 29th July 1923 the plaintiff's name was recorded in the khewat or not. Return shall be made within three months. On receipt of the return ten days shall be allowed to parties to object. Both parties shall be entitled to produce evidence oral and documentary, in the Court of trial.

A.L./R.K. *Appeal allowed.*

(2) A. I. R. 1922 All. 102=44 All. 413.

** A. I. R. 1929 Allahabad 33
Full Bench

SULAIMAN, Ag. C. J., AND BOYS, BANERJI, KENDALL AND WEIR, JJ.

Emperor—Applicant.

v.

Phuchai and *another* — Opposite Party.

Criminal Revn. No. 776 of 1927, Decided on 10th July 1928, against the judgment of the Sess. Judge, Benares.

*** (a) Criminal P. C., S. 109 (a)—Magistrate within whose jurisdiction concealment is to be effected has jurisdiction and not one within whose jurisdiction precautions are taken.**

Sulaiman, Ag. C. J.—The repetition of the expression 'within the local limits of such Magistrate's jurisdiction' in S. 109, sub-Cl. (a) is by no means superfluous. Its use is necessary to specify that it is not the Magistrate within whose jurisdiction the precautions are taken but the Magistrate within whose jurisdiction the concealment is to be effected who has power to demand security. [P 34 C 2]

**** (b) Criminal P. C., S. 109 (a)—(*Per Full Bench*) Concealing to be effected at a certain place—Magistrate having jurisdiction at that place can demand security although residence of the person in that jurisdiction is well known:** (*Boys* and *Banerji, JJ. contra*). 49 *All.* 240=*A. I. R.* 1927 *All.* 50=97 *I. C.* 428 and 49 *All.* 844=*A. I. R.* 1927 *All.* 592 =102 *I. C.* 503, **Overruled.**

If a person is concealing his presence in a part of the territorial limits of the jurisdiction he is necessarily concealing his presence within that jurisdiction also. Therefore if a man is taking precautions anywhere in order to conceal his presence, and that concealing is to be effected within the jurisdiction of a Magistrate who receives the information, such Magistrate has power to demand security even though the residence of the person informed against within the jurisdiction is well-known : **49 All. 240=A. I. R. 1927 All. 50=97 I. C. 428 and 49 All. 844=A. I. R. 1927 All. 592 =102 I. C. 503,** Overruled. [P 36 C 1]

*** (c) Criminal P. C,, S. 109 (a)—No time-limit can be put on taking of precautions—It is to be determined on particular facts.**

Sub-section (a) cannot be interpreted too literally so as to necessitate the continuance of taking precautions till the information is received by the Magistrate. No time-limit can be put on the taking of precautions. In every case it would be a question of fact whether the circumstances justify the inference that he has been taking precautions to conceal his presence and that there was the intention to commit an offence : 27 *C. L. J.* 382 and *A. I. R.* 1925 *Cal.* 616, *Diss. from.* [P 36 C 2, P 37 C 1]

(d) Interpretation of Statutes—Two distinct words in same section do not mean the same thing.

Per Sulaiman, Ag. C. J.—When two distinct words are used in the same section, the ordinary rule of construction is that they do not mean identically the same thing. [P 37 C 1]

**** (e) Criminal P. C., S 109 (b)—(*Per Full Bench*) "Give a satisfactory account of himself" does not mean "explain what he was doing" at a particular time or place — Failure to explain a person's presence does not bring him within S 109 (b)** (*Boys* and *Banerji, JJ. contra*).

If the words "give a satisfactory account of himself" are given the meaning "explain what he was doing" or "explain his conduct" at any particular time or place, it would make the scope of S. 109 (b) too wide. On such an extended interpretation of the expression a man could be bound over merely because he does not discharge the burden of satisfying a Magistrate as to his conduct at a particular time or place. The legislature did not contemplate such an extension of its scope. The expression is somewhat akin to the other expresion used in the same clause, namely "who has no ostensibe means of subsistence." If a man is unable to explain his course of conduct, as distinct from failure to explain a momentary behaviour, he may very well come under the clause, but a man's failure to explain his presence does not bring him within the section. 8 *A.L.J.* 1037 ; 17 *A. L. J.* 432 ; and 891 ; *Rel. on.* [P 37 C 2]

Sulaiman, Ag. C. J.—The facts of this case have been clearly found by the Courts below and cannot be doubted. The police received information that a number of persons were hiding themselves on a dark night at about midnight in a mango grove outside the abadi of a village with a view to commit some offence. When the police went to the grove they found four persons sitting there, who, on being challenged, tried to run away. They were chased and two of them, the present accused, were captured. They had house-breaking instruments (jemmies) with them. When caught, they first gave wrong names and addresses, and then later on disclosed their real identities. They are residents of the same sub-division. They were called upon to show cause under S. 109, Criminal P. C. The Magistrate came to the conclusion that the case fell under S. 109, sub-Cl. (a) and demanded security. The learned Sessions Judge, following the recent pronouncements of this Court, held that that sub-section was inapplicable. The Government have accordingly filed a revision from that order.

In the case of *Emperor* v. *Bhairon* (1) it was remarked that it is an entire mistake to read that sub-clause as applying to any person who takes steps to conceal himself in the sense of concealing his presence in the way in which a criminal conceals his presence, when he goes in the dark, or by a deserted road, or by some other secret means to commit a crime in his own neighbourhood; that it was not intended to deal with anybody, either a habitual resident or a person well-known in the neighbourhood, trying to conceal himself, and that the offence contemplated is that of a person, probably, though not necessarily, coming from outside the jurisdiction into the Magistrate's jurisdiction for some nefarious purpose, and taking precautions to conceal the fact that he is present in that jurisdiction.

This case was explained in the case of *Emperor* v. *Himayatullah* (2), and it was stated that *Bhairon's* case (1) cannot be said to have laid down that a person must go into the district from a place quite outside, and that a person living within the territorial jurisdiction of a Magistrate who takes steps to conceal that he is there, namely, by removing himself from one part to another and disguising his identity or hiding his person, may be within the section.

Two arguments appear to have appealed to the learned Judges. Firstly, that the expression "within the local limits of such Magistrate's jurisdiction" is part of the predicate "to conceal his presence"; and, secondly, that it it is impossible to attribute to that expression a direction as to the jurisdiction of the Magistrate over the offence, because for that purpose the words would be superfluous, the jurisdiction being clearly established by other provisions.

It will be convenient to consider the second argument first. Proceedings under S. 109 are preventive in their nature and do not relate to any substantive offence. Ss. 5 and 177, which confer jurisdiction, deal with offences and are inapplicable. No doubt under S. 12, sub-Cl. (1) the local areas, within which Magistrates have to exercise their powers, are defined by the Local Government and under S. 36 all Magistrates have the powers conferred upon them under the third schedule and Sch. 3 (No. 5) empowers a First Class Magistrate to require security for good behaviour under S. 109. But if the territorial jurisdiction of the Magistrates over proceedings under Ch. 8 had been separately fixed, there would have been no necessity to repeat similar expressions in all the relative sections. That expression occurs in S. 107, sub-S. (2), Ss. 108 and 109, Cls. (a) and (b) as well as S. 110. What is still more noteworthy is that S. 107, sub-S. (2) expressly provides that proceedings shall not be taken unless the person informed against is within the local limits of such Magistrate's jnrisdiction. Had that provision been already laid down by other sections of the Act, there was no necessity to specify it there particularly. Similarly S. 108 emphasizes the presence of the person within the local limits of the Magistrate's jurisdiction, who, within or without such limits, does the act mentioned therein.

It seems to me that the repetition of that expression in S. 109, sub-Cl. (a) was by no means superfluous. Its use was necessary to specify whether it is the Magistrate within whose jurisdiction the precautions are taken, or the Magistrate within whose jurisdiction the concealment is to be effected, who should

(1) A. I. R. 1927 All. 50=49 All. 240.
(2) A. I. R. 1927 All. 592=49 All. 844.

have power to demand security. Obviously it is the Magistrate last mentioned who is authorized. Had the intention been otherwise, the sub-section would have been worded as "any person is, within the jurisdiction . . . . taking precautions. . ." The ordinary rule of grammar is that an adverb of place should refer to the nearest verb and not to the one more remote.

To say that the expression "within the local limits of such Magistrate's jurisdiction" is a part of the predicate "to conceal his presence" is, I would say with great respect, using ambiguous language, inasmuch as it does not clearly bring out the point which causes a difference of opinion, namely, whether the expression is an adjectival clause qualifying the noun "presence" or an adverb of place modifying the verb "to conceal." If it is the former, it would mean concealing the fact of his being present nside the jurisdiction, while if it is the latter, it would mean that the act of concealing his presence must be within the jurisdiction. The former construction narrows considerably the scope of the sub-section, for which there seems to be no justification. In ordinary grammar an expression indicating a place is treated as an adverb of place modifying the nearest verb in the sentence, and not as an adjective qualifying a substantive noun.

It is clear that a man may be concealing his presence with a view to commit an offence, and yet he may not be concealing the fact that he is within the jurisdiction of a Magistrate. A common illustration would be that of a person, who is known to be a resident of a sub-division, and who secretly at night hides himself in a field close to a house with a view to commit burglary when the chaukidar falls asleep. He may continue this process night after night so long as the opportunity does not offer itself to him. He is certainly concealing the fact of his presence inside the field, which is situated within the jurisdiction of the Magistrate, and yet he is in no way concealing the fact that he is present within the jurisdiction. On the other hand, if the concealment of a man's presence is in a part of a larger area, there is undoubtedly a concealment in the larger area also.

I concede that the expression "concealing his presence" is not identical with concealing himself. A man may not conceal his presence at a place and yet he may conceal his identity. For instance, a man well-known as Sir John Wilson, may go to a new place where nobody recognizes him and may put up at a fashionable hotel under the name Mr. Wilson. He cannot be said to be "concealing his presence" though he is without doubt concealing his "identity." On the other hand, the giving out of a false name by a man in conjunction with other circumstances, for example, when he disguises himself, or hides himself, or when it is his duty to disclose his identity, or absence from residence, as in the case of criminals ordered to notify their residence under S. 565, Criminal P. C., may amount to "concealing his presence."

To put a narrow construction on the section would make it practically useless except in cases where persons come from outside the jurisdiction. So long as a criminal leads no one to believe that he has left his residence, he would be quite safe in concealing his presence as much as he likes. As a matter of practice criminals under surveillance, who go from place to place, generally take good care to report their arrivals at the police stations, except when they go out at night for the purpose of committing an offence during that night. On this narrow construction the only conceivable case possible, to which the sub-section would be applicable to people residing within the jurisdiction, would be when a man has left his known residence without intimation and has moved to another place within the same jurisdiction and is in hiding there. Such cases are rare, and when they do occur, the intention is not so much to commit an offence, as to avoid arrest. Thus for practical purposes the sub-section would be useless so far as criminals living within the jurisdiction are concerned. Indeed in *Himayatullah's* case (2) it was remarked that a man, who is deliberately preparing to commit a burglary and when caught by the police admits his intention, cannot be dealt with under the provisions of the section. The commonest form of cases is when criminals from one village go secretly at night to another village and remain in hiding in the house of a comrade in order to go out later at night and commit burglary. On the narrow view of the section such persons could continue the process night after night with impunity. Another difficulty would

be that the police cannot always keep an eye on all the citizens every day and find out their whereabouts. So long therefore as the police have not become aware that a particular individual has left his house, and are not led to believe that he has left the jurisdiction, he can conceal his presence with a view to commit an offence without any fear.

Another extraordinary result would follow from the limited construction in the following way. A thief may come from one sub-division and conceal his presence in another sub-division. He is obviously concealing the fact of his presence within the jurisdiction of the Sub-Divisional Magistrate in charge of the second sub-division and can be tried by him; but as the jurisdiction of the District Magistrate extends over the whole district, the man is not concealing the fact of his presence within the jurisdiction of the District Magistrate, that is, his presence within the district. He has never intended to lead any one to believe that he has left the district itself. The District Magistrate would therefore not have power to try him, although the Sub-Divisional Magistrate would. In my opinion if a person is concealing his presence in a part of the territorial limits of the jurisdiction he is necessarily concealing his presence within that jurisdiction also.

I therefore think that if a man is taking precautions anywhere in order to conceal his presence, and that concealing is to be effected within the jurisdiction of a Magistrate who receives the information, such Magistrate has power to demand security even though the residence of the person informed against within the jurisdiction is well-known.

Now remains the argument which has found favour with the Calcutta High Court, namely, that the act contemplated by the sub-section is one which is continuous and not a momentary one. In the case of *Rashu Kabiraj* v. *Emperor* (3) Shamsul Huda, J., considered that Cl. (a) referred to a continuous act and did not apply to a case where there was a momentary effort at concealment to avoid detection or arrest. Indeed he went to the length of saying that Cl. (a) cannot apply to the case of a person brought under arrest, as such person cannot be said to be taking precautions to conceal his presence. Another Bench of the same High Court accepted that view, holding that the clause did not apply to a case where there is a momentary effort at concealment to avoid detection or arrest. *Piru* v. *Emperor* (4).

Taking the language of the sub-section literally, one might at first sight think that the taking of precautions should continue till the time when the information is received, but a too literal interpretation would lead to an absurd result. In view of the other provisions of the Act it is clear that such a narrow coustruction cannot be accepted. S. 55, sub-Cl. (1) (a) authorizes a police-officer to arrest any person "found" taking precautions to conceal his presence within the local limits of his police station under circumstances which afford reason to believe that he is taking such precautions with a view to commit a cognizable offence. S. 60 requires the officer to produce the person before a Magistrate without necessary delay. We also find that a person who may be ordered to show cause under S. 109 may actually be present in Court (S. 113), or may be in the custody of a police officer (S. 114). Similarly S. 117 allows the order to show cause, being made against a person who is present in Court or who is brought before a Magistrate. It is thus clear that the sub-section cannot be interpreted too literally so as to necessitate the continuance of taking precautions till the information is received by the Magistrate.

I must concede that the use of the present continuous tense "is taking" is unhappy. But I have no doubt that it is intended to be comprehensive enough to cover the present perfect tense "has taken" or "has been taking." The difficulty in holding that it is not a momentary but a continuous act that is contemplated, would be where to draw the line. Is the act continnous when it lasts for one hour, one night, one week or more? Does it become continuous if it is repeated once, twice, thrice or more? Again a man may never conceal himself in the day time but may take precautions to conceal his presence night after night. Would the continuity be broken because there was no concealment during the day? Furthermore, the section is a preventive section intended to frustrate the designs of a criminally minded person before they are

(3) [1918] 27 C.L.J. 382=41 I.C. 649=22 C. W.N. 163.

(4) A.I.R. 1925 Cal. 616.

carried out. If the idea of continuity were pushed far enough, an arrest at the very outset of the preparation would be impossible, as the police would always have to wait till the designs have gone on for some time and have been persisted in. It seems to me that no time-limit can be put on the taking of precautions. In every case it would be a question of fact whether the circumstances justify the inference that he has been taking precautions to conceal his presence and that there was the intention to commit an offence.

None of the Courts below have applied sub-S. (b). The learned Government Advocate also has not relied on this sub-section. In no reported case that I know of has it ever been held that if a man cannot explain his presence at a particular point of time or place, he is a person who cannot give an account of himself within the meaning of this sub-section. Cl. (a) uses the words "conceal his presence etc." Cl. (b) uses the expression "give an account of himself." When two distinct words are used in the same section, the ordinary rule of construction is that they do not mean identically the same thing. I therefore do not think that the two words "presence" and "himself" are interchangeable, and that the inability to give an account of himself is the exact equivalent of the omission to explain his presence at a particular time and place. The force of the word "cannot" is also to indicate utter inability. It has not the same meaning as "does not" or "did not." If a man proves that he is a resident of the neighbourhood, and is a man of substance, he must be said to be able to give a satisfactory account of himself, although he is not able to, or does not, give any convincing explanation why on a particular dark night he was found prowling about in a lonely place.

I do not see any force in the argument that because under S. 54 (1) the police can arrest any person having in his possession without lawful excuse an implement of house-breaking, therefore such a man's case must fall under S. 109 (b) if it cannot fall under any other section. A man may be living openly at his residential house, he may have possession of an implement of house-breaking which he may keep in a box in the house, and he may fail to discharge the burden of proving that he has lawful excuse for keeping it. And yet I fail to see how such a man can be said not to "give a satisfactory account of himself."

If we give to the words "give a satisfactory account of himself" the meaning "explain what he was doing," or "explain his conduct" at any particular time or place, we would make its scope too wide. The section would become applicable to a man who does not leave his house, and as to whom there is no proof that he is concealing his presence, and even no proof that he is making any preparation for committing a crime, but who, when questioned by the police, cannot explain any particular conduct of his.

The section does not say that the failure to give a satisfactory account of one's self must be accompanied by other suspicious circumstances which suggest that he may be contemplating a crime. On such an extended interpretation of the expression a man could be bound over merely because he does not discharge the burden of satisfying a Magistrate as to his conduct at a particular time or place. I do not think that the legislature contemplated such an extension of its scope. To my mind the expression is somewhat akin to the other expression used in the same clause, namely "who has no ostensible means of subsistence." Of course, if a man is unable to explain his course of conduct, as distinct from failure to explain a momentary behaviour, he may very well come under the clause.

I am not aware of any case where a man's failure to explain his presence, has been held to bring him within the section. The cases referred to in *King-Emperor* v. *Bhairon* (1) mostly fall under sub-Cl. (b) and the opinions expressed therein support my view.

In *Sharif Ahmad* v. *Emperor* (5) the police were expecting a gang of thieves to visit the city, and a little before midnight 7 or 8 men were seen coming in from the side of a jungle. They were pursued and the accused along with some others was arrested after a lathi fight.

Chamier, J. held that there was no evidence that he was concealing his presence within the jurisdiction and so Cl. (a) was inapplicable. As to Cl. (b) the learned Judge remarked:

"The Magistrate seems to have required him to furnish security because he could not get a satisfactory account of himself (see

(5) [1911] 8 A. L. J. 1097=12 I. C. 304 = 12 Cr. L. J. 526.

Cl. (b), S. 109, Criminal P. C. The applicant is a peon in the employ of the Municipality. His place of residence and occupation were well-known. It seems to me that he is not a person of whom it can be said that he was unable to give a satisfactory account of himself.

Similarly, in *Ghulam Jilani* v. *Emperor* (6), the three accused were met on the road in Meerut by the police, who were expecting the arrival of men of bad character. Close to that place a jemmy was found. Tudball, J., remarked :

"The applicants gave an explanation of themselves and as a matter of fact it has been established that they are well-to-do and respectable residents of the city of Delhi ..... The present applicants clearly do not come within Cl. (a) as it was not alleged that they were taking precautions to conceal their presence with a view to committing an offence .... as account they gave of themselves was correct and the police of Delhi have reported that these three present applicants are persons who are well-to-do and of good character. In these circumstances I do not think that S. 109, can apply to them."

Again, in *Laltu* v. *Emperor* (7), the accused was arrested along with a number of persons in a lane at night. The Magistrate found that Laltu had not given a true explanation of his presence on that night at that spot. Having ascertained that Laltu resided within the jurisdiction of the Magistrate, Piggot, J., remarked :

"I am quite satisfied that it cannot be said of Laltu that he could not give a satisfactory account of himself within the meaning of S. 109 (b), Criminal P. C."

In this case also it had not been suggested before the Magistrate that the accused had been trying to conceal his presence.

Following the principles underlying the decisions of such experienced Judges, I hold that Cl. (b) is wholly inapplicable. I have already expressed the opinion that Cl. (a) applies.

Boys, J.—Phuchai and Buddhu were called upon by a Magistrate under S. 109 (a), Criminal P. C., to give security. In appeal the Sessions Judge held that he was bound by the decision in *Emperor* v. *Bhairon* (1) that S. 109 (a) was not applicable to such a case, and, accepting the appeal, discharged the sureties. The decision in question was in fact also followed in *Emperor* v. *Himayatullah* (2). The first case was a decision of Sir Cecil Walsh, the then Acting Chief Justice, and Pullan, J. The later decision was also by Walsh, J. sitting with Banerji, J. The Local Government has filed an application in revision based on the single ground

"that the learned Sessions Judge has erred in refusing to bind down the accused under S. 109, Criminal P. C."

The facts are simple. The police received information that a number of persons were hiding themselves in a grove near a village. The result of the raid made on these men was that Phuchai and Buddhu were captured while the others escaped. Phuchai and Buddhu were each found to be in possession of a "sabri", i. e., a jemmy. Both of them at first gave false names and addresses but subsequently gave out their correct names and addresses. They were sent up for security to be taken under S. 109, Criminal P. C. The Magistrate found that, in view of the fact that Phuchai and Buddhu were found on a dark night at about midnight in a mango grove outside the abadi with house-breaking implements and that when challenged by the constables they tried to run away and that on being caught they first gave incorrect names and addresses in order to hide their identities, fully convinced him that

"it has been established beyond doubt that the accused were taking precautions to conceal their presence within the local limits of my jurisdiction and that they were doing so with a view to commit some offence."

He had further carefully examined the defence set up and gave his reasons for rejecting it. He held the case to fall under S. 109 (a) and accordingly demanded security. In *Emperor* v. *Bhairon* (1), the case relied on by the learned Sessions Judge in allowing the appeal, the facts were, as the learned Sessions Judge correctly says, very similar. Three persons who were Pasis by caste were found late at night outside a house in a village close to which they themselves lived, and a house-breaking implement was found upon one of them. When challenged they ran away and were caught and gave false names. Briefly the learned Judges held that the words "within the local limits of such Magistrate's jurisdiction" are part of the predicate "to conceal his presence." In other words, they held that before S. 109 (a) could be applied it must be found that the person to be held liable was not merely "concealing his presence" but concealing his

(6) [1919] 17 A. L. J. 432=51 I. C. 161 = 20 Cr. L. J. 401.
(7) [1919] 17 A. L. J. 801 = 52 I. C. 60 = 20 Cr. L. J. 572.

presence within the local limits of the Magistrate's jurisdiction. It is contended on behalf of the Crown that the words " within the local limits of such Magistrate's jurisdiction" are applicable to the words " any person" or to the words " taking precautions" or to the word " conceal" and that the clause should be interpreted as if it read that " any person within the local limits of such Magistrate's jurisdiction is taking precautions to conceal his presence" or as " that any person is taking precautions within the local limits of such Magistrate's jurisdiction to conceal his presence" or " to conceal within the local limits of such Magistrate's jurisdiction his presence". The question, then, for decision is whether on the one hand Cl. (a) is applicable if the " person is found within the jurisdiction" taking precautions to conceal his presence. or if the person is found " taking precautions within the jurisdiction" to conceal his presence, or if the person is found taking precautions to " conceal within the jurisdiction" his presence, or whether on the other hand it is necessary for the Crown to prove that the person was taking precautions to conceal " his presence within the jurisdiction."

It may be conceded that the phraseology is not as clear perhaps as it might be. I should have been myself inclined to agree with Walsh, J., and Pullan, J., that " the words are free from ambiguity" and to have decided the case in accordance with the view taken by them in *Emperor* v. *Bhairon* (1) without hesitation but the fact that this revision has been filed at the instance of the Local Government and the discussion which followed at the hearing of the revision are sufficient to show that the meaning of the clause is not as clearly expressed as it might be. The fact appears to be that the grammatical meaning of the whole phrase depends in the case of each interpreter upon the exact pauses he makes between or emphasis he lays on each particular portion of the whole phrase. And we must, therefore, look outside the phrase itself for aid in its interpretation. I will, therefore, : proceed to give my reasons for holding that the view taken in *Emperor* v. *Bhairon* (1) and followed in *Emperor* v. *Himayatullah* (2) is the correct one.

There can be no doubt that prima facie, apart altogether from the language used, the legislature may well have had in view either or both of two purposes.

Firstly, it would obviously be reasonable for the magistracy to desire power and for the legislature to confer that power to control the actions of a man whose conduct was open to suspicion and who, whether his ordinary residence was outside the jurisdiction or inside it, was concealing the fact of his " presence within the jurisdiction". A Magistrate may rightly want to be in a position to control, if necessary, persons who are found hiding the fact that they are " present within his jurisdiction" and when the conduct of such persons further gives reasons for supposing that they are contemplating the commission of an offence, the legislature might naturally be expected not to overlook the desirability of giving that power of control by the taking of security. This case, in the view that I hold and for which I will give my reasons, is provided for in S. 109, Cl. (a).

Secondly, it would equally obviously be unlikely that the legislature would omit to notice and provide for the desirability of giving the magistracy power to control a man whose conduct was open to suspicion even though the man might be able to urge that his actual present place of residence within the jurisdiction and ordinary legitimate occupation within the jurisdiction were well-known. That is the present case before us. The Crown has contended that this also is provided for by S. 109, Cl. (a), and has not addressed us on the question whether the case is not provided for by S. 109, Cl. (b). The defence has contended that it does not come within Cl. (a) and would of course gladly accept the Crown's failure to press upon our attention Cl. (b). In my view Cl. (a) does not cover the case but Cl. (b) does ; the legislature had in contemplation both purposes and has provided for both.

To consider first Cl. (*a*). In the first place, we have the use of the word " presence" (concealing his presence). The section does not say " concealing himself." It may be suggested that there is no very great difference, but to my mind there is a difference. The word " presence" itself suggests the idea of " presence in some particular locality," or at some particular time. In the present case there is no question of presence at any particular time.

Next, we find the phrase "is taking precautions" which suggests the idea of continuity. This latter consideration has been noticed in cases to which I shall presently have to refer.

In the earlier Codes we find in the Act 25 of 1861 and 10 of 1872 the expressions "vagabonds", "arrest of vagabonds", "found lurking within the limits of such station", "lurking within his jurisdiction", phrases not ordinarily applicable to a person who is known to be residing in the jurisdiction and whose residence is known. So far then as indications are to be found in the history of the provision the interpretation put on the present S. 109 (a) in *Emperor* v. *Bhairon* (1) finds some support.

Next, I will consider the scheme of the present Code which was called in aid of his argument by the learned Government Advocate but which upon examination I find repels rather than supports the view that he asks us to take. His contention was that in all the sections of the Code whether dealing with offences or dealing with the prevention of offences, we find words referring to the territorial jurisdiction of the Magistrate or of the police officer and that they were inserted for the purpose of giving him territorial jurisdiction. That proposition, however, is not correct. A Magistrate is authorized to exercise certain powers by Sch. 3, and he is declared by S. 36 to have those powers. But neither S. 36 nor Sch. 3 give any indication within what territorial limits he may exercise those powers. For that we have to look to S. 12. S. 12 (2) declares that any Magistrate may exercise the powers given to him throughout the whole of the district except so far as the Local Government or the District Magistrate, subject to the control of toe Local Government, may have defined his local jurisdiction. By these sections the Magistrate has got his powers and his local jurisdiction defined. There were, however, cases in which doubt might arise. The sections already quoted would clearly be sufficient in cases where the offender, the offence and its consequences, etc., were all within the local jurisdiction of the Magistrate. But in particular cases the Magistrate needed further guidance. He finds that he has the powers and he has the local jurisdiction, but can he exercise those powers only when the offence, the offender, the consequences, etc., are all within his jurisdiction, or is it sufficient to give him jurisdiction that the offender is within his local jurisdiction or that the offence was committed within his local jurisdiction or that the consequences ensued within his local jurisdiction, etc.? To guide him on this point it was necessary in particular cases to insert words indicating the special condition necessary to the existence of his jurisdiction.

Therefore, in particular cases, where doubt might otherwise arise, we have his powers limited by such qualification as "If any person within the jurisdiction" or "If any person does so and so within the jurisdiction." Similarly without the addition of some such words it would not be possible to say in regard to the prevention of offences whether it was sufficient that the offender was within the jurisdiction or whether it was sufficient that the offence was expected to be committed within the jurisdiction, etc. Now let us see how the legislature dealt with this question in S. 108. The governing factor might be the place where the person was who disseminated seditious matter, or it might be the place where the dissemination occurred. The legislature directed the Magistrate to be governed by the consideration of the place where the person might be and not by the consideration where the dissemination took place. It therefore worded S. 108 "there is within the limits of his jurisdiction any person." This rendered it beyond doubt that at any rate the person must be within the jurisdiction, and it was sufficient if he was within the jurisdiction. Why, then, in dealing with S. 109, if the legislature had meant the governing factor to be the fact that the person was or was not concealing himself within the jurisdiction, should it not have similarly said that "any person within the local limits" or "taking precutions within the local limits" or "precautions to conceal within the limits."? As the person and the act of concealing will be presumably in the same place the natural thing to have said, if that was the intention of the legislature, would have been "any person within the local limits." Take again S. 110. We similarly find "any person within the local limits." I have not made any reference to S. 107

because it is not possible to draw any conclusion therefrom and it will serve no useful purpose to lengthen this judgment by entering into a detailed discussion of that section. The words in S. 107 of 1882 were somewhat similar to the words in S. 109 (a) of the present Code. But there the punctuation was different and the interpretation was different from either of those which are supported in the present case. To clear the matter the disturbing words were left out of the clause altogether and a complete new sub-section was enacted with special conditions. Lastly, I am unable to find any single case in which S. 109 (a) has received the interpretation which the Crown would ask us to give it. In *Sharif* v. *Emperor* (5) the facts were as follows :

The police expected a gang of thieves to visit the city. A little before midnight 7 or 8 men were seen coming in from the jungle and were pursued. They ran to a certain shop and a lathi fight followed. Subsequently the accused was arrested at the shop with a lathi in his possession. Accused was an octroi chaprasi. The order initiating the proceedings showed that

" action was taken against the accused on the ground that they were habitual thieves and robbers and were taking precautions to conceal their presence within the limits of the Magistrate's jurisdiction."

The Magistrate (Trial Court) demanded security apparently under S. 109 (b) because the accused could not " give a satisfactory account of himself." The District Magistrate on appeal said that the accused

" prowls about at night and is a companion of scoundrels and that he bolts from the police and is armed with and uses a lathi."

Chamier, J., held :

" The Magistrate seems to think that the words ' give a satisfactory account of himself ' mean satisfy the Magistrate that he spends his time or at least his leisure hours in a satisfactory manner. I cannot agree." " There is no evidence that the applicant was taking precautions to conceal his presence within the Magistrate's jurisdiction . . . . The applicant is a peon in the employ of the Municipality. His place of residence and occupation were well-known." "Whether there was ground for taking action against the applicant under any other section, I cannot say. But it seems to me that the proceedings taken under S. 109, Criminal P. C., cannot be supported."

It seems clear that Chamier, J., held that where a person's place of residence and occupation were well-known, it could not be held that he

"was taking precautions to conceal his presence within the Magistrate's jurisdiction"

although he might be prowling about at night with scoundrels armed with and using lathis. The only inference from this is that S. 109 (a) does not apply where the presence of the accused within the Magistrate's jurisdiction was not being concealed. All the other elements were there, the lurking at night in company with scoundrels armed with lathis.

In *Rashu Kabiraj* v. *Emperor* (3), a dealer whose presence and residence within the Magistrate's jurisdiction was well-known, was caught about midnight in a lane with two others who were in possession of a house-breaking implement and gave a false explanation of his presence at the time and place in question. It was held by Teunon, J., (with "some hesitation") and Shamsul Huda, J., following *Sharif Ahmad* v. *Emperor* (5) and *Emperor* v. *Satish Chandra* (8) and *Bhuja* v. *R.* (9) that the case did not come within either Cl. (a) or Cl. (b), S. 109, Shamsul Huda, J., added that in his opinion Cl. (a) "refers to a continuous act." And further that

"clause (a) cannot apply to the case of a person brought under arrest, as the accused was, for, it cannot be said of such a person that he is taking precautions to conceal his presence."

With this second conclusion as to the consequence of the arrest of the accused I do not find myself in agreement and I do not find that it has been since accepted in any other case and I do not therefore think it necessary to discuss it further. The correctness of the first conclusion is, of course, in no way dependent on the correctness of the second.

In *Laltu* v. *Emperor* (7) referred to in the later Allahabad case, *Emperor* v. *Bhairon* (1) Piggott, J., said :

"I have ascertained that Laltu resides within the jurisdiction of the Joint Magistrate before whom proceedings were taken. I do not think it is possible to apply the provisions of S. 109.

The reference by Piggott, J., to having ascertained that Laltu resided within the jurisdiction of the Joint Magistrate can have only one meaning in reference to Cl. (a) and his finding that S. 109 did not apply.

In *Piru* v. *R.* (4), Mukerji, J., agreed with Shamsul Huda, J., quoted above,

(8) [1912] 39 Cal. 456=15 C. L. J. 396=13 I. C. 913=16 C. W. N. 499.
(9) [1872] Ratan Lals' Crim. Rep. 3.

Advocate High Court
Jammu & Kashmir

that the act of concealment referred to was a continuous act such as "passing under a false name" (not merely giving a false name once but "passing" under a false name which is quite a different thing), or "taking precautions to conceal presence or identity at a place amounting to continuous course of conduct" is what is meant by this clause."

In *Rambirick* v. *Emperor* (10) Miller, C J., held that the act of concealment need not necessarily be continuous, but there must be facts.

"indicating a desire to hide the fact that the accused is present within the local limits of the Magistrate's jurisdiction."

The view of Miller, C. J., as regards continuity is not really in conflict with that of Shamsul Huda, J. and Mukerji, J., for it is clear that a person may be arrested at the very beginning of that, if it had continued would have been a continuous act. It is not necessary to prove that the act had been continuing for some time. A person might come inside the jurisdiction and be concealing himself and intend to continue concealing himself, and be caught at the outset. The act of concealment is nonetheless a continuous act in the sense used by Shamsul Huda, J., and Mukerji, J. It is quite different from the momentary or short lived act of a person who does not mean to go on concealing his presence and is only doing so for the purposes of the particular housebreaking etc., on which he is then bent.

These cases were followed by the cases *Emperor* v. *Bhairon* (1), and *Emperor* v. *Himayatullah* (2) already referred to. I have been unable tc find any case in which the contrary view has been taken. I am, therefore, of opinion on the interpretation of the section standing by itself on a consideration of the history of the section, and after studying the scheme of the Act, that S. 109 (a) is only applicable where the person is concealing "his presence within the jurisdiction," and I find support for that view in all the cases that I have mentioned, and, I can find no case to the contrary.

I would make it clear that I do not hold that the person must be a stranger to the jurisdiction. All that is necessary is that he should be concealing "his presence within the jurisdiction." He may be a stranger who has come from outside and is hiding himself within the jurisdiction or he may be a person whose ordinary residence is within the jurisdiction but who is hiding himself elsewhere within that jurisdiction. This latter case is illustrated in *Emperor* v. *Satish Chandra* (8). There a man whose ordinary residence was well-known to be within the jurisdiction had absconded because of a warrant out against him. He left the jurisdiction, but on the warrant being cancelled he returned, unknown to the authorities, and concealed himself in his residential house, only going out at night. So far then there was a concealing of his "presence within the jurisdiction" and the case under S. 109 (a) failed against him only because on the facts it was held that there was no proof that he was intending to commit an offence.

But in my view the matter does not end here. If it did so end it would mean that there was no means indicated by the legislature for a Magistrate to deal with the case of a man whose ordinary residence and occupation within his jurisdiction were well-known and who had not left that residence or occupation but who was (e. g.) temporarily out during the night on a house-breaking expedition. If such an untoward result followed from holding that S. 109 (a) was not applicable it would not be a ground for holding S. 109 (a) applicable in face of other considerations, but it would be a grouud for pausing and again re-considering whether those considerations were really valid. But as I have said, in my view, the matter does not end with S. 109 (a). The Government Advocate did not ask us to hold that the case could be brought within S. 109 (b). He apparently accepted some decisions on the interpretation of that second clause in which, it is suggested, the view was taken that it was applicable only to cases where the person could not give a satisfactory account of himself "generally." Counsel for the defence naturally was prepared to accept that view and contended that his client could not be touched under either Cl. (a) or (b). I am myself unable to agree that Cl. (b) is not applicable. Mention in this connexion has been made of two or three cases, but I do not think any of those cases support a refusal to apply Cl. (b) to the present facts. All that Chamier, J., did in *Sharif* v. *Emperor* (5) was to refuse to apply Cl. (b) to a case where the Magistrate seemed to think

(10) A. I. R. 1926 Pat. 569.

that Cl. (b) justified calling upon a person to satisfactorily account for his leisure time. Whether Cl (b) applied or not to the particular facts was purely a question of fact in the particular case. Similarly *Ghulam Jilani* v. *Emperor* (6), to which I have been referred, dealt so far as Cl. (b) is concerned, purely with a question of fact, and similarly, so far as Cl. (b) was concerned, the case *Laltu* v. *R.* (7). In *Piru* v. *Emperor* (4), it was held that the accused who had been charged under Cl. (b) had in fact given a satisfactory account of himself. So far as Mukerji, J.,seems in that case to have suggested that under Cl. (b) a person has to account for his "presence within the jurisdiction" I am not able to see the justification for that gloss. The word, "there is within such limits a person" are quite different to the wording of Cl. (a), and repel rather than suggest the idea that the person is in any way being called upon to account for his "presence within the jurisdiction" except in so far as that may be part of the general evidence under Cl. (b).

None of these cases seems to me to carry any real and considered suggestion or support to the proposition that the present case does not come within Cl. (b). It is obviously true that Cl. (b) does not justify broadly calling upon any person to satisfactorily account for how he spends his leisure,but if there is a definite evidence that he has been caught spending a portion of that leisure in a manner giving rise to grave suspicion and can give no satisfactory account of the incident, I am unable to see why Cl. (b) should not apply.

I can see no justification for limiting the plain, natural and unambiguous meaning of the word, "cannot give a satisfactory account of himself." If a householder catches a man in his garden in the middle of the night armed with a jemmy and that man cannot explain what he was doing at that hour of the night armed with a jemmy in somebody else's garden, surely it is not using language in any other than its simple straightforward sense to say that "he cannot give a satisfactory account himself." Those words do not refer to his domestic relations or his normal daylight orthodox occupations, but require him to give a satisfactory account of himself in relation to the circumstances which led up to his being called upon for an explanation. Can a man possibly be said to do otherwise than fail in giving a satisfactory account of himself who has to say:

> "I admit I was caught at night in the garden of so and so's house armed with a jemmy ; I decline to explain what I was doing there," (or he gives a futile explanation) "but in the day time I am a most respected member of society."

I would, therefore, hold that the facts found would fully justify us calling upon the person to furnish security under S. 109 (b) and that such security might have been called for from Phuchai and Buddhu.

Before concluding I would refer to one further argument which may properly be adduced in support of the conclusion at which I have arrived. It was remarked by one of the members of this Bench at the hearing that one would expect to find the Magistrate able to take security in cases where the police officer had been empowered to arrest under Ss. 54 or 55. I would prefer to state the proposition similarly but more widely and, if I may say so, more accurately. One would expect to find that where a police officer has been empowered to arrest under Ss. 54 or 55, the Code would make provision for the trial and punishment of the person for a substantive offence where the circumstances indicated that a substantive offence had been committed, and that where the circumstances under which the arrest took place only indicated the intention to commit an offence, one would expect to find the Code providing for the Magistrate being able to take security. Now we are not immediately concerned with cases where the accused has been arrested on the ground that the circumstances indicated that he had committed an offence. So we may state the proposition simply thus, that we should expect to find that, where the circumstances under which the accused had been arrested, suggested that the person had been intending to commit an offence the Code would provide for the Magistrate taking security. With the proposition so stated I entirely, of course, agree. It would be futile to give the police officer power to arrest if no further action could be taken. S. 54, sub-S. (1), clause "Secondly" and S. 55, sub-S. (1), Cls. (a), (b) and (c) deal with circumstances where security for the prevention of an offence is desirable, and in regard to which we

words, conduct that renders a man liable to arrest by the "thanadar" under S. 55, Criminal P. C., becomes blameless under S. 109 in the eyes of the Magistrate. I do not believe that such an anomalous, indeed absurd, result can have been intended by the legislature. Nor do I think that the difficulty can be met by arguing that as soon as the person concerned leaves his ordinary place of residence and begins to conceal himself, 'concealing his presence within the jurisdiction of the Magistrate" begins.

So far as the Magistrate's jurisdiction is concerned it makes no difference whether the person crosses the boundary into another thana, or merely hides in a grove near his own village. If in the one case he is concealing his presence within the jurisdiction of the Magistrate, he is doing the same thing in the other case too; and the distinction between " concealing his presence within the jurisdiction of the Magistrate " and " concealing himself " disappears or at any rate is too subtle to be of any practical value.

One other case has been suggested which would be covered by Cl. (a) if the narrower interpretation were to be accepted, viz.: that of a man who is well-known within the jurisdiction of the Magistrate, who leaves it openly, and then returns secretly and proceeds to conceal his presence there. The facts that he openly proclaimed his departure, that he did actually depart, and that he secretly returned, might no doubt be considered to be a series of precautious taken to conceal the fact of his presence within the jurisdiction. But such a case would be very exceptional and it might forcibly be argued that the precautions were not all taken " within the jurisdiction of the Magistrate " in that they involved leaving that jurisdiction. I cannot persuade myself that Cl. (a) was intended to cover this exceptional case, and that it does not cover the case of a man whose residence and occupation are well-known, but who takes precautions to conceal himself with a view to committing an offence. I would therefore accept the revision.

Weir, J.—The following are the facts of this case:

The station officer of Rohanya received information on 30th December 1926, that a number of persons were hiding themselves near the abadi of village Dewatpur, " in order to commit some offence." The Station Officer thereupon sent five constables to arrest those persons. The constables found the two respondents along with others in a mango grove near Dewatpur village at about 12 o'clock at night at the time when according to one witness, the moon had risen. The men who were in the grove fled, and all except the two respondents got away. When the two respondents were captured each of them had a sabari (a house-breaking implement) and a lathi. They at first gave false names and addresses to the police who arrested them but, when brought to Rohanya Police Station, they gave their correct names and addresses. They both live within the limits of police station Mirza Murad, which is contiguous to Police Station Rohanya, both the stations being within the limits of the jurisdiction of the Magistrate before whom they were brought. The Magistrate held they had been concealing their presence with a view to committing a crime and had been doing so within the local limits of his jurisdiction. He accordingly made an order under S. 109 (a), Criminal P. C., requiring them to give security for good behaviour; but his decision was reversed by the Sessions Judge of Benares, who followed two decisions of this Court, namely, *Emperor* v. *Bhairon* (1) and *Emperor* v. *Himayatulla* (2). The question which we have to decide depends on the interpretation of S. 109 (a), Criminal P.C. That section provides that a Magistrate of the first class may require any person to show cause why he should not be ordered to give security for good behaviour if the Magistrate received information that that person,

" is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence."

In the two decisions which I have cited it was held that the words, " within the local limits of such Magistrate's jurisdiction " are an adjectival phrase qualifying the word, presence, so that the section would not apply to any person who attempted to conceal his presence at any particular spot within the local limits of the Magistrate's jurisdiction, unless he was attempting to conceal himself in order that the local authorities should not be aware whether he was within or without the local limits, i. e., was endeavouring to prevent the local authorities from

being aware of the fact that he was anywhere within the local limits of the jurisdiction. The Government Advocate asks us to place another interpretation upon the words " within the local limits of such Magistrate's jurisdiction," namely, that they do not qualify the noun, presence, but indicate the locality within which the act of attempted concealment must have taken place, in order to give the Magistrate jurisdiction to deal with the case.

Two arguments have been advanced on behalf of the respondents. First, that the words " is taking precautions to conceal etc." indicate a continuous course of action and not merely one isolated act of attempted concealment. In support of this view two authorities have been quoted to us. In the first of these, *Reshu Kaviraj* v. *Emperor* (8) it was held by Shamsul Huda, J., that S. 109 (a)

" refers to a continuous act and does not, therefore, apply to a case . . . . . where there is a momentary effort at concealment to avoid detection and arrest,"

and also that

" clause (a) cannot apply to the case of a person brought under arrest " (as the accused in that case was) " for it cannot be said of such a person that he is taking precaution to conceal his presence."

The other Judge who heard the case, Teunon, J., said that he had " with some hesitation " arrived at the conclusion that the facts did not bring the case within the provisions of S. 109 of the Code. The facts were that at midnight the petitioner and two other persons were in a lane in the town with house-breaking implements; that when the petitioner was seen by the police he ran away and when arrested remained silent. The same opinion was expressed by another Bench of the Calcutta High Court in *Piru* v. *Emperor* (4). The facts of that case were in some respects similar to those last mentioned. The appellant was loitering on Strand Road, at 3 a. m. and endeavoured to hide himself when he saw a constable coming. There was no evidence to suggest that he was hiding, or attempting to hide, at the time when the constable first saw him, or that he was doing so with a view to committing any crime, and, therefore, his case was clearly outside S. 109 (a); but Mukerji, J., one of the two members of the Bench which heard the appeal, said:

" I also agree in the view expressed by Shamsul Huda, J., in the case of *Reshu Kaviraj* v. *Emperor* (3) that Cl. (a) of S. 109 refers to a continuous act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest. In my opinion, passing under a false name of taking precaution to conceal one's presence or identity at a place amounting to a continuous course of conduct is what is meant by the clause. Moreover, such precautions for the purpose of concealment must be taken with a view to committing an offence."

If a man merely hides himself in order to avoid arrest, I think that the case does not come within the scope of Cl. (a); but it seems to me that, in the two cases which I have cited, too much stress was laid on the use of the present tense in S. 109 and on the necessity of establishing something in the nature of a continuous course of conduct before any person can be brought within the purview of Cl. (a). Under S. 55 (a) a Sub-Inspector may arrest without a warrant any person " found taking precautions to conceal his presence within the limits of his station;" so that a man who is brought before a Magistrate may have been arrested in consequence of having taken such precautions, and I do not see why the jurisdiction of the Magistrate should be ousted by the fact that the man has been arrested, especially as S. 114 read along with S. 112 of the Code clearly shows that a Magistrate may take action under S. 109 against a person who is " in custody," because he is empowered by S. 114 to issue " a warrant directing the officer in whose custody the person concerned is, to bring him before the Court.

As to the question whether the concealment must be continuous, I think that if it is begun and kept up with the object of committing a crime, it comes within the ambit of Cl. (a). A man may conceal his presence in various ways. He may endeavour to hide himself from sight, so that his presence cannot be perceived at all, or he may endeavour to conceal his identity either by adopting a disguise or by giving a false name ; and, if he does this, not merely in order to avoid arrest, but with a view to being able to carry out a plan to commit a crime, I think it could be said of such a person that he was " taking precautions with a view to committing an offence." If the attempted deception is part of a scheme or plan, I do not see how the length of time which elapses before the concealment is discovered, can be material. In the view

which I take, it is not the length of time during which the concealment lasts, but the object which prompts the concealment, that determines whether the concealment is or is not such as to come within the purview of S. 109 (a).

I now turn to consider the point on which the arguments addressed to us chiefly centred, namely, whether the words "within the local limits of such Magistrate's jurisdiction," qualify the noun, "presence," so as to restrict Cl. (a) of the section to what I may call, for the sake of brevity, a "within-the-local-limits" presence, or whether they indicate the place where the concealment must take place in order to give the Magistrate jurisdiction. If sub-S. (a), instead of using the words, "to conceal his presence," had used a synonym, such as "to hide himself," there could be no doubt that the words, "within the local limits," would refer to the verb. But since the signification of the words "to hide" would not be wide enough to cover all possible ways in which a man might seek to prevent the police or a Magistrate from being aware that he was in the neighbourhood or a particular place, I think that the words, "to conceal his presence," were used to cover all the methods of concealment which I have indicated above; because, in my view, the word "presence" in Cl. (a) connotes two things, actual bodily presence and indentity, so that a man who adopts a disguise or gives a false name or makes arrangements to cause people to believe that he is somewhere he is not, attempts to conceal his presence just as much as if he hides in a cellar, where nobody can possibly see him. It was said in the two cases decided by this Court, and which I have already cited, that if the words, "within the local limits," are attached to the verb, they are unnecessary, because a Magistrate can only exercise his powers within the local limits of his jurisdiction. To this, I think, two answers may be given. First, that if the words are otiose then Cl. (b) of S. 109 shows that the legislature was quite capable of using the words otiosely and *ex-abundanti cautela*, because they would not be required in Cl. (b) any more than in Cl. (a); but I do not agree that the words are unnecessary. They are used in Ss. 107, 108 and 110, all of which sections are in pari materia with the section which I am considering, and I think that they are necessary for the purpose of showing which of two Magistrates should have jurisdiction in cases which might quite easily occur. Thus, if a man hid himself within one jurisdiction with a view to committing a crime in another, it might be a question which of the two Magistrates could take action against him. It has been said that the words, "within the local limits," taken in their context in this section, naturally accompany and qualify the noun presence, and indicate what I have called a "within-the-local-limits-of the jurisdiction" presence. If this were so, the similar words in S. 55 (a) ought to be given the same meaning, and the Criminal Procedure Code would thus deal with three classes of presences each fitting, as it were, inside the other, like those sets of boxes which are sold by vendors of toys in India, namely, a "within-the-Magistrate's jurisdiction" presence, and then, inside, that, a "within-the-police-station-limits" presence, and then inside that again, actual presence upon some particular spot. The result of this would be to introduce a kind of sliding scale of presences, discriminating in favour of the local badmash. I think that Cl. (a) applies equally to all persons who by attempting to conceal their presence with a view to committing an offence, have shown that they are a danger to any member or members of the public. I do not, however, attempt to disguise from myself the fact that, on account of their place in the section, the words, "within the local limits," are susceptible of either of the two interpretations which I have indicated, and that, if the ambiguity had been present to the mind of the legislature when the Act was passed, the legislature could have chosen some other expression which would have indicated its meaning more clearly.

Thus, if a "within-the-local-limits" presence had been intended, it would have been unnecessary to use the word, presence, at all: the obvious expression to use would have been, "conceal the fact that he is within the local limits" or "conceal the fact that he is anywhere within the local limits," whereas if the second meaning, which, as I have said, I believe to be the correct interpretation, had been intended, it would have been better to have said, "taking

precautions within the local limits of such Magistrate's jurisdiction to conceal his presence." I believe that the latter is the correct interpretation both for the reasons which I have already given, and for this additional, and, to my mind, cogent reason that it gives to the words, "within the local limits," the same meaning as they have in S. 109 (a) namely, that of an adverbial phrase denoting place —the place where an act is done—instead of giving them an adjectival meaning qualifying the noun, presence, in such a way as to make the section work unevenly in the case of persons who are equally to blame and equally dangerous to the community.

I now turn to consider certain decisions of Judges of this Court which are said to support the view taken in the two cases which I have already cited, namely, *Emperor* v. *Bhairon* (1) and *Emperor* v. *Himayatullah* (2). The first of these cases is *Sharif Ahmad* v. *Emperor* (5). In that case Chamier, J., held that a Municipal chaprasi, who was alleged "to prowl about at night and be a companion of scoundrels and to bolt from the police and go about armed" could not be required to give security uuder S. 109 (b) as being unable to give a satisfactory account of himself. Chamier, J. said:

"The Magistrate seems to think that the words, give a satisfactory account of himself mean, satisfy the Magistrate that he spends his time or at least his leisure hours in a satisfactory manner. I cannot agree."

The facts were that six or seven men were seen coming in from the jungle. They were pursued and ran to a shop where some lathi blows were exchanged. Shariff Ahmad and some others were subsequently arrested at the shop. No doubt Chamier, J. said that there was no evidence that the accused "was taking precautions to conceal his presence within the Magistrate's jurisdiction", but that would have been true on either of the interpretations of the section. The next case is *Ghulam Jilani* v. *Emperor* (6) decided by Tudball, J. In that case the appellants and two other persons were met by the police on the road between Meerut city and the railway station. The police had been informed that a raid upon the town was contemplated by men of bad character, and had made preparations to counter-act it. On being arrested the appellants gave their names, and it turned out that they were well-to-do and respectable residents of Delhi. The evidence against them was that somewhere close to the place where the police met them, a burglar's jemmy was fouud lying on the ground. In delivering judgmeut Tudball, J., said:

"The persons contemplated in the section," i. e., S. 109, "are persons taking precautions to conceal their presence within the local limits of the Magistrate's jurisdiction or persons who have no ostensible means of subsistence and who cannot give a satisfactory account of themselves."

In *Emperor* v. *Bhairon* (1) this passage from the judgment of Tudball, J., is quoted, and it is observed that although the learned Judge was only quoting the ipsissima verba of the section, yet, read in the context in which that quotation occurs, it appears that he dwelt upon the scope and ambit of the section in the sense which we are satisfied that it bears. I think that the context in the judgment of Tudball, J., shows that he was not thinking about the effect of the section as interpreted in *Emperor* v. *Bhairon* (1), at all, because the very next words in his judgment are:

"the present applicants clearly do not come within Cl. (a) as it was not alleged that they were taking precautions to conceal their presence with a view to committing an offence."

So little was Tudball, J. thinking of a "within-the-local-limit" presence, that in paraphrasing Cl. (a), he makes no mention of the words, "within the local limits." The last decision is *Laltu* v. *Emperor* (7). The judgment in it is very brief and the facts are stated very shortly. Piggott, J. says:

"the applicant was arrested by certain police officers along with a number of other persons in a lane in the city of Cawnpore under what were undoubtedly suspicious circumstances."

He points out that the Magistrate of Cawnpore called on the applicant to give security because he had not given a true explanation of his presence on the night in question at the spot where the police arrested him. The learned Judge then says:

"I have ascertained that Laltu resides within the jurisdiction of the Joint Magistrate before whom proceedings were taken."

and adds

"I do not think it possible to apply the provisions of S. 109, Criminal P. C., to the state of facts set forth above.

If that very careful Judge had meant that even if Laltu had been found in hiding with house-breaking instruments, the fact that he resided within the jurisdiction of the Joint Magistrate would

have been a complete excuse. Provided that his residence was known then, I think he would have said so. But the case was really one under Cl. (b), S. 109, and all that Piggott, J., decided was that on the principle laid down by Chamier, J. in the case to which I have referred, it could not be said of Laltu that he could not give a satisfactory account of himself within the meaning of S. 109, Cl. (b), Criminal P. C.

A case which was not cited before us in argument, but which was referred to in one of the decisions of the Calcutta High Court with which I have already dealt, is that of *Satish Chandra Sircar* v. *Emperor* (8). In that case the applicant who appears to have been connected with an anarchist agitation and a conspiracy to commit dacoity, had returned to his father's home in Calcutta on 9th August 1911. On 12th August it was reported that he was concealing himself to avoid observation, and he was ordered to give security under S. 109. The facts which were proved against him were, that he secluded himself in the day time and went out at night for exercise. The learned Judges who decided the case said that the prosecution had not made out that the applicant was taking any particular steps to conceal himself for the purpose of committing any offence, and, on revision, they set aside the order against him, remarking that the whole of Cl. (a) must be read together, and the object of the concealment must be with a view to committing some offence. They do not appear to have discussed, or even to have thought of, the distinction between a presence within the jurisdiction, and presence at a particular place.

I now turn to the facts of the case before us. The two respondents were obviously concealing their presence, not specially with the object of preventing the police from detecting them, but in order to escape observation by anybody, until an opportunity should occur for committing some crime of the nature of house-breaking. The fact that they were armed with lathis and had house-breaking implements with them shows that they were concealing themselves with the object of committing a crime. I think that they came within the scope of S. 109 (a) and that the learned Magistrate's decision was right.

After I had written my judgment I had the advantage of reading that of Boys, J. I do not dissent from the view taken by him of the effect of Cl. (b), S. 109, but, as the present case was urged on Cl. (a), and as I am satisfied that the latter clause applied, I prefer to base my judgment upon it.

By the Court (Boys and Banerji, JJ., dissenting).—The order of the Sessions Judge of 4th June 1927, allowing the appeal and discharging the sureties on the ground that S. 109 (a) did not apply to the facts of the case was wrong. S. 109 (a) did apply to the facts of the case. It is, however, unnecessary to pass any further order in view of the fact that the period of one year for which the Magistrate ordered the accused to furnish security has now elapsed, and there is nothing to indicate that the accused have given any further cause in the interval for calling upon them to furnish security. To this extent the application in revision is allowed.

R.K. *Application partly allowed.*

A. I. R. 1929 Allahabad 50

LINDSAY, J.

Ram Charan Banwari Lal—Applicant.

v.

Kishori Lal Ram Sarup—Opposite Party.

Civil Revn. No. 16 of 1928, Decided on 27th March 1928.

Civil P. C., S. 24 (4)—Appeal—A suit transferred from the file of a Court with Small Cause powers, the presiding Judge having been transferred from the place, to the Court of the Additional Munsif—No appeal lies from its decision.

A suit was being tried in the Court with small cause powers. Before the suit was decided, the Judge was transferred. He was succeeded in office by a Judge not invested with the powers of a Small Cause Court Judge. The suit therefore was transferred to the Court of the Additional Munsif who finally decided it. The Additional Munsif having decided the case an appeal was filed.

Held: that no appeal lies as S. 24 (4) did apply, and the Court of the Additional Munsif must be treated as a Small Cause Court: 5 *All.* 274, *Foll.*: 27 *C. L. J.* 461, *Ref.*: 31 *Cal.* 1057, *Diss. from.* [P 51 C 1]

Shambhu Nath Seth—for Applicant.

Kailas Chandra Mital—for Opposite Party.

Judgment.—This is an application for revision under S. 115, Civil P. C., and the ground taken is that the judgment and decree of the lower appellate Court

are nullities because no appeal lay to the Additional Subordinate Judge.

The facts of the case are as follows : The firm of Ram Charan, Banwari Lal, who are the applicants here brought a suit against another firm carried on in the name of Kishori Lal, Ram Sarup. The suit was for the recovery of Rs. 386 odd and was filed in the Court of Mr. Zia-ul-Hasan, who was the Subordinate Judge of Farrukhabad with Small Cause Court powers to try suits of a value not exceeding Rs. 500.

Before the suit could be decided Mr. Zia-ul-Hasan was transferred from Farrukhabad to Cawnpore. He was succeeded in office by Mr. Shankar Lal, a Subordinate Judge, but it so happened that Mr. Shankar Lal was not invested with the powers of a Small Cause Court Judge. It became necessary, therefore, for some arrangements to be made to effect the disposal of the suits which had been filed in Mr. Zia-ul-Hasan's Court as Small Cause Court Judge. The suit with which we are concerned now was transferred first to the Court of the Munsif of Farrukhabad and subsequently to that of the Additional Munsif who finally decided it. The order for the transfer of the case was made apparently by the learned District Judge. I find endorsed on the order-sheet of the suit which is now before me an order over the signature of Mr. Shankar Lal indicating that the case was being sent to the Court of the Munsif of Farrukhabad in accordance with an order of transfer passed by the District Judge.

The Additional Munsif having decided the case, an appeal was filed and in the lower appellate Court the ground was taken that regard being had to the provisions of S. 24, Civil P. C., no appeal lay. S. 24 (4) lays down that a Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for purposes of such suit, be deemed to be a Court of Small Causes. If that sub-section applies to the present case, and I think it does, then it is clear that the Additional Munsif who decided the suit as the trial Court, must be treated as a Court of Small Causes, and there would have been no appeal against his decision.

It has been suggested that there is nothing to show that the suit was transferred under the provisions of S. 24 (4), but it appears to me that there is no other authority under which the District Judge could have transferred the case.

The Judge of the lower appellate Court before whom this question of jurisdiction was raised came to the conclusion that S. 24 (4) could not apply because, as he says the Court of Small Causes had ceased to exist as soon as Mr Zia-ul-Hasan had given over charge and left the district. Consequently the Judge says that at the date the order of transfer was passed there was no Court in existence. If that be so the question might very well be asked how was it possible for the District Judge to transfer a case from a Court which did not exist to a Court which did exist. That was the question which was asked in the case of *Kauleshar Rai* v. *Dost Mohammad Khan* (1). That case is exactly in point here the facts being exactly the same. The learned Judges were of the opinion that a suit transferred under circumstances similar to those with which I am now concerned was a suit finally tried by a Judge who was a Small Cause Court Judge. In the course of their judgment their Lordships observed as follows :

"It was contended for the plaintiff that the suit was not withdrawn from a Court of Small Causes as that Court had gone out of existence at the time of the Judge's order ; but this argument is without force. The suit was on the register of a competent Small Cause Court which was in existence when the suit was lawfully instituted therein. If the suit was not withdrawn from what Court was it withdrawn? Not from that of the late Subordinate Judge on whose register the suit as a matter of fact had never been entered and could not legally have been entered as an original suit under the mandatory provisions of S. 15, of the Procedure Code."

This case has never been dissented from as far as my knowledge goes except in the case of *Dulal Chandra Deb* v. *Ram Narain Deb* (2) but this latter case in turn has been dissented from by another Bench of the Calcutta High Court whose judgment is to be found in *Madhusudan Gope* v. *Behari Lal Gope* (3).

The decision of the lower appellate Court that it had jurisdiction to entertain this appeal is erroneous. In my opinion it is clearly established that the Court had no such jurisdiction, and that being so, effect must be given to this application for revision.

I allow the application and set aside the decree of the lower appellate Court.

(1) [1883] 5 All. 274.
(2) [1904] 31 Cal. 1057.
(3) [1918] 27 C. L. J. 461=44 I. C. 881.

The decree of the Court of first instance is restored. The applicant is entitled to his costs both in this Court and in the lower appellate Court.

N.K./R.K. *Application allowed.*

A. I. R. 1929 Allahabad 52

DALAL, J.

Pir Bakhsh and *another*—Plaintiffs—Appellants.

v.

Rameshwar Nath — Defendant — Respondent.

Second Appeal No. 393 of 1926, Decided on 9th July 1928, from decree of 3rd Sub-Judge, Moradabad, D/- 21st December 1925.

(a) Landlord and Tenant—Landlord failing to put tenant in possession of part of property—Recovery of arrears of proportionate rent can be made,

Where the landlord had not put the tenant in possession of one shop altogether and in possession of two of the shops only partially,

Held: that he was entitled to a decree for recovery of arrears of proportionate rent: 46 *Cal.* 956, *Diss. from.*: *A. I. R.* 1922 *Cal.* 153, *Ref.* [P 52 C 2]

(b) Civil P. C., O. 8, R, 6—Sum due as damages ascertainable only after protracted inquiry cannot be set off.

A set-off of a sum due to a party by way of damages which are not ascertained but could be determined only after a protracted inquiry, cannot be allowed under the provisions of the Code. [P 52 C 2]

K. N. Laghate—for Appellants.

S. N. Seth—for Respondent.

Judgment.—The plaintiff sued for possession of four shops and for arrears of rent at the rate of Rs. 100 a year for a certain period of time. The suit was resisted. The question of possession is of no importance now, because possession has been decreed and that decree Mr. Shambhu Nath Seth on behalf of the respondent does not contest now. The claim for rent was disallowed on the ground that the plaintiff had not put the defendant in possession of one shop altogether and in possession of two of the shops only partially. The defendant further claimed a set-off which was decreed. It is argued that the decree is contrary to the provisions of O. 8, R. 6, Civil P. C. I am not in agreement with the Calcutta case quoted by the two subordinate Courts, *Manindra Chandra Nandi* v. *Narendra Chandra Lahiri* (1). Fletcher, J., in delivering the judgment of the Court has applied certain technical rules of English Law to India. Another Bench of the Calcutta High Court in *Nagendra Chandra Lahiri* v. *Manindra Chandra Nandi* (2) was doubtful as to the application of the English principles of law to Indian conditions. There is no ruling on the subject of this Court, and if the plaintiff had sued for the recovery of arrears of proportionate rent, I would have decreed it. The suit, however, was one for the entire amount of rent, and even in the grounds of appeal here no desire is expressed of recovering proportionate amount of rent. In this Court also the full rent is claimed on the ground that the defendant well knew the plaintiff's want of title to one shop and to portions of two other shops and that the defendant was speculating in the matter. According to the plaintiff, the defendant knowingly took the lease and was prepared to pay the sum of Rs. 100 in spite of the want of the title of the plaintiff to some of the shops. These allegations have not been proved. The case of the plaintiff, therefore, as put forward by him is not proved, and I refuse to remand the suit at this stage for determination of the proportionate rent due to the plaintiff. The plaintiff's suit for rent, therefore, fails here also, though for reasons different from those given by the two subordinate Courts.

Next as to the set-off, the appeal must succeed. Under the provisions of O. 8, R. 6, Civil P. C., the defendant in a suit for recovery of money can claim to set-off against the plaintiff's demand any "ascertained sum" of money legally recoverable by him from the plaintiff In the present case the defendant desired a set-off of a sum due to him by way of damages which was not ascertained but could be determined after a protracted inquiry. Such a sum of money cannot be set-off under the provisions of the Code already quoted. The lower appellate Court ought not to have ordered any inquiry into the matter.

In the result I decree the appeal for the sum of Rs. 205-10-0 with proportionate costs of all the Courts. The rest of the appeal is dismissed with proportionate cost of all the Courts. The objection by way of appeal is dismissed because the ground 1 was not pressed and the ground 2 cannot

(1) [1919] 46 Cal. 956=52 I. C. 13=23 C. W N. 585.

(2) A. I. R. 1922 Cal. 153=49 Cal. 1019.

succeed when I refuse to grant a set-off. The decree of the lower appellate Court as regards the Rs. 205-10-0 is reversed and the decree of the trial Court in that particular substituted.

D.B./R.K. *Appeal partly allowed.*

** A. I. R. 1929 Allahabad 53
Full Bench

BOYS, KENDALL AND KING, JJ.

AFTERWARDS

MUKERJI AND SEN, JJ.

Ram Saran Das—Defendant—Appellant.

v.

Bhagwat Prasad and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 804 of 1926, Decided on 15th November 1928, from a decree of Addl. Dist. Judge, Meerut, D/- 2nd March 1926.

*** (a) Agra Pre-emption Act, (1922) Ss. 19, and 20—Defendant, a non-cosharer in mahal purchasing zamindari house—Plaintiff a cosharer suing for pre-emption—Defendant obtaining gift of share after institution of suit but before decree—Under S. 20 the acquisition must be made before suit—But under S. 19 plaintiff's claim would be defeated although gift is obtained after suit because he has no "subsisting right" at the time of decree.**

Where purchaser acquires interest in the mahal after the institution of suit for pre-emption by cosharer but before decree is passed he can under S. 19 defeat pre-emptor's suit by means of such acquisition.

Defendant purchased a zamindari house at a time when he was not a cosharer. Plaintiff who was a cosharer, brought a suit for pre-emption. After the institution of the suit but prior to the passing of the decree the defendant obtained a gift of a share in the mahal.

Held: that S. 20 as it is worded would only entitle the defendant to rely on an acquisition made prior to the date of suit, because the words "no suit for pre-emption shall lie" are sufficient and clear indication that judgment upon the rights of the parties must be passed on the basis of the facts existing at the date of the suit. The marginal note of the section also clearly indicates that the acquisition must have been made "prior to suit". S. 20 would not therefore help the defendant. *A. I. R.* 1926 *All.* 661, *not Appr.*). But he would defeat plaintiff's claim under S. 19 because the words "subsisting right of pre-emption" in S. 19 must be understood in the same sense in which they were understood before the passing of the Act of 1922. The plaintiff had no "subsisting right" at the date of the decree. Hence plaintiff will not succeed in his suit because his right for pre-emption was defeated by the defendant's gift of a share of the mahal before decree: *A. I. R.* 1926 *All.* 749, *Ref.*

[P 55 C 1 2, P 56 C 1]

**** (b) Interpretation of Statutes—Marginal notes, in Agra Pre-emption Act, inserted under legislature's authority can be referred to while exposing meaning of sections—Agra Pre-emption Act, (1922).**

The question whether a marginal note can be referred to for an exposition of the meaning of a section depends upon whether the note has been inserted by or under the authority of the legislature. The marginal notes in the case of Agra Pre-emption Act being inserted under the authority of the legislature, can be referred to while interpreting the sections of that Act. *Claydon* v. *Green*, (1868) 3 *C. P.* 511, *Dist.* 26 *All.* 393 (*P. C.*), *Ref.* [P 56 C 2, P 58 C 1]

N. C. Vaish—for Appellant.

Panna Lal—for Respondents.

Boys, J.—The following question has been referred to the Full Bench:

"Whether on a true interpretation of Ss. 19 and 20 Agra Pre-emption Act of 1922 the defendant vendee can defeat the plaintiff's right of pre-emption, which undoubtedly existed at the date of the institution of the suit, by acquisition of an interest equal or superior to plaintiff's in the mahal after the institution of the suit but prior to the passing of the decree by the first Court?"

The reference to S. 19 in the question is inserted in manuscript after the referring order was typed. This subsequent insertion we note only because the discussion of the question in the referring order is confined to the effect of S. 20 of the Act, and no opinion has been expressed in that referring order in regard to the effect of S. 19.

We have, however, manifestly to consider both sections. In the present case the facts are that Ramsarup on 26th March 1924, sold a zamindari house to the defendant Ramsaran Das who at the time of the sale was not a cosharer.

On 25th March 1925, Bhagwat Prasad by virtue of his right as a cosharer brought a suit for pre-emption against Ramsaran Das, the vendee, and Ramsarup, the vendor. On 7th April 1925, that is subsequent to the filing of the suit, but prior to the decree, Ramsaran Das, the defendant vendee, obtained a gift of a share in the Mahal. It will be noted that this suit was brought under the Agra Pre-emption Act of 1922, and one of the questions, in fact the main question, with which we are concerned is whether the Act altered the law as it is admitted to have previously existed.

Both Courts decreed the plaintiff's suit repelling the defendant's contention that he could defeat it because he had become

a cosharer before the decree by virtue of the gift to him.

The defendant has appealed and on his behalf it has been contended that by virtue of S. 20 of the Act of 1922 a subsequent gift to him after the filing of the suit but before the decree defeated the plaintiff's right and the suit should have been dismissed. Reliance appears to have been placed on behalf of the defendant on S. 20 throughout, and his counsel did not apparently intend to rely at all on S. 19 until reference to that section was made by the Court at the hearing before us. This will no doubt also account for the fact that the applicability of S. 19 is not discussed in the referring order, and that mention of that section only finds subsequent place in the question referred. The explanation of this is probably to be found in the fact that S. 20 was interpreted in a sense to some extent favourable to the defendant in *Qudratunnissa Bibi* v. *Abdul Rashid* (1). No attention appears to have been directed to the fact that that case is also authority for the proposition that S. 19 must also be interpreted in a sense favourable to the defendant even if S. 20 would not help.

As the case now is before us for judgment we have to consider the effect of both sections. It is admitted on all sides that according to the previously existing law a gift to the vendee, though subsequent to the date of suit, would, if prior to the decree, defeat the right of the plaintiff-pre-emptor and his suit would have to be dismissed. That is how the law undoubtedly stood before the passing of the Act of 1922. A reference has been made in the referring order to the view expressed by me in *Haji Sultan* v. *Masitu* (2). I decline to give the reference to the report of that judgment in the *Allahabad Law Journal* which contains three printer's errors which render the judgment unintelligible. In that judgment I referred to the fact that the cursus curiae in defendant's favour involved a departure from the ordinary principle that a plaintiff's right should be determined by the state of affairs existing at the date of suit. I said:

"There is obviously something to be said in support of this departure from the ordinary rule of regarding the date of suit as the crucial date, but it is a dangerous departure. I think that its extension to further cases is one to which I should be very loath to assent without full consideration. These observations are only necessary because I want to guard against the suggestion that anything and everything that occurs subsequent to the date of a suit may similarly be taken into consideration. I agree with the order proposed."

I have quoted this passage in full because the remarks are referred to in the referring order as throwing doubt on the cursus curiae. It is, however, apparent from the passage that I have quoted that though I disliked, and I may add would not have been a willing party to the establishment of such a cursus curiae, I acknowledged that it already existed and agreed to follow it. It is quite a different matter that we have got to consider. The case before the Court in *Haji Sultan* v. *Masitu* (2) was a case prior to the Act of 1922, and we had not got to consider in that, nor did I consider in that, the effect of the new Act of 1922 which was not applicable to the case then before us, or the question whether that Act amended the law or codified it as already existing.

To turn now to the Act itself. The defendant relied, as I have said, on S. 20. He contended that there was nothing to show that S. 20 was intended to alter the law, and that it covered not only acquisitions prior to the suit but also acquisitions subsequent to the date of the suit. S. 20 reads, so far as is material for the present case:

"No suit for pre-emption shall lie where the purchaser . . . . has acquired an indefeasible interest in the mahal which, if existing at the date of the sale or foreclosure, would have barred the suit."

It was contended that because the words "prior to the institution of such suit" did not appear in the second portion of the section and did find place in the first portion subsequent to the word "has" where it first occurs, therefore it must be taken that the omission of those words in the second portion indicates that the second portion was intended to protect the vendee even though the interest he had acquired was acquired subsequent to the date of the suit. In *Qudrat-un-nissa Bibi* v. *Abdul Rashid* (1), the contention

"that S. 20 permits a defence only when prior to the institution of the suit a purchaser has transferred property or has acquired an indefeasible interest in the Mahal"

was rejected. It is, however, in my opinion, manifest that the words :

(1) A. I. R. 1926 All. 661=48 All. 616.
(2) A.I.R. 1926 All. 749=48 All. 689.

"No suit for pre-emption shall lie."

are sufficient and clear indication that judgment upon the rights of the parties must be passed on the basis of the facts existing at the date of the suit. That the section might, grammatically speaking, have been more happily worded is beyond doubt, but it is equally beyond doubt that as worded it will only entitle the defendant to rely on an acquisition made prior to the date of suit.

Counsel for the defendant-appellant then, practically upon the insistence of the Court that he could not succeed relying upon S. 20, but might succeed possibly relying upon S. 19, fell back upon that section. The next question, then, is whether S. 19 has altered the law as it existed before the Act of 1922, or whether it still permits the defendant to fall back upon the acquisition of an interest between the suit and the decree as defeating the pre-emptor's right. The material words in S. 19 are:

"No decree for pre-emption shall be passed in favour of any person unless he has a subsisting right of pre-emption at the time of the decree."

Prior to the passing of the Act it is admitted that the plaintiff pre-emptor would in face of the authorities have had no "subsisting right". It is clear that the Act was an Act intended "to consolidate and amend the law" (see the preamble). But it is also beyond doubt that if the law was clearly established in one sense by a well-known cursus curiae, we cannot conclude that there was any intention to alter the law unless that intention was clearly expressed. If the law has not been altered then the plaintiff pre-emptor had no "subsisting right" at the date of the decree; his right had been defeated by the gift to the vendee prior to the decree.

How then can he be said to have lost his "subsisting right" by anything appearing from the Act. I suggested to the plaintiff-respondents' counsel, and he of course accepted the argument, that possible inference might be drawn from the wording of S. 20. That section makes it clear that the acquisition of an interest prior to the date of suit barred the plaintiff-pre-emptor's right. It might not unreasonably be argued that the failure to embody in that section the defeat of the plaintiff-pre-emptor's right by an acquisition subsequent to the date of suit, embodying the law as previously existing, suggests an inference that the legislature did not intend to embody that portion of the law previously existing that subsequent acquisition would defeat the plaintiff-pre-emptor's right, and by the omission intended to indicate that the rights of the parties should be governed by the general principle that judgment must be passed on their rights as existing on the date of suit. There is something to be said for this contention, but I agree that it is too slight a foundation on which to base the conclusion that the legislature intended to amend the law and that the plaintiff-pre-emptor's subsisting right must be held to have been defeated. Similarly there is an apparent want of proper sequence in the rights of parties at the date of suit being declared in a section which follows that declaring the rights of parties at the date of the decree; and from this it is suggested that an inference may be drawn that S. 19 was intended to deal with the loss of rights by a change in the position of the pre-emptor and S. 20 with the loss of the pre-emptor's rights by a change in the position of the vendee. But here again the foundation is too slight upon which to found, even with the aid of the inference with which I have just above dealt, the conclusion that the legislature intended to alter the law. It appears to me therefore that, though I still unwillingly subscribe to the view that a plaintiff's right can be defeated by something done subsequently to the date of suit by the vendee, I must hold that the legislature knew what the law was prior to the Act as established by the cursus curiae, and that if it had intended to amend that law it would have done so in express words.

As the law stands a plaintiff may go into Court with absolute honesty and stating absolutely the whole true facts and may have an undoubted right to a decree, and then after he has incurred possibly much trouble and expenditure, the defendant by securing a gift to himself of a small share in the mahal may render the bona fide expenditure of time and money incurred by the plaintiff fruitless. That is, however, a question of what is expedient and proper and not an answer to the question how the law stands.

I would hold, therefore, that S. 20 is not concerned with the effect of acquisitions subsequent to the date of the suit

but that the law as laid down in S. 19, Act 2 of 1922, is that a defendant vendee can by obtaining a gift to himself of a share in the mahal subsequent to the date of suit and prior to the decree defeat the plaintiff-pre-emptor's right. With this answer I would return the reference. I may add that since writing this judgment I have had the advantage of seeing the judgment of King, J., and I agree with him in the view expressed therein as to the right of the Court to consider in the case of this Act at any rate the marginal notes to the sections.

King, J.— I agree with Boys, J., that the plaintiff's right to a decree for pre-emption has been defeated by the provisions of S. 19, Agra Pre-emption Act, 1922, and not by the provisions of S. 20. As the reasons which lead me to the same conclusion are not precisely identical with his, I think it desirable to state my views.

In this case the plaintiff had a right of pre-emption up to the date of the institution of the suit. After the institution of the suit, but before the passing of the decree, the purchaser (defendant 1) acquired in the mahal an indefeasible interest which gave him a right of pre-emption equal or superior to that of the plaintiff. The question is whether in these circumstances the plaintiff's right to a decree for pre-emption was defeated under S. 19 or S. 20 of the Act.

The object of the Act, as stated in the preamble, was to consolidate and amend the law relating to pre-emption. It is important, therefore, to bear in mind the previous law when we have to construe the provisions of the Act.

It is admitted that under the law administered before the commencement of the Act no plaintiff in a pre-emption suit could obtain a decree unless he could show a subsisting right of pre-emption, firstly at the date of the sale, secondly, at the date of the institution of the suit, and thirdly at the date of the decree. In the present case the plaintiff had a right of pre-emption up to the date of the institution of the suit, but he had no subsisting right of pre-emption, in the sense in which that expression was understood in the previous law, at the date of the decree, because the purchaser had by that time acquired a pre-emptive status equal or superior to that of the plaintiff. The plaintiff therefore would not have been entitled to a decree under the previous law.

The appellant (the purchaser) contends that the same rule of law holds good under the present Act. I think his contention is correct, but the ground upon which he bases his contention is wrong. In the Courts below the purchaser relied entirely on S. 20 of the Act in support of his contention. His learned counsel adopted the same attitude before the Division Bench which made this reference. The result was that in the referring order there is no discussion of the question whether S. 19 does not govern the decision of the appeal. It was assumed that S. 20 was the only section applicable. It is difficult to understand why the appellant's learned counsel failed to rely upon S. 19 when he could have quoted the most recent rulings of this Court in support of his contention. In any case, it is clearly necessary for us to consider the effect of S. 19 as well as of S. 20.

I agree with the view expressed by Boys, J., and by the Referring Bench that S. 20 does not help the appellant. The relevant words of that section read as follows :

> "No suit for pre-emption shall lie where the purchaser . . . . . has acquired an indefeasible interest in the mahal which, if existing at the date of the sale, would have barred the suit."

The mere fact that the words "prior to the institution of such suit," which occur in the first portion of the section, cannot grammatically be read into second portion, does not, in my opinion, affect the result, although I agree that the meaning might have been better expressed. I think the section enacts the old rule that the plaintiff must have subsisting right of pre-emption at the date of the institution of the suit. The section mentions certain events which would bar the institution of the suit, and I take it as referring necessarily only to events that have taken place before the institution. I do not see how the institution of the suit can be said to be barred by an event that has not taken place before the institution. To my mind the language of the section clearly applies only to the acquisition of an interest before the institution of the suit.

If any doubt remains, it should be set at rest by a reference to the marginal note. The question whether a marginal note can be referred to for an exposition of the meaning of section depends upon whether the note has been inserted by, or under the authority of, the legislature.

This principle is apparent from the reasons given in the leading case *Claydon* v. *Green* (3) which lays down the old rule, observed by the Courts in England, that marginal dotes ought not to be relied on interpretting an Act of Parliament.

"At the time when that Act (the Alehouse Act, 1828 (9 Geo. IV C. 61) passed, the parliament Roll had no marginal notes, or punctuation, nor were the statutes separated into sections. We cannot, therefore, look at the marginal note for an exposition of the meaning of the section. Indeed it is difficult to see how the marginal notes could ever be used in the construction of Acts of Parliament, seeing they are not put there by the legislature or assented to by them."

It seems that since 1849 marginal notes do appear on the rolls of Parliament and there has been some conflict of judicial opinion whether marginal notes may be referred to when the true meaning of section of an English statute enacted after 1849 is in doubt. The conflict of opinion, however, arises solely from the uncertainty existing in the minds of the Judges on the point whether the marginal notes can be considered to have been inserted with the assent of the legislature. All the English rulings which I have seen referred to on this point clearly imply, or expressly hold, that marginal notes can be referred to for the purpose of interpretation if they can be regarded as inserted or assented to, by the legislature. It would indeed be quite unreasonable, in my opinion, to take the contrary view.

The question then arises how far the marginal notes in the Agra Pre-emption Act can be regarded as inserted, or assented to, by the legislature. The answer depends upon the practice followed by the U. P. Legislative Council in matters of legislation at the time when the Act was passed. On this point I am able to speak from personal knowledge, having been a member of the U. P. Legislative Council in the capacity of Legal Remembrancer or Deputy Secretary or Secretary of the Legislative Department for several years, including the period when this Act was passed. I speak of the practice followed during the term of office of the first President of the Reformed Council. In the first place, every bill is drafted with marginal notes. The practice of inserting marginal notes is expressly required by the instructions issued by the Government of India for statutory drafting, and has been in force in this province for many years. Every bill is therefore introduced in the Council with a marginal note annexed to each clause. Even at the first stage, when the general principles of a bill are under discussion, I have known a non-official member of the Council to criticize severely the drafting of a bill owing to a mistake in a marginal note. I merely mention this fact as showing that the members of this Council do not consider marginal notes to be outside the sphere of their criticizm.

When the bill is referred to a select committee of the Council, the committee invariably consider the marginal notes along with the clauses and make such amendments in the marginal notes as they think fit. The practice of the Council differs in this respect from the practice of the House of Commons. Finally, when the Bill is taken into consideration in the Council the marginal notes are not ordinarily read out and formally passed by the Council along with the clauses, but amendments to marginal notes, and the insertion of new marginal notes form the subject of formal motions and resolutions. I would lay stress upon this fact as showing that the marginal notes are considered, and are assented to expressly or tacitly, by the Council. The following extracts from the official report of the proceedings of the U. P. Legislative Council will serve to prove that the practice during the period under consideration, was as I have stated. Two of the extracts relate to the Agra Pre-emption Bill itself, and two to a more recent Bill:

"Mr. C. M. King: I propose substituting "Exclusion of pre-emption in respect of certain alienations." for the present marginal note (of Cl. 8, Agra Pre-emption Bill.) The amendment was put and adopted. The motion that Cl. 8 of the Bill as amended to stand part of the Bill was put and adopted. (Vol. 9, p. 496 1st November 1922)."

"Mr. C. M. King: I further move that in the marginal note to Cl. 5 (of the Agra Pre-emption Bill) after the word "mahals" the words "or villages" be inserted, simply because we have provided for the right of pre-emption in villages as well as in mahals. The motion was put and adopted. The motion that Cl. 5 as amended do stand part of the Bill was put and adopted. (Vol. 11, p. 153, 14th Decemher 1922)."

"Mr. C. M. King: Thirdly I move that in the marginal note (to Cl. 44 of the Oudh Courts Bill) after the words "Subordinate Judge" the words "or Munsif" be inserted,.' Amendments agreed to. Cl. 44, as amended, ordered to stand part of the Bill (6th March 1925 Vol. 22, p. 485).

"Mr. J. R. W. Bennett: I move that the following marginal notes be inserted against the

(3) [1868] 3 C. P. 511 at 519=37 L. J. C. P. 226=18 L. T. 607=16 W. R. 1126.

paras. 1 and 2 respectively of Cl. 48 (of the Oudh Courts Bill) "Bar of redemption suits when mortgage executed before the 13th February 1844" and "Redemption suits not barred where fixed term for redemption had not expired before 13th February 1856. " Amendment agreed to, Cl. 48 as amended, ordered to stand part of the Bill. (7th March 1925 Vol. 22, p. 506). "

Further examples may be found in Vol. 22 at pp. 479 and 505.

The practice of the legislature, in respect of marginal notes, being as shown above, I think it is clear that the marginal notes of the Agra Pre-emption Act must be regarded as inserted in the Act with the assent and authority of the Legislative Council. I think they may be treated as parts of the Act to the same extent as the headings of chapters, or the headings of groups of sections. They can therefore, properly be regarded as giving a contemporanea expositio of the meaning of a section, when the language of the section is obscure or ambiguous. I do not think that this view conflicts with the dictum of their Lordships of the Privy Council in the case of *Balraj Kunwar* v. *Jagatpal Singh* (4)

"It is well settled that marginal notes to the section of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament."

I take this to mean that no reason had been shown to their Lordships for ascribing to the marginal notes of Indian statute any greater authority than could be ascribed to the marginal notes of an act of Parliament, and therefore they were not prepared to ascribe any greater authority to the former. Very likely no such reason could have been given. The Indian statute under consideration in that case was the Oudh Estates Act which was passed by the Governor-General-in-Council in 1869. Their Lordships could not be expected to attach any authority to the marginal notes of that Act unless they were satisfied that the notes had been inserted with the assent of the legislature. Apparently no attempt was made to prove this proposition. It may be that the proposition was not even true. I find no trace in the arguments or judgment of any statement or explanation of the proceedure followed by the Indian legislature in the year 1869 in respect of marginal notes. In the circumstances, therefore, it was only to be expected that their Lordships would not attach any authority to such notes.

I see no reason, however, for supposing that their Lordships would exclude all reference to the marginal notes of the Agra Pre-emption Act, 1922 even if they were satisfied, by reference to the official report of the Proceedings of the Legislative Council of the United Provinces, that such notes must be regarded as inserted with the authority and assent of the legislature. That would be a good reason for differentiating between the marginal notes of that Act and the marginal notes of an Act of Parliament. The marginal note to S. 20 reads as follows:

"Sale of property to pre-emptor or acquisition of right by the original purchaser prior to suit"

I may observe in passing that the word " pre-emptor " must be taken as equivalent to " person having a right of pre-emption, " but the important point is that the note clearly indicates that the events mentioned must have taken place " prior to suit. " This confirms the conclusion, to which I have arrived on other grounds, that S. 20 has no application to the present case, where the purchaser acquired his interest after the institution of the suit. I am unable to agree to the interpretation put upon S. 20 in the case of *Qudrat-unnissa* v. *Abdul Rashid* (1).

The next question is whether S. 19 defeats the plaintiff's right to a decree. I think it clearly does. At the time of passing the decree the plaintiff had no subsisting right of pre-emption because the purchaser had by that time acquired a pre-emptive status equal or superior to that of the plaintiff. To my mind it is clear that S. 19 enacts the old rule that the plaintiff cannot get a decree unless he shows a subsisting right of pre-emption at the date of the decree. I think the expression " subsisting right of pre-emption " must be understood in the sense in which it was understood before the passing of this Act. The plaintiff may lose his right in a variety of ways, and one way is by the purchaser's acquisition of an interest which puts him on the same level as the plaintiff in respect of the right of pre-emption. It may be considered hard that the plaintiff

(4) [1904] 26 All. 393 at 406=31 I. A. 132=7 O.C. 248=1 A.L.J. 384=8 Sar. 639 (P.C.).

should be defeated by the purchaser acquiring such an interest after the institution of the suit, but this was the old rule, and I have no doubt but that S. 19 enacts the same rule. I express no opinion on its justice or expediency. I am in full agreement with the interpretation put upon S. 19 in the case of *Qudrat-un-nissa* v. *Abdul Rashid* (1) which has been followed in the case of *Ram Khelawan* v. *Banke Bihari* (5) and *Deonarain Singh* v. *Ajudhia Prasad* (6). I agree that the reference should be answered in the affirmative in respect of S. 19 and in the nagative in respect of S. 20.

Kendall, J.—I agree with my learned brothers in their interpretation of Ss. 19 and 20 of the Act, and need add nothing to what they have said on the point. As regards the use of marginal notes I can support from my own experience as Legal Remembrancer and Judicial Secretary the remarks of King J. on the procedure in the reformed Legislative Council; and the conclusion at which I arrive is the same as his, namely that the marginal notes of the Agra Pre-emption Act, 1922 may properly be referred to by the Court in order to interpret the meaning of that statute.

Order of the Court:—Let the reference be returned with the answer that in the circumstances named the plaintiff's right of pre-emption is not defeated by the provisions of S. 20 but is defeated by the provisions of S. 19.

Mukerji and Sen, JJ:—Certain point of law was referred by us to the Full Bench. A Full Bench has formulated its answer and the case has come back to us. In view of the finding of the Full Bench this appeal must be allowed. We accordingly allow the appeal, set aside the decrees of the Courts below and direct that the plaintiff's suit do stand dismissed with costs thoughout.

S.N./R.K. *Appeal allowed.*

(5) A. I. R. 1927 All. 517=49 All. 268.
(6) A. I. R. 1927 All. 575=49 All. 696.

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* A. I. R. 1929 Allahabad 59

SEN AND WEIR, JJ.

Parsotam Narain and *others*—Defendants—Appellants.

v.

Benares Bank Ltd., Benares—Plaintiff—Respondent.

First Appeal No. 509 of 1925, Decided on 8th August 1928,

*** (a) Hindu Law—Debts—Legal necessity—Ancestral property cannot be transferred to raise money to start or carry on a new business even for family benefit. [But see A. I. R. 1928 All. 454 (F.B.).]**

Where there is ancestral property held in coparcenary by a Hindu family governed by the Mitakshara, it is not competent to the father, the karta or the adult members of the family to transfer the ancestral property to raise money to start or carry on a new business with the object of pecuniary gain for the family. A karta is not to be allowed to involve the joint ancestral property in the risk of loss through business ventures. [P 60 C 2]

(b) Usurious Loans Act (10 of 1918)—Act is not retrospective.

Where the mortgage bond has been executed before the Usurious Loans Act came into operation, the Court has no jurisdiction to reopen the transaction under the provisions of that Act. [P 62 C 1]

(c) Interest—Twelve annas per cent. per mensem. at six monthly rests is not unreasonable or unconsionable.

Interest at the rate of twelve annas per cent. per mensem. compoundable six monthly is not unreasonable or unconscionable. [P 62 C 1,2]

K. N. Katju and *N. P. Asthana*—for Appellants.

B. E. O'Conor and *Damodar Das*—for Respondent.

Judgment.—The suit which has given rise to the present appeal was instituted by the Benares Bank, Limited, against the defendants-appellants and certain other members of their family for recovery of Rs. 27,261-9-4 on foot of a mortgage, dated 1st September 1911.

The mortgage in suit was executed by Babu Jagdish Narain for himself and as guardian of his minor sons, Parsotam Narain, Hari Narain and Maharaj Narain, and by Babu Raghubir Narain for himself and as guardian of his minor sons, Gopal Narain, Prahlad Narain and Narsingh Narain. Suraj Narain and Dip Narain, two adult sons of Jagdish Narain also joined in the mortgage. Substantial zemindari and house property was mortgaged to secure a debt of Rs. 28,000, and the stipulated rate of interest was twelve annas per cent. per mensem with half yearly rests. The mortgagors agreed to pay the mortgage money in five years. In the year 1913 the mortgagors paid two sums of money, viz., Rs. 3,500 and Rs. 628 4-9, to the plaintiff bank. In 1919 the mortgagors sold one of the mortgaged villages, viz., Sheodaspur, for Rs. 29,700. This amount was also paid to the plaintiff Bank. Sheodaspur has

been released from the present claim. The total sum received by the bank up to the date of the suit is Rs. 33,828-4-9.

The present action was commenced on 2nd day of August 1923. Jagdish Narain one of the mortgagors had died a few years before the institution of the suit.

Babu Suraj Narain, Babu Dip Narain and Babu Raghubir Narain, the adult mortgagors, did not contest the suit. The remaining defendants raised a variety of pleas, all of which were repelled by the Court below, which granted a decree to the plaintiffs for the amount claimed.

Only three pleas were urged on behalf of the defendants in the appeal to this Court : (1) That the mortgage-bond was not executed by each of the adult mortgagors in the presence of any two of the three attesting witnesses, and that the document, therefore, did not fulfil the requirements of S. 59 of Act 4, 1882. (2) That of the sum secured by the mortgage, Rs. 10,000 was not borrowed either for payment of antecedent debts or for legal necessity, and thus the adult members of the family were not competent to charge the joint ancestral property for the said sum of Rs. 10,000. (3) That there was no reason for borrowing money at as high a rate of interest as twelve annas per cent. per mensem with six monthly rest. (Judgment then discussed evidence and holding that the bond was validly attested and that Jagdish Narain and others were not competent to mortgage the joint ancestral property to secure a loan of Rs. 6,342 from the bank proceeded.) It appears that about the year 1902 or 1903, Jagdish Narain started a business of taking contracts from the Public Works Department relating to buildings and also some plumber's business. Suraj Narain states that the balance of Rs. 10,000 (after excluding the sum required for payment of Rs. 6,342 to Bhagwati Prasad) was taken for the theka or contract business and was given to Jagdish Narain from time to time according as he required it. Jagdish's servant Ambika Prasad used to take the money ; and Suraj Narain used to operate on his bank accounts by issuing cheques in favour of Ambika Prasad. The learned Subordinate Judge does not find that there was any ancestral trading business carried on by the family. He concludes that the business carried on was "a family business," and he bases his conclusion upon the hearsay statements of some of the plaintiff bank's witnesses, on the admission of Suraj Narain that he has been carrying on the Public Works Department contract business after the death of Jagdish, and upon the fact that the defendants have not produced their account-books at the trial of the suit. In our opinion this finding cannot be upheld. The hearsay evidence relied on by the learned Subordinate Judge was clearly inadmissible and ought to have been ruled out. There is nothing to prevent a member of a joint family from carrying on business for himself ; and the admission of Suraj Narain does not prove that the business was carried on for or on behalf of the joint family of which he was a member. In fact, he denies that the business belonged to the joint family. No application was made by the plaintiff bank that the defendants be directed to produce the account-books relating to the business carried on by Jagdish and, after his death, by Suraj. We do not see how those account books could have been material for the purpose of the suit. Assuming that the business was carried on by the joint family, it was started for the first time about the year 1902, and, therefore, it was not an ancestral trading business. It was a speculative venture floated by Jagdish, within a few years of his death. Even on the assumption that it was a family business, we do not think that the case of the plaintiff bank is substantially advanced.

Where there is ancestral property held in coparcenary by a Hindu family governed by the Mitakshara, it is not competent to the father, the karta, or the adult members of the family to transfer the ancestral property to raise money to start or carry on a new business with the object of pecuniary gain for the family. In the present case this money was not borrowed for the continuance of a well-established ancestral trading firm. A karta in a joint family is not to be allowed to involve the joint ancestral property in the risk of loss through business ventures. We, therefore, hold that the sum of Rs. 10,000 borrowed from the plaintiff bank was not justified either on the ground of being required to satisfy an antecedent debt or to answer a joint family necessity.

It was argued by the respondent that a portion of the hypothecated property, (viz., Mauza Manjhiari and the house situated in Mohalla Chowk Ganga Das in

the city of Allahabad) was non-ancestral property. It was said that originally the property belonged to the father of Jagdish Narain that he gifted the same to his wife Mt. Sheo Devi and the property devolved upon Jagdish Narain & Raghubir Narain through her ; so that this property was, consequently, the acquisition of Jagdish and Raghubir, and was not the joint ancestral property of the appellants. The plaintiff bank alleges in para. 1 of the plaint that the property is owned " by the defendants." No issue was framed in the trial Court as to whether any portion of the mortgaged property was non-ancestral. No evidence was adduced by the plaintiff to prove that the property was other than joint ancestral property of the defendants. The mortgage bond in the clearest terms recites that the properties mortgaged belonged to all the executants. Reliance was placed upon the statement of Suraj Narain that the property had descended through Sheo Devi ; but he stated that Sheo Devi had died some ten years before the date of his deposition, so that in any event the property had not vested in the family or any of its members by inheritance from Sheo Devi at the date when the mortgage was executed. No attempt was made in cross-examination to prove that Sheo Devi had surrendered or made a gift of her property to her sons or grandsons. There is, therefore, nothing to suggest that any part of the property was non-ancestral. It is patent from the statement of Suraj Narain, coupled with the recitals contained in the mortgage bond, that Mt. Sheo Devi was never the owner of the property ; that there had never been an operative gift in her favour, and that the property had always remained and been treated as the joint ancestral property of the family. The name of Mt. Sheo Devi was in all probability entered in the village papers (if it was entered at all) for the sake of her consolation. The plaintiff bank has, therefore, failed to prove that any portion of the mortgaged property was not the joint ancestral property of the family.

There now remains the question of the rate of interest. Since the mortgage-bond was executed before the Usurious Loans Act came into operation, we would not have any jurisdiction to re-open the transaction under the provisions of that Act. Interest at the rate of twelve annas per cent. per mensem compoundable six-monthly does not appear to us to be unreasonable or unconscionable. It appears that Jagdish Narain had borrowed from Mt. Dwarka Bibi at the rate of eleven annas per cent. per mensem with six-monthly rests. The amount secured by the mortgage was considerably smaller than the amount of the mortgage in suit. We do not think that the appellants have made out any case to justify this Court in reducing the stipulated rate of interest.

Although the plaintiff Bank did not ask for it, we think that it is well entitled to a simple money-decree for Rs. 10,000, the amount of unsecured debt. In view of the payments made from time to time, and the clear acknowledgment of liability in a large number of documents, of which Ex. 34, dated 29th August 1919, may be cited as an example, the claim for a money-decree is amply within limitation. We pass a simple money-decree for Rs. 10,000 against Raghubir Narain, Dip Narain and Suraj Narain personally and against the heirs of Jagdish Narain, limited in the case of these heirs to the extent of the personal assets of Jagdish Narain in their hands, other than the mortgaged property together with simple interest at twelve annas per cent. per mensem from the date of the bond up to the date of realization, subject to the further direction, which we proceed to give.

The mortgage is valid to the extent of Rs. 18,000 with interest at twelve annas per cent. per mensem with six-monthly rests. The mortgagors have already paid to the plaintiff bank Rs. 33,828-4-9. We direct that an account be taken of the sums due and the sums received up to the date in 1919 when Rs. 29,700 was receivde by the plaintiff Bank. If after adjustment of the debits and credits, any sum of money be found due to the plaintiff bank a decree for the said amount be passed under O. 34, R. 4, Civil P. C. If no amount be found due, the plaintiff's claim against the appellants and the mortgaged property be dismissed. If after adjustment of the debits and credits, a surplus be found in favour of the mortgagors, the same should be applied towards the reductoin of the simple money-debt and the simple money-decree be passed only for the balance.

We modify the decree of the Court below and allow the appeal to the extent indicated above. We do not allow the appellant any costs of this Court or of the Court below. In view of the peculiar cir-

cumstances of the case we order that the parties bear their costs throughout.

We have asked Mr. Damodar Das at the time of delivering judgment in this case as to whether the figure Rs. 29,700 said to have been received by the plaintiff Bank in 1919 is a correct figure or not. He says that the figure is correct.

S L./R.K. *Decree modified.*

A. I. R. 1929 Allahabad 62

SULAIMAN, J.

Raghunath Das—Applicant.

v.

Chingan—Opposite Party.

Civil Revn. No. 216 of 1928, Decided on 15th November 1928.

(a) Provincial Small Cause Courts Act, Sch. 2, Art. 15—Suit for refund of money under terms of a contract is within Art. 15.

A suit for the refund of money under the terms of a contract is undoubtedly a suit for the specific performance of the contract and is not cognizable by a Court of Small Causes : 19 *M. L. J.* 220, *Foll.* [P 62 C 2]

(b) Provincial Small Cause Courts Act, Sch. 2, Art. 15—Suit for refund against a person refusing to perform his part of contract is not barred—Contract Act S. 39.

The defendant agreed to sell to plaintiff property, for a certain sum which he had received from plaintiff, after buying the property at an auction sale. The defendant bought it but by collusion with a third person put it out of his power to perform his part of the contract. The plaintiff sued for the refund of his money.

Held : that a suit lay for cancellation of the contract under S. 39, Contract Act, and then was triable by Small Cause Court for the refund of the amount : *A. I. R.* 1924 *Mad.* 903, *Ref.* [P 62 C 2]

K. D. Malaviya—for Applicant.

Nirmal Chandra Sen—for Opposite Party.

Judgment.—This is a civil revision under the Small Cause Court Act. The case has not been tried satisfactorily. In para. 5 of the written statement there was a denial of the jurisdiction of the Court to hear the case. No issue has been framed on this point nor has the question been at all considered. The plaintiff's case as set forth in the plaint was that on 4th June 1926, some property had been put up for auction and there were a number of bidders including the plaintiff and the defendant. The plaintiff paid Rs. 110 to the defendant on the understanding that after the sale was finished in his favour and the sale confirmed he would "sell" the property to the plaintiff. Later when the plaintiff demanded the property, the defendaut put up a third person and got him to institute a suit against himself which was not defended and was decreed ex parte. The defendant had suffered no loss because he realized the decretal amount. The plaintiff alleged that in spite of payment the defendant refused to repay the amount. The date of the cause of action was fixed as the 4th June 1926, when the auction sale took place and the amount was paid. The defendant in his written statement beside denying the jurisdiction of the Court and any cause of action against himself, pleaded that he was a mere benamidar for the plaintiff and had been paid Rs. 110 in order to make a bid in his own name. He denied any collusion with the stranger to get the decree in respect of the property against him.

It seems to me that the plaintiff should have at the very outset been called upon to state whether it was a part of his case that at the time when Rs. 110 were paid it was agreed that if it turned out that the judgment-debtor was not the owner of the property the amount would be refunded, that is to say that there was an express agreement as to warranty of title by the present defendant. If his case is that there was such an agreement for refund then the present claim would be one for the specific performance of that contract and would not be cognizable by a Court of Small Causes. A suit for refund of money under a contract is undoubtedly one for specific performance of it: *Veerasalingam* v. *Sathapalli Sathiaru* (1). If, however, the plaintiff does not allege that it was the understanding that the amount would be repayable in case the title was subsequently found to be defective then he can only succeed in a Court of Small Causes by showing that the defendant had refused to perform his part of the contract and that the plaintiff has accordingly cancelled it. On such refusal by the defendant, the plaintiff can under S. 39, Contract Act cancel the contract and then sue for the recovery of the amount which had been paid by him, *Sundara Thevan* v. *Ananthan Kaladi* (2).

In the plaint there is no allegation that the defendant has definitely refused to execute a sale-deed of the property in favour of the plaintiff. The refusal alleged is the refusal to pay the money and the date of the cause of action is not the date

(1) [1909] 19 M. L. J. 220=1 I. C. 552=5 M. L. T. 296.

(2) A. I. R. 1924 Mad. 903.

of such refusal but the date of payment. The plaintiff did, however, allege that the defendant got a collusive suit instituted against himself and decreed ex parte, and in this way put the property out of his control. If such a collusive device were proved, the defendant's conduct would, in my opinion, amount to a refusal to perform his part of the contract, in which case the plaintiff can sue in the Court of Small Causes for the refund of his money.

The Court below, however, has not considered these aspects of the case. Its decree without deciding the question of jurisdiction or the plaintiff's right to recover the amount, cannot be maintained. I set aside the decree of the Court below, send the case back to that Court with direction to restore it to its original number on the file and dispose of it according to law. The costs of both the Courts will abide the event.

M.N./R.K. *Case sent back.*

A. I. R. 1929 Allahabad 63(1)

MUKERJI, J.

Ganga Din and *another*—Appellants.

v.

Piyare—Defendant—Respondent.

Second Appeal No. 1178 of 1926, Decided on 19th November 1928.

Transfer of Property Act, S. 6 (e)—Right to mesne profits is not "mere right to sue."

A right to claim mesne profits is not a "mere right to sue" within the meaning of S. 6 (e): 38 *Mad.* 308, *Diss. from*: *A.I. R.* 1921 *Mad.* 56, *Rel. on.* [P 63 C 1, 2]

Baleshwari Parsad—for Appellants.

Judgment.—This appeal must be allowed. The plaintiffs are the appellants before this Court. They purchased certain zamindari rights and also mesne profits admittedly payable by defendant 1, to the plaintiffs' vendors. The suit out of which this appeal has arisen was brought for recovery of possession and mesne profits. The suit succeeded in the Court of first instance. On appeal the learned District Judge dismissed the suit, so far as it claimed mesne profits, on the ground that transfer of mesne profits was a transfer of a "mere rights to sue" and was therefore invalid in law, having regard to the provisions of S. 6, T. P. Act.

With all respects to the learned Judges who decided the case of *K. Seetamma* v. *P. Venkatramanayya* (1), I am unable to hold that a right to claim mesne profits is a "mere right to sue" within the meaning of S. 6, T. P. Act. I may point out that in the Madras High Court itself the soundness of this decision has been doubted in *Venkatarama* v. *Ramasami* (2).

Mesne profits has been defined in the Civil Procedure Code as:

"those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits."

A person who is entitled to a property in the possession of a trespasser is entitled not only to the property but to the profits of which he has been improperly deprived. The profits rightfully belong to the owner of the land and it is not accurate to say that the profits are payable merely by way of damages.

I allow the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance. The appellants will have their costs in this Court and in the Court below.

W.S./R K. *Appeal allowed.*

(1) [1913] 38 Mad. 308=25 M. L. J. 410=21 I. C. 387=(1913) M. W. N. 918.

(2) A. I. R. 1921 Mad. 56=44 Mad. 539.

A. I. R. 1929 Allahabad 63(2)

NIAMATULLAH, J.

Gopi Ram—Defendant—Appellant.

v.

Durjan and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1485 of 1926, Decided on 8th November 1928.

(a) Transfer of Property Act, S. 119—Defect in title of one party (e. g., Hindu manager)—Exchange is not inoperative—Hindu Law.

An exchange of property cannot be inoperative only because of a defect in the title of a party to it.

A manager of joint Hindu family exchanged family property, and the transaction was not challenged by other members.

Held: that the exchange was valid. [P 64 C 1, 2]

(b) Specific Relief Act, S. 8—Exchange complete—Suit is one for recovery of possession—Transfer of Property Act, S. 118.

On the completion of the transaction of exchange, right to property becomes vested in the parties, and the party should then sue for recovery of possession, and not for specific performance of the contract of exchange. *Wolverhampton* and *Walsall Railway Co.* v. *L & M. W. Ry. Co.* (1873) 16 *Eq.* 433, *Foll.* [P 64 C 2]

(c) Transfer of Property Act, S. 118—Two separate deeds are not necessary.

There is nothing in law which makes it imperative for parties entering into a transaction of exchange to execute two separate deeds. [P 64 C 2]

A. Aziz—for Appellant.

Panna Lal—for Respondents

Judgment. — Plaintiff - respondent brought the suit out of which this appeal has arisen for recovery of possession of the land in dispute on the allegation that by a deed of exchange, dated 7th January 1924, defendant 1 transferred it to him in lieu of certain other property and a sum of Rs. 25, and that defendant 1 is wrongfully withholding possession of the same. The claim was resisted by the defendant 1 on the ground that the title of the plaintiff in the property given by him in exchange was defective in so far as defendants 2 and 3 are minor members of a joint Hindu family with the plaintiff and have an interest in the property assigned by the plaintiff, that the suit in its nature is one for specific performance of contract and the specific relief claimed by the plaintiff should be refused under the circnmstances of the case, and that in the absence of two formal deeds of transfer, one executed by the plaintiff and the other by defendant 1, title to the property to which the transaction of exchange relates, did not pass. Some of these pleas prevailed with the Court of first instance where the plaintiff's suit was dismissed except as regards the sum of Rs. 25 paid by him to the defendant which was ordered to be refunded. On appeal by the plaintiff the lower appellate Court has decreed the suit. Defendant 1 has preferred this second appeal.

The learned counsel for defendant 1 has reiterated his complaint viz., that the title of plaintiff is defective as he cannot be considered to be the sole owner of the property transferred by him to defendant 1. It is not necessary to decide the question whether the plaintiff had authority to transfer the property to defendant 1 either because he is the sole owner, or because the transaction was advantageous to the family, assuming in the latter case, that the property belonged not to the plaintiff exclusively but to the joint family of which he is a member. Defendants 2 and 3, the other members of the family are parties to the case, and the transaction of exchange or the plaintiff's right to transfer the property in which they are said to be interested, has not been challenged by them. I think the lower appellate Court has taken a correct view of the matter in holding that if defendant 1 is hereafter deprived of the property which has been given to him in exchange by the plaintiff, he will then be entitled, under S. 119, T. P. Act, to compensation or to the return of the property in dispute transferred by him to the plaintiff.

As regards the argument that the present suit is in the nature of a suit for specific performance, I think it is untenable. The suit is for recovery of possession of a property, right to which became vested in the plaintiff on the completion of the transaction of exchange. As was observed in *Wolverhampton* and *Wallsall Ry. Co.*, v, *L. & N. W. Ry. Co.* (1).

"There is a class of suits in this Court known as suits for specific performance of executory agreements, which agreements are not intended between the parties to be the final instruments regulating their mutual relations under their contracts. We call those executory contracts as distinct from executed contracts : and we call those contracts 'executed,' in which that has been already done which will finally determine and settle the relative positions of the parties, so that nothing else remains to be done for that particular purpose. The common expression, 'specific performance' as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they are intended to, be placed."

The deed of exchange sued on by the plaintiff is clearly an executed contract and not a merely executory one for which a suit for specific performance might have been necessary. This plea must, therefore fail.

Lastly it has been contended that there should have been mutual deeds of transfer executed by plaintiff and defendant 1 to effect the enchange. There is nothing in law which makes it imperative for parties entering into a transaction of exchange to execute two separate deeds. The deed of exchange in question is not said to be on insufficient stamp or wanting in apt words by which title can be conveyed from one to the other. It is duly registered. There is no reason why it should not operate as a deed of exchange. This ground of appeal must also fail.

No other ground was urged in the arguments on behalf of the appellant and in view of what has been stated above this appeal must fail and is dismissed with costs.

W.S./R.K. *Appeal dismissed.*

(1) [1873] 16 Eq. 433 = 43 L. J. Ch. 131.

A. I. R. 1929 Allahabad 65

SEN AND WEIR, JJ.

Ram Narain and *another*—Defendants—Appellants.

v.

Ram Das and *others* — Plaintiffs and Defendants—Respondents.

First Appeal No. 341 of 1925, Decided on 19th July 1928, from decree of Sub-Judge, Benares, D/- 16th August 1924.

Civil P. C., S. 97—Preliminary decree not appealed against—Court cannot go behind it while passing final decree.

A Court cannot at the time of passing the final decree go behind its own preliminary decree where it has become final by not being appealed against : (1884) *A. W. N.* 215, *Foll.* [P 66 C 1]

B. E. O'Conor and *Mukhtar Ahmad*—for Appellants.

K. N. Katju, Harnandan Prasad, U. P. Upadhiya and *Shiva Prasad Sinha*—for Respondents.

Judgment.—This is an appeal by two of the defendants, Ram Narain and his son Lachhmi Narain from a final decree dated 16th August 1924, in a suit for partition of the joint family property. The property consisted of moveables, house property and zemindari shares. The three plaintiffs are the two sons and one grandson of Rameshwar Sahu and the principal defendants were Ram Narain, defendant 1, who is the appellant before us, and, Deo Narain, an insane brother of Ram Narain. The share of the plaintiffs in the joint family property was one-half and the share of the defendants 1, 2 and 3 was the remaining half. The suit was resisted upon various grounds but ultimately a preliminary decree for partition was passed by the learned Subordinate Judge of Benares on 23rd April 1924. The operative part of the decree, material for the purpose of the present appeal may be reproduced here :

"It is ordered and decreed that the account of the defendants is correct, that the plaintiffs' objection be disallowed, that the amin do partition the immovable property specified in the plaint, that the amin do partition the property into two parts and make a report by 14th May 1924, as to which portion can be given to the plaintiffs and that the amin do partition the property in such a way as there may be no difference in the actual price of any property."

The defendant Deo Narain is a lunatic and was represented in the action through his wife Mt. Makhna. The plaintiffs originally appointed Ram Narain as guardian ad litem of the lunatic ; but Ram Narain refused to act, and, therefore, on the application of the plaintiffs, the Court appointed Mt. Makhna as the guardian ad litem.

It is significant that in the two written statements filed by Deo Narain and Ram Narain neither of them wanted to have his share in the joint family property ascertained and partitioned. The result of it was that a preliminary decree was passed in favour of the plaintiffs alone for a partition of their moiety share in the joint family property.

A commissioner was appointed to make the partition of the various items of property, involved in the suit and during the pendency of the proceedings an application was presented on behalf of Deo Narain through his wife Mt. Makhna that it was to the interest of the lunatic to have his share in the joint family property ascertained and partitioned from the shares of the plaintiffs on the one hand and that of Ram Narain on the other. This application was opposed by the plaintiffs and Ram Narain ; but the learned Subordinate Judge allowed the application, upon the ground that it was to the interest of the lunatic that his share should be separated from the share of Ram Narain, the co-defendant, otherwise there was every prospect of the property of Deo Narain being utilized by Ram Narain for his personal use to the prejudice and detriment of the lunatic. Mr. Nizam-ud-Din Haidar, the commissioner appears to have devoted considerable time in assessing the value of the immovable property, belonging to the joint family. He held that the value of this property was Rs. 1,21,350-7-0. He allowed property of half of this value to the plaintiffs and of a ,quarter value to each of the defendants Ram Narain and Deo Narain.

An appeal was preferred by the plaintiffs to this Court, which was numbered and registered as First Appeal No. 61 of 1924. This appeal was dismissed by a Bench of this Court on 31st January 1927, for default of prosecution. Ram Narain and his son Lachhmi Narain have preferred the present appeal and their contention is that the trial Court having in its preliminary decree directed the partition of the moiety share of the plaintiffs alone and not having ordered that the shares of the defendants should be separated inter se, the learned Judge of the Court below was not justified in the

course of the preparation of the final decree in directing that the share of Deo Narain should be separated from that of Ram Narain.

We have already observed that Deo Narain in his written statement did not claim that his quarter share in the joint family property should be separated. From a reference to the preliminary decree, dated 23rd April 1924, we find that the share of Deo Narain in the joint family property was not ascertained nor was there an order that his share should be determined and separated. Deo Narain did not appeal from the preliminary decree to this Court and a finality now attaches to the decree which was passed by the learned Subordinate Judge on 23rd April 1924. The Subordinate Judge had not the jurisdiction or the legal competency to go behind the preliminary decree, dated 23rd April 1924, and directing the partition of the share of Deo Narain from that of Ram Narain. For a parallel case we would refer to *Balkishun Das* v. *Sita Ram* (1), Under the circumstances, we are of opinion that the contention of the appellant ought to succeed and the decree of the Court below directing the partition of the share of Deo Narain should be set aside.

Matters have been complicated by the death of Deo Narain during the pendency of this appeal. If Deo Narain, at the time of his death, was a separated Hindu, a title to a quarter share of the entire property devolves upou his widow Mt. Makhna.

The fact of our varying the decree of the Court below will not in any way prejudice the right of Mt. Makhna to institute a suit for partition of the share of Deo Narain from that of Ram Narain in the family property. It has been argued by the learned counsel for Deo Narain that we ought to determine the question in this appeal as to whether Deo Narain was at the time of his death a separated Hindu. We do not think that the decision of this issue is necessary for the purpose of the determination of the appeal now before us. The learned Subordinate Judge has found and we accept the finding that Mt. Makhna was justified in making an application before the learned Subordinate Judge for the separation of the share of Deo Narain because that was calculated to safeguard the interests of Deo Narain as against Ram Narain. Our attention has been drawn to the following passage in the judgment of the learned Subordinate Judge, dated 16th August 1924 :

"All the circumstances convince me that Deo Narain's share should be separated. The plaintiff raised several false pleas in the suit. He stated that the household properties, cash, jewellery and outstanding debts were separated about three years ago. We have seen above the value of these amounted to Rs.one lac and more. The plaintiff's plea was found false and the Court ordered to bring these into partition. By such false pleas the plaintiff wanted to become owner of the same dishonestly. The insane defendant will lose his properties if they are not divided off and given to his guardian and wife Mt. Makhna."

We are of opinion that there was considerable justification on the part of Mt. Makhna in applying to the Court below for the partition of the share of Deo Narain with a view to safeguard his interests.

But, as we have already held that after the passing of the preliminary decree, the Court below was not competent to entertain the application on behalf of Deo Narain to separate his share and the said share could not be separated, we leave Ram Narain and Mt. Makhna to have their rights adjusted by means of a separate suit if they so choose. In the meantime, we are of opinion, that the portion of the property, which has not been allotted to the plaintiffs should be considered for the purpose of the present suit to be the property held in common. What the legal effect of the application of Mt. Makhna upon the status of the family property or the constitution of the family qua Ram Narain and Deo Narain is, has got to be determined in a subsequent suit if the parties are not agreed as to it or if one or the other party choose to institute a suit. The parties are agreed that the property allotted to the plaintiffs is equal in value to the property allotted to the two sets of defendants, namely, Ram Narain and Deo Narain. An exception was taken by Mr. O'Conor as to the equality of the division on the ground that the amenities attending some of the houses, allotted to the plaintiffs and Deo Narain, were greater than those which were allotted to the share of the present appellants ; but he is agreed that if the properties allotted to Deo Narain and Ram Narain be pieced together in that case Ram Narain should have no grievance.

(1) [1884] A.W.N. 215.

The result is that we allow the appeal, modify the decree of the Court below and direct that the shares of Ram Narain, Lachhmi Narain and Mt. Makhna, as the representative of Deo Narain be held in common. In view of the peculiar circumstances of the case we direct the parties to bear their own costs.

M.N./R.K. *Decree modified.*

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* A. I. R. 1929 Allahabad 67

NIAMATULLAH, J.

Bhullan and *others*—Defendants—Appellants.

v.

Dasrath Pandey and *others*—Plaintiffs—Respondents.

Second Appeal No. 1264 of 1926, Decided on 7th November 1928, from decree of Dist. Judge, Benares, D/- 7th April 1926.

*** (a) Civil P. C., O. 23, R. 1 (3)—Suit for ejectment of year to year tenant withdrawn in 1918 without permission—Suit for ejectment from 1924 is not barred.**

The subject-matter of a suit for ejectment of a year to year tenant with effect from a certain year is not the same as his ejectment with effect from a subsequent year. O. 23, R, 1 (3), can only bar a second suit for ejectment instituted after the withdrawal of the first without necessary permission of the Court if the object of both suits is to eject the tenant with effect from the same year. [P 67 C 2, P 68 C 1]

A suit for ejectment was withdrawn in 1918 without the permission of the Court. Another suit was instituted seeking ejectment with effect from 1924.

Held: that the suit was not barred: *A. I. R.* 1926 *All.* 34, *Foll.* [P 68 C 1]

(b) Agra Tenancy Act (2 of 1901), S. 177—Question of proprietary title a matter in issue when appeal filed—Subsequent abandonment of the plea by respondent rendering decision on it unnecessary — District Judge's jurisdiction to hear appeal is not barred—Practice—Subsequent events.

If a controversy relating to proprietary right exists at the time when the appeal is filed, subsequent abandonment of the plea by the respondent before the District Judge, which makes it unnecessary for the question of proprietary right being decided, does not deprive the District Judge of jurisdiction to hear the appeal. [P 68 C 1]

Gadadhar Prasad—for Appellants.

Harnandan Prasad—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiffs-respondents for ejectment of defendants from certain lands alleged to be part of village Darweshpur which admittedly belongs to the plaintiffs-respondents. The defendants-appellants are fixed rate tenants in an adjoining village named Sultanpur which belongs to certain other persons not interested in this litigation. The defendants claim the lands in dispute as part of their fixed rate tenancy denying the plaintiffs' proprietary rights with respect to them on the ground that they lay within the boundary of village Sultanpur with which the plaintiffs-respondents have no concern. The Court of first instance found in favour of the plaintiffs on the merits of the case, but dismissed it on a technical ground, namely, that the suit is barred by the provisions of O. 23, R. 1 (3) inasmuch as a previous suit of a similar character had been withdrawn in 1918 by the plaintiffs-respondents without obtaining the leave of the Court to bring a fresh suit. It should be noted that the present suit was for ejectment of the defendants with effect from 1st July 1924. On appeal by the plaintiffs the learned District Judge held that the suit was not barred by O. 23, R. 1 (3), Civil P. C. and decreed the suit directing the ejectment of the defendants who have preferred this second appeal.

Two questions have been argued by the learned counsel for the defendants-appellants in support of the appeal. Firstly, it is maintained, that O. 23, R. 1 (3), Civil P. C. bars the suit as held by the Court of first instance. I am of opinion that this contention is untenable. O. 23 R. 1 (3), Civil P. C., provides:

"Where the plaintiff withdraws from a suit , ... without the permission referred to in sub-R. (2) . . . . . he shall be precluded from instituting any fresh suit in respect of such subject-matter. . . . . ."

It seems to me that the subject-matter of a suit for ejectment of a year to year tenant, with effect from a certain year is not the same as his ejectment with effect from a subsequent year. The right of the landlord in such a case is a recurring right and so long as the tenancy subsists he can always maintain an action for ejectment. To hold that, because the landlord once abandoned his attempt to eject his tenant by withdrawing his suit without obtaining permission to institute another suit, a subsequent suit is barred, is tantamount to holding that a year to year tenant became a perpetual lessee in consequence of such withdrawal. O. 23, R. 1 (3) can only bar a second suit for

ejectment instituted after the withdrawal of the first without the necessary permission of the Court if the object of both suits is to eject the defendant with effect from the same year. The learned District Judge has referred to a case of this Court, namely, *Mt. Kumari* v. *Adit Misir* (1), which supports the view taken by me in agreement with the learned District Judge. It is next contended that the learned District Judge had no jurisdiction to hear the appeal preferred by the plaintiffs, as the question of proprietary right arising in the case had been abandoned by the respondents previous to the hearing of the appeal on the merits. This argument has no force. S. 177, Ten. Act 2 of 1901, provides that

"an appeal shall lie to the District Judge from the decree of an Assistant Collector of the first class in any of the suits. . . . . in which a question of proprietary title has been in issue in the first instance and is a matter in issue in appeal."

The forum of appeal is determined by the nature of the questions which arise before the Court of first instance and which are raised in the memorandum of appeal. If a controversy relating to proprietary right exists at the time when the appeal was filed, subsequent abandonment of a plea by the respondent before the District Judge, which makes it unnecessary for the question of proprietary right being decided does not deprive the District Judge of jurisdiction to hear the appeal. It cannot be disputed that the appeal did originally lie to the District Judge. The appellant who was the respondent before him could not divest him of that jurisdiction by withdrawing his objection as regards the plaintiff's proprietary right in the land in dispute so as to make the commissioner's Court the proper forum of appeal from that stage. For these reasons I hold that the learned District Judge had jurisdiction to hear the appeal which had been rightly preferred to him,

In view of my findings on the two questions raised in appeal it must fail and is dismissed with costs.

W.S./R K. *Appeal dismissed.*

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(1) A. I. R. 1926 All. 34.

A. I. R. 1929 Allahabad 68

BANERJI AND BENNET, JJ.

Emperor—Appellant.

v.

Abdul Ghafur—Accused—Respondent.

Criminal Appeal No. 544 of 1924, Decided on 10th July 1928, from order of 1st Addl. Sess. Judge, Saharanpur, D/- 14th April 1924.

(a) Arms Act, Ss. 19 (f) and 29—Where unlicensed possession is clear, previous sanction is unnecessary.

Where the accused is clearly in possession of arms and ammunition without a license, no sanction is necessary for starting prosecution under S. 19 (f): *A. I. R.* 1926 *All.* 143, *Foll.* [P 69, C 1]

(b) Arms Act, S. 30—In U. P. Officer in charge of Police Station is empowered to conduct search—Officer taking action must be presumed to be empowered.

In the United Provinces, an officer in charge of a Police Station is empowered to conduct a search. An officer who takes action under a particular section must be deemed to have full powers until the contrary is proved. [P 69, C 1]

(c) Arms Act, S. 29—When unlicensed possession is clear accused cannot question legality of search.

Whether the search was legal or illegal, arms having been found in the possession of the accused, no question of the legality of the search or otherwise can be raised by him: *A. I. R.* 1925 *All.* 434, *Rel. on.* [P 69, C 2]

U. S. Bajpai—for the Crown.

S. N. Mukerji—for Respondent.

Judgment.—This is an appeal by the Local Government against an order of the Additional Sessions Judge of Saharanpur acquitting Abdul Ghafur of an offence punishable under S. 19 (f) of the Arms Act 11 of 1878.

The accused was a tailor working at Rurki. One Mohan Lal, a supply agent, informed the Cantonment Magistrate of Rurki on the 9th January 1924 that the accused had a gun and revolver without license. The Cantonment Magistrate sent the information to the Deputy Superintendent of Police who ordered the local police to take up the matter. The second officer of the Rurki police station, Sub-Inspector Chittar Mal recovered a revolver with 16 cartridges from the possession of the accused and rifle, which the accused admits belongs to him, from the Military Stores at Rurki. The accused denied the charge and said that the revolver and rifle were not recovered from him and that the case was got up against him by Mohan Lal. The Magistrate who tried the case and the learned Sessions Judge

found that the accused was in possession of the arms and ammunition without a license, but the learned Judge acquitted the accused on the ground that under S. 29 of the Arms Act no sanction had been obtained from the District Magistrate previous to the prosecution and that the Magistrate had failed to record the grounds of his belief when ordering the investigation as repuired by S. 25 of the Arms Act. The third illegality which the learned Judge held to have been committed was that there was nothing on the record to show that the Sub-Inspector who conducted the search was legally empowered to do so under the provisions of the Arms Act. We have come to the conclusion that there is no force in any of the points taken by the learned Sessions Judge. In the first place, we are of opinion that no sanction was necessary for starting the prosecution in this case. Our grounds for coming to this conclusion are the same as those,of Daniels, J., in the case of *Amir Ahmad* v. *Emperor* (1).

Even if sanction was necessary we are of opinion that sanction was duly obtained in this case and the fact that the witnesses were resummoned and the trial commenced de novo complied with the provisions of the law. The learned Judge is in error in thinking that because the case had once already been before the Court it was a continuity of the same proceedings.

Under S. 30 of the Arms Act a search is to be made in the presence of some officer specially appointed by name or in virtue of his office by the Local Government in this behalf, and in the United Provinces an officer in charge of a police station is empowered to conduct a search. We are of opinion that it was for the defence to make out that Sub-Inspector Chhitar Mal who was the second officer and had conducted the search was not in charge of the police station at the date of the search and not for the prosecution to prove that fact. We must presume that an officer who takes action under a particular section must be deemed to have full powers until the contrary is proved. Even if the Sub-Inspector Chhitar Mal was not in charge of the police station we think that in view of the provisions of S. 56, Criminal P. C. he could have been authorized by the officer in charge of the police station to lawfully conduct the search. We are therefore of opinion that not only the letter of the law but the spirit of the law have been fully obeyed in this case. Whether the search was legal or illegal, we are of opinion that arms having been founded in the possession of the accused, no question of the legality of the search or otherwise can be raised by him: See *Emperor* v. *Kutroo* (2).

We, therefore, set aside the acquittal of Abdul Ghafur and convict him under S. 19 (f) of the Arms Act. We cannot accept the statement of Mohan Lal that Abdul Ghafur had these arms and was threatening people to shoot at them. The evidence is that he used the gun for the purpose of sport. Under these circumstances we think the ends of justice will be met by inflicting a light sentence. He is 25 years of age and has already been in jail under a warrant of this Court for about a month. Under the circumstances we sentence him to one month's rigorous imprisonment. It is unnecessary to inflict a sentence of fine. We maintain the order of the learned Judge about the confiscation of the rifle, revolver and cartridges.

S.L./R.K. *Acquittal set aside.*

(1) A. I. R. 1926 All. 143.

(2) A. I. R. 1925 All. 434 = 47 All. 575.

A. I. R. 1929 Allahabad 69

DALAL AND KENDALL, JJ.

Emperor—Appellant.

v.

Angad—Accused—Respondent.

Criminal Appeal No. 663 of 1928, Decided on 3rd October 1928, from order of Sess. Judge, Aligarh, D/- 9th May 1928.

Arms Act, S. 19 (f)—In Aligarh District, for prosecution under S. 19 (f), District Magistrate's sanction is not necessary.

According to S. 29, sanction of the District Magistrate was necessary to prosecute a person under S. 19 (f) for possessing arms without a license in the District of Aligarh, only for three months after 15th March 1878 and not subsequently. *A. I. R.* 1926 *All.* 143 and *A. I. R.* 1929 *All.* 68, *Rel. on.* [P 69, C 2, P 70, C 1]

U. S. Bajpai—for the Crown.

L. M. Banerji—for Respondent.

Judgment.—The point raised in this appeal is concluded by authority. The learned Judge was of opinion that sanction of the District Magistrate was necessary to the prosecution of a person under S. 19 (f) of the Arms Act (11 of 1878) for possessing arms without a license in the District of Aligarh. His attention was

not called, it appears to the judgment of Daniels, J., in *Amir Ahmad* v. *Emperor* (1) which was subsequently followed by a Bench of two Judges in this Court in *Emperor* v. *Abdul Ghafur* (2). The learned Judge has missed the point that the District of Aligarh was a locality to which S. 32, Cl. (2), Act 31 of 1860, applied on the date in 1878 on which the Arms Act came into operation. Clause (2), S. 32, Act 31 of 1860 enacts as follows :

"In every such province, district or place in which an order for a general search for arms has been issued and is still in operation under Act 28 of 1857, it shall not be lawful for any person to have in his possession any percussion caps sulphur etc, without a license."

In the District of Aligarh, therefore, in accordance with the terms of S. 29 of the Arms Act, sanction of the District Magistrate was necessary only for three months after 15th March 1878, and not subsequently. It may be repeated here that the Government Gazette of the North-Western Provinces for the year 1858 contains a notification issued by the Governor-General No. 5336, dated the 21st December 1858 extending the provisions of Ss. 1, 2 and 5 of Act 28 of 1857 to the whole of the North-Western Provinces and at the same time authorizing a general search and seizure of arms in those parts of the Provinces which lie to the North of the rivers Jamna and Ganges. As pointed out by Daniels, J. this notification has not been repealed and reference to it has been repeated in para. 92 of the Arms rules and orders issued under the authority of the United Provinces Government in 1924.

On the merits the conviction must be upheld. We however think that the fine is unnecessarily heavy. We set aside the Sessions Judge's order of acquittal, convict Angad under S. 19 (f) of the Arms Act and impose a fine of Rs. 10 or in default 15 days rigorous imprisonment. If the fine is not paid within two weeks of to-day's date in the Court of trial, Angad shall surrender to undergo the sentence. If any excess fine has been recovered, it shall be refunded.

S.L./R.K. *Acquittal set aside.*

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(1) A. I. R. 1926 All. 143.
(2) A. I. R. 1929 All. 68.

A. I. R. 1929 Allahabad 70

MUKERJI AND KING, JJ.

Swadeshi Cotton Mills Co., Ltd., Cawnpore, In the matter of.

Misc. Ref. No. 231 of 1928, Decided on 2nd July 1928.

Income-tax Act (11 of 1922), S. 10 (2) (7) —S. 10 (2) (7) is applicable to sale of obsolete machine after it broke down.

A machine was declared to be obsolete. It was discarded because it was obsolete and also because it broke down past repairs. The machine was then sold.

Held : that the machine was sold in consequence of its having become obsolete within the meaning of S. 10 (2) 7. [P 70 C 2]

Kailas Nath Katju—for Assessee.

Uma Shankar Bajpai—for the Crown.

Mukerji, J.—This is a case stated by the Commissioner of Income-tax at the instance of the Swadeshi Cotton Mills Company, Limited, Cawnpore. The question submitted for our answer runs as follows :

Was the engine in question sold or discarded in consequence of its having become obsolete within the meaning of S. 10 (2) (vii), Income-tax Act, 1922?

The facts are given in the order of the learned Assistant Commissioner dated 16th January 1928 and are as follows :

The Swadeshi Cotton Mills Company Limited had a steam driven engine. So far back as in 1923 it was decided that it should be replaced (at such date as might be found convenient) on the ground that it had become obsolete. The machine was, however, not actually replaced although an electricity driven engine was provided. In September 1926 the engine actually broke down, and the question arose whether it should be repaired or not. Within a few days the company decided that it should not be repaired but should be sold. It was actually sold for 1,200 and odd. The question is whether the machinery was discarded becuse it was obsolete within the meaning of Cl. (vii), sub-S. (2), S. 10, Income-tax Act.

As already stated, the machine had been declared to be obsolete. It was discarded because two things happened. It was obsolete and it also broke down and it broke down past repairs. In the circumstances we are of opinion that the engine was sold in consequence of its having become obsolete within the meaning of S. 10 (2) (vii), Income-tax Act, 1922. The costs of this reference will be paid by the Government.

M.N./R.K. *Reference answered.*

A. I. R. 1929 Allahabad 71

SULAIMAN AND KENDALL, JJ.

Amarjit Upadhiya—Defendant — Appellant.

v.

Algu Chaube—Plaintiff — Respondent.

First Appeal No. 107 of 1925, Decided on 15th November 1928, from decree of Sub-Judge, Azamgarh, D/- 28th January 1925.

Hindu Law — Stridhan — Daughter's daughter is preferred to daughter's son.

Under the Mitakshara law the daughter's daughter is entitled to succeed in preference to the daughter's son. 28 *Mad.* 1 (*F.B.*), *Foll.* 25 *All.* 468 (*P.C.*), *Dist.* [P.71 C 2]

A. Sanyal—for Appellant.

Iqbal Ahmad and *N. Upadhiya*—for Respondent.

Judgment.—This is a defendant's appeal arising out of a suit for recovery of possession. The plaintiff alleged that the property in dispute was the stridhan property of his maternal grandmother Mt. Mahadei alias Gomta and that on her death he became the sole heir to it. The defendant denied that the property was the stridhan property of Mt. Gomta and also denied that the plaintiff was competent to bring the claim. There was, however, no specific assertion in the written statement that the plaintiff had sisters who would succeed to the stridhan estate, if it were one, in preference to him. But at the trial the defendant was allowed to lead oral evidence to the effect that the plaintiff had two sisters who were alive. No protest was made on behalf of the plaintiff to the production of such evidence, and there was no cross-examination of the three witnesses who deposed to that effect on the point. The learned Subordinate Judge has decreed the claim without considering this part of the defendant's oral evidence.

In appeal the point was raised before us that the plaintiff in the presence of his sisters had no locus standi to sue. We accepted the findings of the Court below that the plaintiff was the daughter's son of Mt. Gomta and that the property in dispute was her stridhan property. We called upon the plaintiff to produce an affidavit in this Court stating whether or not he had any sister alive. No such affidavit was produced. We therefore felt that the matter should be further inquired into. We accordingly sent down three issues to the Court below for findings, and gave the parties liberty to adduce fresh evidence. The findings returned are that the plaintiff has got sisters alive and that there is no evidence to show that their rights have in any way passed on to the present plaintiff. There is also a finding that the plaintiff's mother Mt. Reshma Kuar had predeceased the plaintiff's grandmother Mt. Gomta.

Objections have been filed on behalf of the plaintiff to the finding that he has sisters. The defendant in addition to his own deposition produced two fresh witnesses apart from the three witnesses who had been examined before, all of whom stated that the plaintiff has two sisters, viz.: Mt. Surta and Mt. Sheokalia who are alive and are married. The plaintiff's reply supported by one witness was that these ladies were his first cousins. Neither party thought fit to produce either of the two ladies. The learned Subordinate Judge who heard the whole evidence has come to the conclusion that the plaintiff's denial was false and that the defendant's evidence is true. We see no reason to take a contrary view. We must therefore accept the finding that the plaintiff has got sisters alive. It is not disputed before us that the plaintiff's mother Mt. Reshma Kuar had predeceased her own mother. It follows that on the date when Mt. Gomta died she left property which had been her stridhan property. Chap. 2, S. 11, para. 15, and 18 of the Mitakshara make it quite clear that to a stridhan estate daughters' daughters have preference over daughter's sons.

The learned advocate for the respondent has relied on the case of *Sheo Shankar Lal* v. *Debi Sahai* (1). In that case daughters' sons were given preference over a daughter's daughter. That case, however, is clearly distinguishable. On the death of the female whose stridhan was in dispute, her daughter had first succeeded and it was a dispute between the grandsons and the grand daughters of the stridhan owner after the death of the daughter. Their Lordships of the Privy Council held that property which a woman has taken by inheritance from a female is not her stridhan and that stridhan when once it has descended to a female ceases to be stridhan. The sons got the property because it had ceased to be stridhan in

(1) [1903] 25 All. 468=30 I. A. 202=8 Sar. 465 (P.C.).

the hands of their mother. In the case before us the property never descended from one female to another, and therefore did not cease to be stridhan. It must accordingly go to the stridhan heirs of Mt. Gomta. Those heirs are her daughters' daughters in preference to her daughter's son. This view has been accepted in Madras in *Subramanian Chetti* v. *Arunachelum Chetti* (2) and the ground on which the Privy Council decision has been distinguished by the Madras High Court has been accepted by this Court in several cases. In the presence of his sisters who are entitled to succeed to this property the plaintiff has no locus standi to sue. His sisters may sue hereafter. We accordingly allow this appeal and setting aside the decree of the Court below dismiss the plaintiff's suit. In view of the fact that the point was not specially raised in the Court below at the first stage, we direct that the parties should bear their own costs of both Courts.

M.N /R.K. *Appeal allowed.*

(2) [1905] 28 Mad. 1 (F.B.).

A. I. R. 1929 Allahabad 72

SULAIMAN AND KENDALL, JJ.

Chakhan Lal and *others*—Defendants—Appellants.

v.

Kanhaiya Lal and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 195 of 1925, Decided on 5th November 1928, from a decree of Sub-Judge, Agra, D/-22nd December 1924.

(a) Contract Act, S. 127—Money partly paid and partly promised to be advanced to principal debtor is sufficient consideration for surety—Advances need not benefit the surety.

A person stood surety for his brother for the payment of a sum, part of which was due on previous debts of the brother, part was due on hundis jointly executed by both, part was paid at the time the person agreed to stand as surety and part was to be paid later on by the creditor who did not pay the same. It was agreed that the surety would be released on payment of a certain sum.

Held : that there was sufficient consideration for the undertaking of suretyship for the whole sum to render it valid even though the surety may not have benefited from any of the advances made. [P 73 C 2, P 74 C 1]

(b) Hindu law—Debts—Son's liability—Surety accepted by father for debts promised to be advanced—Sons are liable for principal and interest.

An undertaking of suretyship for the payment of an amount due to the principal debtor is binding on the sons of the surety both for the principal amount and interest thereon, even if the liability as a surety is accepted by the father in respect of a debt which though not already due but which is promised to be advanced subsequently : 26 *All.* 611 and 39 *Cal.* 843, *Foll.* [P 74 C 2]

(c) Hindu law—Alienation—Father cannot charge joint property as surety.

No father of a Hindu family can, as a surety charge the family property so as to effect a valid alienation as he can only do so for purposes of necessity or for an antecedent debt : *A. I. R.* 1924 *P. C.* 50, *Rel. on.* [P 75 C 1]

Sankar Saran, *Gopinath Kunzru* and *H. P. Agarwal*—for Appellants.

G. Agarwala and *N. P. Asthana*—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit on the basis of a mortgage deed dated 25th July 1918. This appeal was originally connected with first appeal No. 187 of 1925 which has already been disposed of. It is on the paper book of this latter appeal that all the relevant documents are to be found. Chakhan Lal was a contractor carrying on business at Agra and in the course of his business he borrowed money on hundis from the present plaintiffs. On 2nd October 1917 he executed a mortgage deed as security for the payment of the amounts due from him on the hundis previously executed. The total amount due on the hundis aggregated to Rs. 10,000. It was mentioned in the deed that the old hundis would be renewed from time to time. Subsequent to this deed certain hundis were executed jointly by Chakhan Lal and his brother Balak Ram, the principal amount advanced on such hundis being Rs. 2,800. After this on 25th July 1918, a fresh mortgage deed was executed jointly by Chakhan Lal and Balak Ram, acting for themselves and as guardians of their minor sons. The consideration for this deed was the sum of Rs. 10,000 due on the previous deed of 12th October 1917 executed by Chakhan Lal, Rs. 2,800 due on the hundis executed jointly by the two brothers totalling Rs. 12,800 and a further sum of Rs. 7,200 out of which part was paid at the time and Rs. 5,400 were actually left in the hands of the creditor for subsequent payment.

As there has been some controversy as to the correct interpretation of this document it is necessary for us to recite its

terms briefly. In the opening portion of the document there is a recital that although the previous deed of October 1917, was executed by Chakhan Lal alone yet Balak Ram also was liable by means of the hundis in lieu of which it was executed. The two brothers then declare that they have borrowed Rs. 20,000 and shall pay the said sum to the creditor within three years and promised that they shall continue to pay interest on the said sum after every two months without fail and further declare that for the satisfaction of the aforesaid creditor they, the executants, pledge and hypothecate in lieu of that debt the property specified in the document. Reading these clauses together there can be no doubt that initially there was a joint liability undertaken by both the brothers for the payment of the entire amount of the mortgage-debt. There is, however, a clause towards the end of the document which declares that Balak Ram had joined in the execution of the document and mortgaged his share of the property simply as surety ; that the creditor should realize his money first from Chakhan Lal's share of the property, but if he failed to realize it from the said share he should realize it from the share of Balak Ram. There was a further provision that if Balak Ram would pay Rs. 10,000 together with interest his share of the property would be considered to be released. These provisions undoubtedly indicate that the liability of Balak Ram at least for the bulk of the consideration was not that of a principal but of a surety only.

The Court below has decreed the claim in full except as regards the costs of a previous suit which had been claimed by the plaintiffs. Several points are urged on behalf of the defendants in this appeal. Taking up the case of Chakhan Lal, it is contended that the consideration for the mortgage deed in suit has not been established. Stress is laid on the fact that the plaintiffs have not produced their regularly kept account books. We are, however, of opinion that this contention cannot prevail. The original hundis in lieu of which the bond was executed have been produced from the custody of the plaintiffs and they are admittedly signed by Chakhan Lal. Being negotiable instruments there is a presumption of the passing of consideration. The fact that they are still in the possession of the plaintiffs also suggests that they were not paid till the mortgage deed was executed. Lastly there is the acknowledgment by Chakhan Lal himself in the deed that the amounts due on those hundis are outstanding. Chakhan Lal has not gone into the witness box to rebut all this evidence and we find it impossible to hold that the mortgage deed was without consideration. The plaintiffs admitted, however, that Rs. 5,400 which had been left in their hands for subsequent payment were not paid. There is no point in the suggestion that Rs. 600 which were paid before the Sub-Registrar should be deducted. Even if the amount was required for the expenses of the execution and registration of the document and remuneration for legal advice, the mortgagors undertook to pay it. The payment of the sum of Rs. 1,200 evidenced by the promissory note is also fully established. There is no force therefore in the appeal preferred on behalf of Chakhan Lal.

As regards Chakhan Lal's sons also we are of opinion that their appeal must fail. The amounts due on the previous hundis and pronote were undoubtedly antecedent debts, the payment of which was binding on the joint family property. There is no suggestion that these debts were in any way illegal or immoral. A valid charge was therefore created on the family property of Chakhan Lal and the Court below was right in passing a decree for sale not only as against Chakhan Lal but as against his sons.

As regards Balak Ram, it was first contended that there was no consideration for his undertaking to be a surety. This contention in our opinion cannot be accepted. In the first place there was the outstanding liability of Chakhan Lal himself which was re-acknowledged by him and a fresh bond was going to be executed by him in lieu of his previous hundis. If as the deed recites the creditor was not willing to give further credit to Chakhan Lal and Balak Ram stood surety for that purpose there would be good consideration for his undertaking. In the second place the previous hundis for Rs. 2,800 had been executed jointly by the two brothers and they would form some consideration for the deed. Lastly there was a promise to pay a further sum by the creditor and that promise also would be good consideration. Even if therefore Balak Ram did not personally

benefit from any of the advances made, it cannot be said that his undertaking was without consideration and therefore void as against him.

It was next contended that according to a correct interpretation of the mortgage-deed Balak Ram was not jointly liable for the whole amount but that he undertook the liability only for the sum that might be subsequently paid by the plaintiffs. We have already set forth the principal provisions of the bond and have indicated that in our opinion this interpretation of the bond is not correct. There was a joint liability undertaken by both the executants who made themselves jointly liable for the payment of the whole debt. No doubt the deed made it clear that the position of Balak Ram was that of a surety and that he would be liable if the property of Chakhan Lal was proved to be insufficient to pay the amount. There was a further provision that if Balak Ram paid Rs. 10,000 with interest he would be released from all further liability. We are therefore of opinion that so far as Balak Ram is concerned he cannot successfully urge that he is not bound by the deed.

The last point to consider is the liability of the sons of Balak Ram. The learned advocate for these sons has strongly contended that there was no legal necessity for Balak Ram to charge the family property and that if there was no actual debt due from him he was not entitled to hypothecate joint family property and accordingly there is neither a debt due from Balak Ram and his sons nor is there any valid charge created on the family property. That it is open to a father to undertake liability as a surety for the payment of a debt due by another person cannot be disputed. The contention, however, is that there is no such liability in respect of a debt which is not already due but which is promised to be advanced subsequently. In the Mitakshara there is a separate section in Chap. 6 devoted to the obligations of sureties. Suretyship is described as being of three classes, viz., for appearance, for confidence and for payment. It is expressly provided that on failure of a suretyship for payment the sons have to pay the amount. The commentary on the original text of Yajnavalkya is clearer still for it expressly lays down that where a person promises to pay the amount in case the principal debtor does not pay the sons are liable to pay it. The contention that the text and the commentary refer only to a case where the amount has been previously paid and exists as a debt was repelled by this High Court in the case of the *Maharaja of Benares* v. *Ram Kumar Misser* (1) That case was followed by the Calcutta High Court in the case of *Rasik Lal Mandal* v. *Singheswar Roy* (2). The same view has been accepted in Madras. There can therefore be no doubt that the undertaking given by Balak Ram to pay the debt due to the plaintiffs in case Chakhan Lal failed to pay the amount was a liability which was binding not only on Balak Ram but also on his sons.

A subsidiary question as to whether the liability is as regards the principal only or also interest due on the amount has also been raised. We are, however, of opinion that the undertaking given by the surety was for the whole amount due, viz; for the principal and interest and the sons are liable to pay the whole amount. Had the liability been confined to a fixed sum the sons could not have been liable to pay interest on that principal sum.

The last question to consider is whether a valid charge has been created by Balak Ram on his joint family property. So far as the sum of Rs. 2,800 evidenced by the hundis executed jointly by Balak Ram and Chakhan Lal is concerned, we are of opinion that they are in the nature of antecedent debts in lieu of which Balak Ram was entitled to alienate the property. Even if it be assumed that the liability of Balak Ram for this amount was that of a mere surety there is no doubt that the Mitakshara treats such an obligation as a "debt" incurred by the surety on account of his having become a surety. We may quote in this connexion note No. 10 in S. 4.

"Likewise the sons shall pay an amount equal to his father's debt incurred by his becoming surety, without any interest."

The previous hundis executed by Balak Ram created an obligation in the nature of a debt and the sons are bound by his alienation in order to secure it. As regards the balance of the amount viz., the previous sum of Rs. 10,000 and a further sum of Rs. 1,800 the liability of the

(1) [1904] 26 All. 611=1 A. L. J. 330.
(2) [1912] 39 Cal. 843=16 C. L. J. 107=14 I. C. 147=16 C. W. N. 1103.

father as surety did not entitle him to alienate the family property.

Their Lordships of the Privy Council in the famous case of *Brij Narain Rai* v. *Mangla Prasad* (3) have summed up the various propositions as a result of the authorities considered. They must be taken to have laid down exhaustively the law relating to the power of the manager of joint Hindu family as regards the alienation of the family property. No manager can alienate or burden the joint estate except for purposes of necessity or for an antecedent debt. It follows therefore that even as a surety he cannot charge the family property so as to effect a valid alienation. We must therefore hold that no valid charge on the family property of Balak Ram was created for this balance. But his liability as surety stands and that liability the sons cannot repudiate.

We accordingly dismiss the appeals preferred by Chakhan Lal and his sons and also the appeal of Balak Ram. But we allow the appeal of the sons of Balak Ram in part and direct that a mortgage decree for the payment of the whole sum due should be passed against Chakhan Lal and his sons, the amount to be realized by sale of the property mortgaged by them, with a further liability under O. 34, R. 6, if necessary. We further declare that the shares of Balak Ram and his sons are also liable for the payment of Rs. 2,800 together with interest in case the whole amount has not been satisfied by sale of the property belonging to Chakhan Lal and his sons. As regards the balance of the amount we declare that the liability of Balak Ram and his sons would arise only if the property mortgaged by Chakhan Lal and his sons is proved to be insufficient to pay the amount of the mortgage debt. In case of such deficiency the claim would be decreed against Baiak Ram personally, and against Balak Ram's sons to the extent of joint family property in their hands, the creditor having the remedy to realize the amount by attachment and sale of any joint family property in the hands of Balak Ram and his sons as well as any other property that may belong to Balak Ram personally. We further declare that if Balak Ram and his sons pay in all Rs. 10,000 with interest they would be released from all further liability. As the appeal fails substantially we direct that the appellants will bear their own costs and pay the costs of the respondents.

M.N./R.K. *Appeal partly allowed.*

(3) A. I. R. 1924 P. C. 50=46 All. 95=51 I.A. 129 (P.C.).

A. I. R. 1929 Allahabad 75

SULAIMAN, Ag. C. J.

Brijbhukhan and *others*—Plaintiffs—Appellants.

v.

Tota Ram and *others* — Defendants—Respondents.

Application in Second Appeal of 1928, Decided on 13th June 1928.

Appeal — Memorandum insufficiently stamped — High Court can reject it—Civil P. C.. O. 41, R. 2 — Court-fees Act, S. 4 [But see A. I. R. 1923 All. 349 (1).]

High Court has full power to refuse to accept a memorandum of appeal when it has the endorsement of the Stamp Reporter, that the amount of the Court-fees paid is insufficient, otherwise the provisions of S. 4, Court-fees Act, would be evaded indirectly : 38 *Bom.* 41, *Diss. from.*; 1 *Lah.* 234; 3 *Pat. L. J.* 74 ; 27 *M. L. J.* 677, *Rel on.* ; *A. I. R.* 1923 *All.* 349, *Ref.* [P 76 C 1]

S. W. Chaubey—for Appellants.

Judgment.—It seems to be the practice of some junior vakils to file appeals with insufficient Conrt-fee stamps, knowing that they are insufficient, with a view to save limitation. I think that such deliberate attempts to get round the provisions of the Court-fees Act should not be tolerated. If a litigant has not got sufficient money ready to pay the whole Court-fees, the appeal ought to be filed when such Court-fees have been made good, accompanied with an application for extension of time. But the filing of an insufficiently stamped appeal, knowing it to be defective, should not be permitted.

No doubt the Bombay High Court has held that an appellate Court is bound to accept an insufficiently stamped memorandum of appeal and to grant time to make it good. *Achut Ramchandra Pai* v. *Nagappa Bab* (1). But this view has not been followed at Patna, *Ram Sahay Ram Pande* v. *Lachmi Narayan Singh* (2), nor by the Lahore High Court, *Lekh*

(1) [1913] 38 Bom. 41=21 I. C. 337=15 Bom. L R. 902.

(2) [1917] 3 Pat. L. J. 74=42 I.C. 675=5 Pat. L. W. 18.

Ram v. *Ramji Das* (3). The Madras High Court has also dissented from the Bombay view — *A. Narayana Rao* v. *A. Seshamma* (4).

Section 149, Civil P. C., no doubt gives a Court power to allow deficiency to be made good in its discretion. The concession cannot be claimed as of right. But S. 4, Court-fees Act, expressly provides that no document shall be

"filed, exhibited, or recorded in, or shall be received, or furnished by any of the said High Courts in the exercise of its original, appellate or revisional jurisdiction, unless in respect of such document there be paid a fee of an amount indicated in the schedules as the proper fee."

I am clearly of opinion that we have full power to refuse to accept a memorandum of appeal when it has the endorsement of the Stamp Reporter that the amount of the Court-fees paid is insufficient, otherwise the provisions of S. 4, Court-fees Act, would be evaded indirectly. That there is such a discretion is clear from the case of our own High Court— *Jai Singh Gir* v. *Sita Ram Singh* (5). Ch. 3, R. 10 of our rules also contemplates a case where an insufficiently stamped document nas been filed or used in the Court or office "through a mistake or inadvertence."

I accordingly refuse to accept these insufficiently stamed appeals and direct them to be returned to the counsel, with liberty to file them afresh on payment of full Court-fees, accompanied by an application for extension of time under S. 5, Lim. Act, provided good cause is shown for the extension.

A.L./R.K. *Appeals returned.*

(3) [1919] 1 Lah. 234=57 I. C. 215.
(4) [1914] 27 M. L. J. 677=26 I. C. 33.
(5) A. I. R. 1923 All. 349.

A. I. R. 1929 Allahabad 76

MUKERJI, J.

Chhotkan Kurmi—Defendant — Appellant.

v.

Ram Deo Sahu and *another*—Plaintiffs—Respondents.

Second Appeal No. 1639 of 1926, Decided on 26th November 1928, from decree of Sub-Judge, Basti, D/- 12th July 1926.

(a) Agra Tenancy Act (1901), S. 4 (12) (d)—No right under 4 (12) (d) exists in respect of abadi.

The right to improve land as given by S. 4 (12) (d) does not exist in respect of the land situated in the abadi as such land is not land within the meaning of S. 4 (2). [P 76 C 1]

(b) Landlord and Tenant—Abadi—Tenant occupying land in abadi is mere licensee—License to use open land is different from license to build—Tenant allowed to use land for tying cattle cannot use it for building purposes.

A tenant occupying land in the abadi is in the position of a mere licensee unless he can show that he held under any particular lease. There is a material difference between a license to merely use a piece of vacant land and a license to build on the same. A tenant having a license to use a particular piece of land for tying cattle etc. cannot be allowed to have a building thereon : 29 *I. C.* 264, *Dist.*; *A. I. R.* 1926 *All.* 66, *Foll.* [P 77 C 1]

A. P. Bagchi and *Ram Anugrah Narain Sinha*—for Appellant.

A. P. Pandey for *Harnandan Prasad* —for Respondents.

Judgment.—The respondents instituted the suit out of which this appeal has arisen against the appellant on the ground that they have erected a building on a piece of vacant land within the zamindari of the plaintiffs and without their permission. The prayer was that the plaintiffs should be restored to possession after demolition of the constructions. The defence, as usual in these cases, was that the construction was very old and the plaintiffs were estopped from maintaining the suit, evidently on the ground that the building was old. There is also a plea that the land was appurtenant to the holding. Both the Courts have decreed the suit. They have, however, found that the land, being in front of the defendant's house, was used by him for agricutural pnrposes, e. g , tying of cattle and so forth. In this Court it has been contended that the land being a a part of the holding the defendant was entitled to improve it by erecting buildings, as provided by Cl. (12), sub-Cl. (d), S. 4, N. W. P. Ten. Act of 1901, S. 4, Cl. (12), sub-Cl. (d) has no application whatsoever, for the simple reason that this land is situated in the abadi and is not "land" within the meaning of S. 4 (2) of the Act.

Then it has been contended that in view of a ruling of a single Judge of this Court, namely *Padarath Tewari* v. *Baz Singh* (1) the suit should have been dismissed it being held that the defendant was entitled to erect a building. The Courts below have relied on the case of

(1) [1915] 29 I. C. 264.

Bhagwan Rai v. *Jaddu Raj Rai* (2). In the earlier case of *Padarath Tewari* (1), the findings were that the land had been occupied by the tenant by having, on it, cattle troughs, sugar pressing mill and a shed for sugarcane juice and keeping cattle. On these findings it was held that the tenant could rebuild the shed which they had there. It was not at all a case in which a land which was entirely vacant was built upon by the tenant who had previously no building thereon. The correct law seems to be what has been laid down in the case of *Bhagwan Rai* v. *Jaddu Raj Rai* (2). A tenant occupying land in the abadi is in the position of a mere licensee unless he can show that he held under any particular lease. A license to use a particular piece of land in a particular way cannot be utilised to use the land in a different way. A license to erect a permanent building cannot be revoked. If there had been a license given to that tenant to erect a permanent building on the land, the plaintiffs would not be in a position to ask for possession over the land. It does, therefore, make a material difference between a license to merely use a piece of vacant land and a license to build on the same.

On the findings of the Courts below, the building cannot be maintained. It is, however, clear that the land should be restored to the defendant's possession so that he might use the same in the way in which he was using it before he decided to erect a building on the same. The judgments of the Courts below, as also the decree of the Court of first instance, do not show that possession was decreed to the plaintiffs. The point, however, is not very clearly brought out either in the judgments or in the decree. To remove the doubt, I direct that the following be inserted in the decree namely:

"on the demolition of the buildings the defendant would hold the land, to be used as a vacant piece of land by him for agricultural purposes.

The appeal substantially fails and is hereby dismissed, except as indicated above, with costs.

M.N./R.K. *Appeal dismissed.*

(2) A. I. R. 1926 All. 66.

A. I. R. 1929 Allahabad 77

NIAMATULLAH, J.

Bengali Lal—Defendant—Appellant.

v.

Bohre Panna Lal—Plaintiff—Respondent.

Second Appeal No. 1472 of 1926, Decided on 8th November 1928, from decree of Sub-Judge, Mainpuri, D/- 4-8-1926.

(a) Limitation Act, S. 1—Defence.

There can be no limitation against a plea in defence. [P 78 C 1]

(b) Transfer of Property Act, Ss. 60 and 58 — Usufructuary mortgage — Rs. 150 advanced on the deed—Mortgagee entitled to possession in lieu of Rs. 100 — Remaining Rs. 50 to bear interest at Rs. 2 per cent. per month—Undertaking to pay entire mortgage money—Mortgagor suing for redemption on payment of Rs. 100 only — Mortgagor is liable to pay also Rs. 50 and interest — No express provision is necessary.

A sum of Rs. 150 was advanced on a mortgage-deed. The mortgagee was entitled to possession of the mortgaged property in lieu of Rs. 100 and was further entitled to interest on the remaining Rs. 50 at the rate of Rs. 2. Mortgagor undertook to pay entire mortgage money in two years and to obtain redemption and in case of default of payment of Rs. 50 together with interest at the stipulated rate the mortgagee was entitled to foreclose. The mortgagor sued for redemption on payment of Rs. 100 only:

Held: an express provision to the effect that redemption could not take place without payment of Rs. 50 and interest was not necessary. As the payment of Rs. 50 and the interest thereon formed part of the mortgage transaction the amount is mortgage money within the meaning of S. 60 and must be paid on redemption. [P 78 C 1, 2]

N. P. Asthana and *Baleshwari Prosad*—for Appellant.

G. Aggarwalla—for Respondent.

Judgment.—The plaintiff-respondent brought the suit out of which this second appeal has arisen for redemption of a shop mortgaged by him under a deed dated 6th August 1881 on payment of Rs. 100 only. The defendant-mortgagee claimed Rs. 666 incurred by him in repairing the mortgaged property. This latter sum may be left out of account as both the lower Courts found against the mortgagee and held that he has failed to establish his allegation. As regards the amount of mortgage money, to which the defendant-mortgagee is entitled on redemption, the stipulation contained in the mortgage-deed is that the mortgagee having advanced Rs. 150 was entitled to possession of the mortgaged property in lieu of

Rs. 100 (*baewaz mublig sau rupya . . . . . dakhal de diya*) and was further entitled to interest on the remaining Rs. 50 at the rate of Rs. 2 per cent. per mensem. The mortgagor undertook to pay the entire mortgage money (mubligan mazkur) in two years and to obtain redemption and in case of default of payment of Rs. 150 together with interest at the stipulated rate the mortgagee would be entitled to foreclose. The lower appellate Court has held that the mortgagor is entitled to redeem on payment of only Rs. 100 in the absence of a stipulation in the deed making obligatory on him to pay the remaining Rs. 50 with interest. He is of opinion that the mortgagee's right to recover Rs. 50 with interest by foreclosure is now barred by limitation. I am unable to agree with him on either of the two points. The second one may be shortly disposed of. There can be no limitation against a plea in defence. If, therefore, the mortgagee-defendant is otherwise entitled to insist on payment of the Rs. 50 in question and its interest, the law of limitation cannot affect his claim. On the question of the interpretation of the deed I entertain no doubt as to what the intention of the parties was. The usufruct of the mortgaged property was considered just enough for the interest on Rs. 100, and it was, therefore, agreed that that sum would carry no interest beyond the usufruct of the property. The remaining sum of Rs. 50 is agreed to carry interest as already stated. The property was hypothecated for the entire mortgage money whatever its amount may be. The mortgagor undertook to pay the whole amount in two years and to redeem the property, and if he failed to do so, the mortgagee could foreclose for satisfaction of every part of the mortgage money.

It is not necessary, for the defendant to enforce payment of the entire mortgage money before redemption, that there should be an express provision in the deed to the effect that redemption cannot take place without payment of Rs. 50 and interest. S. 60, T. P. Act entitles a mortgagor to redeem only

"on payment, or tender at a proper time and place, of the mortgage money".

Section 58 of the same Act defines mortgage money as

'the principal money and interest, of which payment is secured for the time being."

Therefore, if, as part of the mortgage transaction payment of Rs. 50 and interest thereon is secured on the mortgaged property, it is mortgage money within the meaning of S. 60 and must be paid on redemption. On construction of the deed I hold that it is secured on the mortgaged property which can be foreclosed in satisfaction thereof. In this view of the case, I am of opinion that the Court of first instance took a correct view of the matter and rightly directed payment of the entire sum due under the mortgage-deed.

I, therefore, allow the appeal, discharge the decree passed by the lower appellate Court and restore that of the Court of first instance. The plaintiff-respondent shall pay the costs of the defendant-appellant in all the Courts.

S.L./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 78

BENNET, J.

Ram Kishore Singh and *others*—Plaintiffs—Appellants.

v.

Raghubir and *others*—Defendants—Respondents.

Second Appeal No. 810 of 1926, Decided on 30th July 1928, from decree of Dist. Judge, Allahadad, D/- 27th January 1926.

U. P. Tenancy Act (2 of 1901), S. 13 (b) —Tenant ejected and re-admitted—Tenancy is continuous only for S. 11—When ejected tenant is re-admitted, agreement changing rent need not be registered—Agra Ten. Act, S. 47.

When a tenant is ejected under S. 58 (A) or (B), the break before his re-admission is to be condoned only for purposes of S. 11. It is nowhere provided in the Act that when a tenant is re-admitted by his landholder after ejectment, the rate of rent is to be the same; the rent can be changed by an agreement, which need not be registered. [P 79 C 1, 2]

Haribans Sahai—for Appellants.

Shiva Prasad Sinha—for Respondents.

Judgment.—This is an appeal by the plaintiffs against a decree of the lower appellate Court to the effect that the rent due to the plaintiffs from the defendants is at the rate of Rs. 34-10-4 per annum and not at Rs. 54 as found by the Assistant Collector. The facts which are proved are as follows :

In Fasli 1318 the plaintiffs obtained a decree of ejectment against Angnu, father

of Rahgubir, respondent 1. The lower appellate Court has found that after this ejectment the plaintiffs came to terms with Raghubir and treated him as a tenant. The entry in the khatauni for the rent of the holding was changed after the ejectment from Rs. 34-10-4 to Rs 54 per annum. It is also found that for the year Fasli 1319 the defendant paid rent at this rate and a receipt, paper No. 31-A, of the file 10081-47 of 1923, was produced. The Court of first instance found that the plaintiff and Raghubir had agreed that rent should be fixed at Rs. 54 per annum after ejectment. The lower appellate Court considered that a registered agreement was necessary to change the rate of rent.

"A person against whom a decree for ejectment is obtained but who continues nevertheless with the zemindar's permission to cultivate the land as a tenant cannot be considered to have originated a new tenancy as from the date of the ejectment decree or even as from the date of formal giving over of possession and hence the enhancement of the rent of such a person has to be by a registered agreement. Mere payment in one harvest of rent demanded at an illegal rate does not legalize such rent."

The learned District Judge has not referred to any section of Act 2 of 1901 for the propositions which he lays down.

Apparently, however, he means to refer to "continuous holding" in S. 13 (b). This provides that if a tenant is ejected under sub-S. A or B, S. 58 of that Act and within a year from the date of such ejectment he has been re-admitted by his landholder to the tenancy of the land from which he has been so ejected, he shall be deemed for the purpose of S. 11 to have held continuously. S. 11 deals solely with the acquiring of occupancy rights by holding the same land continuously for a period of 12 years. It is nowhere provided in the Act that when a tenant is re-admitted by his landholder after ejectment, the rate of rent is to be the same. If this had been the intention of the Act it would have been natural for the legislature to state so plainly in the Act. No ruling of this Court was produced on the subject.

For the appellants reliance was placed on *Sobha Ram* v. *Chandra Kunwar* (1). In that case, there was a similar ejectment and re-admission to a holding. It was held by the Board:

"The tenancy of appellants no doubt terminated with the ejectment, and apart from S. 13 there was a break between the former and the latter tenancies. S. 13 provides that the tenancy shall be deemed to be continuous. but it does so "for purposes of S. 11" only, For calculation of the period of 12 years there was a continuous tenancy. For all other purposes there was a terminated tenancy and a fresh tenancy. I do not think that the fixing of the rent for the new tenancy can be considered to be an enhancement of a previously existing rent.

It was argued that this decision of the Board of Revenue was not binding on this Court. But I consider that there are general considerations of law on account of which I should follow this decision of the Board of Revenue. These considerations are briefly as follows :

In general it is open to a landlord and an ejected tenant to make whatever new agreement in regard to a tenancy they please. This is natural under ordinary freedom of contract. The only legal restriction placed in the way of such a contract by the parties in this appeal is the restriction contained in S. 13, Act 2 of 1901. That restriction merely lays down that for the purpose of S. 11, the holding shall be deemed to be continuous. There is no resrriction whatever in S. 13 or any other part of the Act as to the rate of rent which may be agreed upon between the parties to this contract. For those reasons I consider that the agreement was not in any way fettered by law. The finding of the two Courts below is that there was an agreement, and the finding of the Court of first instance that that agreement was at Rs. 54 per annum has not been set aside by the lower appellate Court. That finding was based on the new entry in the revenue papers and the actual payment at the enhanced rate for Fasli 1319. I consider that in the present case there was no need for a registered agreement under S. 47, Act 2 of 1901. Accordingly I allow this appeal with costs in this Court and the lower appellate Court and I restore the decree of the Court of first instance.

S.L./R.K. *Appeal allowed.*

(1) Sel. Dec. No. 2 of 1907.

A. I. R. 1929 Allahabad 79

SULAIMAN, Ag. C. J.

Ganga Dihal Rai — Decree-holder — Appellant.

v.

Ram Oudh and *others* — Judgment-debtors—Respondents

Execution First Appeal No. 194 of 1928, Decided on 23rd November 1928.

(a) Civil P., O. 21, Rr. 2 and 58 — Applications under these may be combined.

An application by the judgment-debtor praying for an adjustment to be recorded need not be a document 'separate' from the objections filed by him on the ground of such adjustment : *A. I. R.* 1924 *All.* 706, *Held Overruled by A. I. R.* 1928 *All.* 629 (*F.B.*).

[P 80 C 2]

(b) Evidence Act, S. 92 — Proof of subsequent adjustment of decree is not inadmissible.

Oral evidence to prove a subsequent adjustment under which part of a decree was paid and the rest agreed not to be executed against the judgment-debtors is not inadmissible by reason of S. 92 : *A. I. R.* 1922 *All.* 13, *Dist., Walsh, J., in A. I R* 1922 *All.* 13, *Diss from.*

[P 80 C 2]

(c) Civil P. C., O. 21. R. 2 —Decree-holder disputing adjustment—Court can record it if proved.

Even where alleged adjustment is disputed by the decree-holder, Court can enquire into the matter and record the adjustment if it is proved. The expression "the decree-holder fails to show cause " does not merely mean fails to appear." but would include " fails to satisfy the Court " : *A. I. R.* 1922 *All.* 13 *Foll.*

[P 80 C 2]

Saila Nath Mukerji—for Appellant.

S. N. Verma—for Respondents.

Judgment.— This appeal arises out of certain execution proceedings which were objected to by the judgment-debtor. The appellant Ganga Dihal had obtained a decree for costs against Ram Oudh and others jointly. He applied for execution of this decree principally against Ram Oudh the judgment-debtor. The judgment-debtor filed an objection to the application for execution pleading that the decree had been adjusted out of Court, and in that very objection prayed that the payment of the decree may be caused to be certified by the decree-holder. The Court below has held that the objection can be entertained and has found in favour of the objector and dismissed the application.

The first point raised before me is that the prayer for adjustment should have been made before the application for execution was filed and that the payment ought to have been certified and recorded in a separate proceeding previous to the execution application. Strong reliance is placed on the case of *Baijnath* v. *Panna Lal* (1). In my opinion that case must now be taken to have been overruled by the Full Bench case of *Joti Prasad* v. *Sri Chand* (2). It seems to me that it is not necessary that the application praying for the adjustment to be recorded should be a document separate from the objections filed by the judgment-debtor.

The adjustment was alleged to have been made on 28th March 1927, and the prayer for the adjustment to be recorded was made on 9th May 1927. The judgment-debtor's application was therefore within 90 days as required by Art. 174, Lim. Act, and could be entertained. No doubt the alleged adjustment was disputed by the decree-holder. But it is now clearly settled that the Court even in case of such dispute can enquire into the matter and record the adjustment if it is proved. The expression "the decree-holder fails to show cause" in O. 21 R. 2, sub-Cl. (2) obviously does not merely "mean failsto appear" but would include "fails to satisfy the Court". *Lachman Das* v. *Baba Ram Nath Kali Kamliwala* (3), was also a case where the decree-holder was denying the adjustment and the Court assumed that the matter could be enquired into.

Ram Oudh's case was that the parties agreed that he and his brothers would execute a sale-deed of 2 pies share for Rs. 200 and pay Rs. 300 in cash and in lieu of it the decree-holder would exempt them from the execution proceedings arising out of the joint decree which amounted to just over Rs. 1,000. The decree-holder denied any such adjustment. The objector went into the witness-box and produced one of the two attesting witnesses to a receipt executed by the decree-holder and also another witness. The Court below after hearing the evidence has come to the conclusion that the decree-holder's denial is untrue and that he must have been paid Rs. 300 as evidenced by the receipt. As the receipt has come out of the possession of the objector and he is corroborated by the evidence of two witnesses I see no reason to take a different view of the evidence from what the Court below has done. Ram Oudh further stated that the agreement was that on the receipt of the consideration of Rs. 500 the decree-holder would exempt his group from the execution proccedings. His two witnesses said that the agreement was that their property would be released. When one set of the judgment-debtors took all the

(1) A. I. R. 1924 All. 706=46 All. 635.

(2) A. I. R. 1928 All. 629 (F.B.).

(3) A. I. R. 1922 All. 13=44 All. 258.

pains to execute a sale-deed in favour of the decree-holder and also pay Rs. 300 in cash, the total amounting to half the decretal amount which was the extent of their liability, it is only natural to suppose that the understanding must have been that they would be released from all further liability. The oral evidence on this point is positive and the Court below has believed it. I accordingly see no reason to record a different finding. The contract between the parties was not reduced into the form of any document. The sale-deed and the receipt were executed in pursuance of it.

The learned advocate for the appellant has urged that oral evidence to prove an adjustment under which the judgment-debtors were to be released from all further liability was inadmissible in evidence under S. 92, Evidence Act. He has relied on the case of *Lachman Das* v. *Baba Ram Nath Kali Kamliwala* (3). Piggott, J., did not express the view that S. 92 was a bar to the proof of such an adjustment. His judgment was based on the finding that in that case there had in fact been no adjustment of the decree at all but that there was merely an oral agreement to adjust the decree which agreement had not been carried out. He came to the conclusion that in the execution proceedings the question of enforcing the specific performance of such an oral agreement did not arise. On this point Walsh, J., agreed with him, though he was inclined to regard the judgment-debtor's application as "in substance a suit for specific performance". No doubt he further expressed the view that the plea of adjustment amounted to setting up a new contract in substitution of the original decree and that such agreement could not be proved by verbal evidence in view of the provisions of S. 92. Being an opinion of a single Judge it is not absolutely binding upon me. With due respect, I am unable to agree that S. 92 is any bar to the proof of such adjustment. That section refers to any contract, grant or other disposition of property as well as any matter required by law to be reduced to the form of a document. But the words "as between the parties to any such instrument" suggest that the section applies to dispositive documents between contracting parties. A decree is not an "instrument" between parties in the sense in which that expression is used in this section. I therefore do not think that a decree is covered by this section. It is also doubtful whether a proof of a subsequent adjustment of a decree can be said to amount to contradicting, varying, adding to or substracting from the terms of the decree. A subsequent payment or adjustment of a decree is by no means a variation of its terms. I am therefore unable to hold that oral evidence to prove a subsequent adjustment, under which part of the decree was paid and the rest agreed not to be executed against the judgment-debtors, is inadmissible in evidence.

I may mention that in many cases where the decree-holder, on receipt of consideration, agreed to an adjustment, and subsequently denied the adjustment and did not certify it to the Court, the judgment-debtor's remedy to sue for damages for breach of the contract has been well recognized. In all such suits oral evidence to prove the adjustment has of course to be admitted. The result therefore is that this appeal is dismissed with costs including in this Court fees on the higher scale.

P. S. Some days after the delivery of this judgment my attention was drawn to a Calcutta case, 24 *I. C.*, 391, where also the opinion was expressed that a decree is not covered by the section.

M.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 81

SULAIMAN, Ag. C. J., AND MUKERJI AND KING, JJ.

Ganesh Shankar Vidyarthi, In the matter of.

Misc. Case No. 658 of 1928, Decided on 30th July 1928.

Contempt of Courts Act (1922). S. 2—Article in a newspaper highly prejudicial to a fair trial—Article also written with that object—Writing is a gross contempt of Court.

A printer and publisher of an article in a newspaper, which is calculated to influence the mind of not only the prosecution witnesses in a case but also of the general public and is therefore highly prejudicial to a fair trial, and which is written with the object of prejudicing the public against the merits of the prosecution, is guilty of contempt of Court of a grossly reprehensible character which cannot be overlooked. [P 82 C 1]

Uma Shankar Bajpai—for the Crown.

Kapil Deo Malaviya—for Applicant.

Sulaiman, Ag. C. J.—Mr. Ganesh Shankar Vidyatrthi, Editor, Printer and Publisher of the Partab Newspaper, Cawnpore, has been called upon to show cause why he should not be punished for contempt of the Court of Mr. Mahendra Prasad, Magistrate of Allahabad, committed on account of an article headed "Naini Jail riot and Mr. Dublis," which appeared in his paper on 22nd April 1928. The article in question was undoubtedly a most offensive article and the tone and language employed indicate that the intention of the accused was to make the public believe that the accused persons had been oppressed by the jail authorities and provoked into disobedience. The article contained a passage, among others, expressing the opinion of the editor that he

"could unhesitatingly say that Mr. Dublis (one of the accused) is by no means one of those young men who involve others in trouble by inciting them and try to save their own skin."

There was a further suggestion that prisoner witnesses inside the jail were in a helpless position and could be made to make any false statement that the jail authorities wanted them to make because they had to be submissive to them and before them they "trembled like a cane." In our opinion, there can be no doubt that the article in question was calculated to influence the mind of not only the prosecution witnesses but also the general public, and was therefore highly prejudicial to a fair trial, though very likely no great harm has been actually done. The object of writing appears to have been to prejudice the public against the merits of the prosecution. The act amounted to a gross contempt of the Court of the Magistrate, was highly reprehensible and cannot be overlooked.

The accused, however, has admitted his guilt before us and tendered an unconditional apology throwing himself on the mercy of the Court. Having taken all the circumstances into consideration, we have come to the conclusion that although we must and do find the accused guilty of the offence with which he is charged, we do not think that we should, in view of his apology, impose any punishment on him. We accordingly let him off with a warning, and we trust that he will take good care in future to respect the dignity of Courts, and not commit any such offence again. We direct that he should pay the costs of these proceedings including counsel's fee which we assess at Rs. 100.

M.N./R.K. *Accused found guilty.*

A. I. R. 1929 Allahabad 82

SULAIMAN, J.

Prem Narain—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 757 of 1928, Decided on 27th October 1928, from order of Sess. Judge, Saharanpur, D/- 17th July 1928.

(a) Penal Code, S. 366—Girl kidnapped under 16—Accused believing her to be over 16—Accused cannot be protected.

If it turns out that the girl was under 16 years of age, the accused, even if he honestly believed her to be over 16, cannot protect himself as he must be deemed to have acted at his peril. [P 82 C 2]

(b) Penal Code S. 366—Illicit intercourse does not cease to be so merely because it is repeated.

Illicit intercourse does not cease to be one, merely because it is repeated. If the intention is to kidnap the girl in order to seduce her to illict intercourse, the fact of previous intimacy with her is wholly immaterial.

[P 82 C 2, P 83 C 1]

Judgment.—There can be no doubt as to the facts of this case. The statement of Captain Tobit alone fixes the complicity of the accused. The evidence fully establishes that the accused brought over Mt. Jugia and kept her in his quarters, alleging that she was his wife. The medical evidence, coupled with the statement of the girl's father, establishes that she is under 16 years of age. There is no reason to suppose that the accused believed that she was over 16. Even if he did, that would be no valid defence to the charge. If it now turns out that she was under 16 years of age, the accused, even if he honestly believed her to be over 16, cannot protect himself as he must be deemed to have acted at his peril.

The learned Sessions Judge has quoted the opinion of a living commentator to the effect that where a man had had illicit connexion with a girl before she was kidnapped, it would not be said that he kinapped her with intent to seduce her to illicit intercourse. The learned Judge has rightly dissented from such a startling view. Illicit intercourse does not cease to be one, merely because it is repeated

If the intention is to kidnap the girl in order to seduce her to illicit intercourse, the fact of previous intimacy with her is wholly immaterial. The circumstances show that Mt. Jugia went over to live with the accused of her own free will, but no question of consent arises with regard to the offence under S. 366. I. P. C. I, therefore, dismiss the appeal.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 83

DALAL, J.

(*Sahu*) *Munna Lal*—Plaintiff—Appellant.

v.

Tara and *another*—Defendants—Respondents.

Second Appeal No. 1606 of 1926, Decided on 21st November 1928, from decree of Dist. Judge, Shahjahanpur, D/- 9th August 1926.

(a) Civil P. C., O. 11, Rr. 14 and 21—Non-compliance with order under R. 14—Dismissal under R. 21 is not justified.

A Court has no jurisdiction to dismiss a suit under R. 21 for non-compliance with an order by the Court under R. 14 for production of documents : *A. I. R.* 1924 *Mad.* 582, *Foll.* [P 83 C 2]

(b) Civil P. C., O. 11, R. 21—Order of dismissal wrongly passed under R. 21, without jurisdiction—It is decree and appeal lies.

An appeal lies against an order of dismissal of a suit under O. 11, R. 21. by a Court which had no jurisdiction to dismiss it under that rule. The order not being passed under that rule, the dismissal under it is a decree and appealable. [P 83 C 2, P 84 C 1]

M. L. Agarwala and *Benod Behari Lal*—for Appellant.

Harnandan Prasad—for Respondents.

Judgment.—The trial Court of the Assistant Collector purported to dismiss a suit for the recovery of arrears of rent under the provisions of O. 11, R. 21. The suit was undefended but the Court directed the plaintiff to produce his account-books. This order was presumably passed under the provisions of R. 14, which makes it lawful for a Court at any time during the pendency of any suit to order the production by any party thereto upon oath of such of the documents in his possession as the Court shall think right. There was no application by the defendants that the account-books were wanted for inspection. Apart from other reasons which I shall state presently the order of the Assistant Collector was beyond his jurisdiction because the provisions of R. 21 imply action to be taken by a defendant. The penalty is not imposed on disobedience of an order of a Court because the penalty follows, on the party who seeks this remedy applying to the Court for an order to dismiss a suit or to strike out a defence. Here the defendant being absent there was no party to claim the privilege of the penalty and under the rule it is my opinion that a Court cannot act on its own motion.

The second reason why I consider the order of the Assistant Collector to be without jurisdiction is that the penalty does not attach to an order for the production of documents. This follows from what I have already stated. The penalty does not arise from any action of the Court but arises from an action of a party. Under R. 14 the Court is permitted to order production and on failure of such production there is no penalty because R. 21 does not permit of a penalty on the motion of the Court. It is only where a party makes application and fails to obtain the evidence which it seeks from the opposite party that the penalty of R. 21 follows. There is thus a very clear distinction between R. 14 and Rr. 6 to 8, 12 and 15. Rr. 6 to 8, 12 and 15 apply to parties who have been given the right to move for serving of interrogatories, for discovery of documents and for inspection thereof, as regards matter within the knowledge of the other party and documents within the control of the other party. R. 21 does not apply without a party making a motion and, therefore, no penalty can attach to R. 14 because under that rule the Court acts of itself and not on the motion of a party. There is a recent judgment of a Bench of two Judges of the Madras High Court in which it was held that O. 11, R. 21, Civil P. C. did not justify the dismissal of a suit for non-compliance with an order under O.11, R. 14, Civil P. C., for production of documents, *Subbayyar* v. *M. L. M. Ramanathan Chettiar* (1).

The point has arisen in second appeal because the lower appellate Court rejected the appeal of the plaintiff on the ground that no appeal lay from a dismissal of a suit under O. 11, R. 21. The order of the trial Court, however, was not one passed under that rule and the suit must be con-

(1) A. I. R. 1924 Mad. 582.

sidered to have been dismissed on the merits and such a dismissal would be a decree and appealable. I set aside the decree of the District Judge dated 9th August 1926, and remand the first appeal to that Court for a trial according to law. Costs here and hitherto shall abide the result.

M.N./R.K. *Appeal remanded.*

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* A. I. R. 1929 Allahabad 84

DALAL, J.

Banarsi Das and *another*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 801 of 1928, Decided on 19th November 1928, from order of Dist. Magistrate, Cawnpore, D/- 27th September 1928.

*** Criminal P. C., S. 446—Case against Indian accused together with one European —Magistrate cannot assume jurisdiction over Indians by discharging the European —He must commit them to Sessions.**

Under S. 446 where a Magistrate decides under S. 443 that a case ought to be tried under the provisions of Chap. 33, and the case is a warrant case, the Magistrate enquiring into the case shall, if he does not discharge the accused under S. 209 or S. 253, commit the case for trial to the Court of Sessions whether the case is or is not exclusively triable by that Court. The provisions of that section are mandatory and a Magistrate, after deciding that he had no jurisdiction, cannot assume jurisdiction against the Indian accused by discharging the European British subject. [P 84 C 1, 2]

Sailanath Mukerji and *Rama Kant Malaviya*—for Applicants.

Uma Shankar Bajpai—for the Crown.

Order.—An Indian, a police constable was complainant in this case and one of the accused was a European of the name of Mr. Marshall. In the first complaint Mr. Marshall was made the principal offender. On an application by him the Magistrate recorded a finding under S. 443 (1), Criminal P. C., that the case was one which ought to be tried under the provisions of Chap. 33. Subsequently the Magistrate by an exceedingly summary order discharged Mr. Marshall on 18th September, and assumed jurisdiction himself to try the Indians who were prosecuted along with Mr. Marshall. Under S. 446, Criminal P. C., where a Magistrate decides under S. 443, that a case ought to be tried under the provisions of Chap. 33, and the case is a warrant case, the Magistrate enquiring into the case shall if he does not discharge the accused under S. 209 or S. 253, commit the case for trial to the Court of sessions whether the case is or is not exclusively triable by that Court. The provisions of that section are mandatory and a Magistrate after once deciding that he had no jurisdiction cannot assume jurisdiction by discharging the European British subject. In the present case it is obvious to me that the discharge was made in order to assume jurisdiction. Reference is made in the order of discharge by the Magistrate to a first statement of Beni Singh. How statement of a witness made to the police can be used in evidence, is not explained. Such a statement can be utilized to contradict the statement of Beni Singh. The Magistrate, however, has not proceeded to discuss how Beni Singh's statement in Court is contradicted by another previous statement. There is nothing on the record to show that a copy of the previous statement was given to the defence in order to contradict Beni Singh. There was another complainant Lakhan Singh also and no reference is made to his evidence charging Mr. Marshall with the crime. He definitely stated "The Babu and Sahib had asked them to bring us inside." Another statement of Lakhan Singh is "The Babu and Sahib asked Beni Singh to take up his puttis and half-pants."

The order discharging Mr. Marshall is not before me for revision, but I mention these facts to indicate that the Magistrate has gone out of his way to assume jurisdiction by discharging Mr. Marshall on insufficient grounds. I do not think that the wording of S. 446 permits of such an assumption of jurisdiction. The Magistrate is empowered only to hold an enquiry in this case and if he does not discharge the Indian applicants, Banarsi Das, Ram Chandra, Sukh Lal, Hugal Kishore and Joti Swarup, he is bound to commit them to the Court of sessions and he is hereby directed to do so if he does not discharge them.

R.K. *Committal ordered.*

A. I. R. 1929 Allahabad 85 (1)

SULAIMAN, Ag. C. J. AND BANERJI, J.

Mangat Rai and *others*—Applicants.

v.

Babu Ram—Opposite Party—Respondent.

Execution First Appeal No. 11 of 1928, Decided on 2nd July 1928, from decree of Sub-Judge, Budaun.

Civil P. C., S. 47—Order rejecting application for stay of sale is not order under S. 47 conclusively determining rights of parties and is not appealable.

No appeal lies against an order rejecting an application for stay of sale as the order does not involve any question relating to the execution of the decree which would amount to an adjudication conclusively determining the rights between the parties with regard to any of the matters in controversy: *A. I. R.* 1924 *All.* 808 ; *A. I. R.* 1926 *All.* 268, *Rel. on.*; 14 *A. L. J.* 363, *Dist.*

Sarkar Bahadur Johari—for Applicants.

Sulaiman, Ag. C. J.—This is an execution first appeal arising out of a mortgage decree. The appeal purports to have been preferred from an order dated 19th December 1927. That order merely was one rejecting an application for stay of the sale. It is clear to us that such an order is not appealable. It did not involve any question relating to the execution of the decree which would amount to an adjudication conclusively determining the rights of the parties with regard to any of the matters in controversy. S. 47 has to be read with S. 2, Civil P. C., and reading the two sections together it is obvious that every order passed by an execution Court is not necessarily appealable. It is only appealable when it determines the rights of the parties with regard to any matter in controversy. A refusal to postpone a sale did not determine the rights of the parties within the meaning of that section. We may refer to the case of *Husain Bhai* v. *Beltie Shah Gilani* (1) and *Muhammad Zakaria* v. *Kishan Narain* (2).

The learned advocate for the appellant has relied on the case of *Shiam Lall* v. *Roshan Lal* (3). Piggott, J., in that case did not express any final opinion on the question whether an order passed in the course of proceedings held under O. 21, R. 26 was appealable. Walsh, J., however, thought that because there were 15 paras. of controversial pleadings in the objection their dismissal was a judicial decision. In the present case a refusal to postpone the sale did not amount to a final judicial decision.

There are other grounds taken in the memorandum of appeal, but they apparently were not pressed before the Court below, for there is no reference to them in the order and Mr. Johari, on behalf of the appellant, is unable to state that they were actually pressed before the Court below.

We are further of opinion that they have no force. Mr. Johari contends that the judgment-debtor has been prejudiced because the sale proclamation did not mention that the other encumbrances mentioned therein were subsequent. This objection of the judgment-debtor was futile because the dates of all these subsequent encumbrances were actually mentioned in the sale proclamation The only other point urged by him is that the decree-holder should not have been allowed to purchase the property at a price lower than the value estimated by the Court. O. 21, R. 72, Civil P. C., was amended by this Court in 1927, and under the amended rule there is no power in a Court to restrict the option of the decree-holder and compel him to purchase property at any minimum price. No other point is pressed before us. The appeal accordingly has no merits and is dismissed under O. 41, R. 11.

M.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1924 All. 808=46 All. 733.
(2) A. I. R. 1926 All. 268=48 All. 260.
(3) [1916] 14 A. L. J. 363=35 I. C. 230.

A. I. R. 1929 Allahabad 85 (2)

WEIR, J.

Mt. Pran Dei—Defendant—Appellant.

v.

Sat Deo Tiwari and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 914 of 1926, Decided on 3rd August 1928, from a decree of Sub-Judge, Basti, D/- 16th February 1926.

(a) Transfer of Property Act, S. 3—Registered agreement not to alienate property is not notice to vendee, if agreement makes no mention of specific property.

Where, by a registered agreement between two persons, one agreed not to alienate property without the other's consent but no specific property was mentioned in the agreement mere registration could not be treated as

notice to a vendee who would not have discovered the existence of the agreement by a search for transactions affecting the property sold. [P 46 C 1]

(b) **Transfer of Property Act, S. 54—Price not paid—Suit for possession by purchaser—Court should decree possession conditionally on payment of the price.**

No doubt a purchaser is entitled to sue for possession, notwithstanding the fact that he has not paid the consideration but the Court should consider the equity arising out of the non-payment. A decree for possession should be passed conditionally on payment of the purchase money : 30 *All.* 125, *Foll.* [P 86 C 2]

Harnandan Prasad—for Appellant.

N. Upadhiya—for Respondents.

Judgment.—In this case the plaintiff sued for possession of a 4 pie share in area Mahulani Khurd which he alleges was sold to him for Rs. 400 by Ram Milan, defendant 1. He has joined as defendant Ram Milan's wife Mt. Pran Dei and one Shiva Haragh Pathak. The sale in respect of which the suit was brought was effected on 29th November 1923. Several defences were raised, but I am concerned with only two of them. The first is this : Mt. Pran Dei, who is the sole appellant in this appeal, alleges that on 7th September 1920, her husband Ram Milan entered into an agreement with her that he would not alienate, either by mortgage or sale, any part of his property without her consent. This agreement is in writing and has been registered ; and counsel for Mt. Pran Dei contends that the agreement is valid under S. 25, Contract Act. The learned Subordinate Judge decided that the agreement was ineffectual to restrain Ram Milan's right to sell the property, and secondly, that in any event,the plaintiff was not aware of the existence of the agreement and could not be in any way affected by it, because no specific property was mentioned in the agreement. I agree with the learned Subordinate Judge in holding that the fact that this agreement though registered cannot be treated as notice to the plaintiff since the property in suit is not mentioned in it, and, therefore, a purchaser or mortgagee would not have discovered the existence of the agreement by a search for transactions affecting the property in suit. The learned Subordinate Judge has found as a fact that the plaintiff "had no knowledge of this agreement," i. e., had no actual notice of it, and so I hold that the agreement has no effect upon his rights as a purchaser of the property in suit. It is, therefore, unnecessary for me to decide whether the learned Subordinate Judge was or was not right in holding that the agreement between Mt. Pran Dei and her husband, Ram Miian, could not affect the validity of the sale to the plaintiff even if the plaintiff had express notice of it. The point does not seem to be free from doubt : see *Ali Hasan* v. *Dhirja* (1) and *Kuldip Singh* v. *Khetrani Koer* (2) and I abstain from expressing any opinion on the point.

The next question is whether the plaintiff is entitled to a decree for possession of the property in suit. The deed by which the property was sold to him contained a statement that Rs. 230 of the consideration had been paid to Ram Milan before the deed was registered, and that the remaining Rs. 200 were left with him to be paid to one Mt. Mukhraji, the mistress of Ram Milan. The plaintiff says that he paid Rs. 200 before the deed was executed and also paid the remaining Rs. 200 to Mt. Mukhraji, but both the Courts below have disbelieved his statement and have held that no part of the consideration has been paid by him. The learned Subordinate Judge has nevertheless decreed the plaintiff's claim for possession with costs relying on the authority of *Raj Nath Singh* v. *Paltu* (3). That case was decided by Stanley, C. J., and Pramada Charan Banerji, J. It was in many respects similar to the case before me. There had been a sale of four pies share in a village for Rs. 200. The plaintiff alleged that this money had been paid and claimed possession. The defendants denied that any part of the consideration had been paid and both the Courts below held that this was the fact. Stanley, C. J., and Banerji, J., held that although the plaintiff was entitled to sue notwithstanding the fact that he had not paid the consideration, there was nevertheless, an equity arising out of the non-payment of the purchase-money by the plaintiff, and that regard ought to be paid to it in any decree which the Court might pass. Accordingly they directed that if within six months from the date of their judgment the plaintiff should pay to the defendants the sum of Rs. 200, the

(1) [1882] 4 All. 518=(1882) A. W. N. 118.
(2) [1898] 25 Cal. 869=2 C. W. N. 463.
(3) [1908] 30 All. 125=5 A. L. J. 96=(1908) A. W. N. 38.

property mentioned in the plaint should be delivered to him, but in default of such payment the plaintiff shall forfeit his right to recover the property. That decision is binding upon me. I shall follow it and make the same order as was made in it.

I accordingly vary the decree of the Court below and direct that if the plaintiff pays to Ram t Milan within six months from the da e of this judgment the sum of Rs. 400, the property mentioned in the plaint shall be delivered to him : but if the plaintiff does not pay the purchase-money within the time aforesaid, his suit shall stand dismissed with costs in all the Courts. If, however, the plaintiff pays the said purchase money within the said period, then in view of the fact that the plaintiff falsely alleged that he had paid the entire purchase money when in fact he had not, I direct that the parties shall abide their costs in the Courts below ; but that if the plaintiff pays the said purchase money within the time aforesaid, he shall be entitled to the costs of the appeal in this Court.

S.L./R.K. *Decree altered.*

A. I. R. 1929 Allahabad 87

SEN AND NIAMATULLAH, JJ.

Boulton Bros. & Co. Ltd. (India) Delhi—Plaintiffs—Appellants.

v.

New Victoria Mills Co. Ltd., Cawnpore—Defendants—Respondents.

First Appeal No. 377 of 1925, Decided on 29th May 1928, from decree of Addl. Sm. C. C. Judge, Cawnpore.

(a) Principal and agent — Contract of agency subsisting — Agent's shortcomings in discharge of his duties under agreement — Principal is liable to pay commission under agreement—Contract Act, S. 39.

So long as the agency subsists, the principal remains under his contractual obligation to pay the commission in terms of the agreement which creates mutual rights and obligations of a continuing nature, in spite of all the shortcomings of the agent in the discharge of his duties under the agreement. [P 94 C 1]

A certain company, *S*, was appointed managing agents of another company, *P*, for a certain number of years, and the agreement was duly executed. The company *S* was thereunder entitled to a certain commission as remuneration for their services as managing agents. Such services were not, however, categorically enumerated in the agreement. The agreement was to have immediate effect and the directors of *P* company were to enforce it. *P* paid certain amounts to *S* as commission for their services for certain periods. But the services rendered by the company *S* were not of a substantial nature and it was found that their services were not profitable to *P* company. So the contract of agency was put an end to. The company *S* therefore sued for their commission up to the date of their dismissal as managing agents.

Held: that in spite of all the shortcomings of the *S* company in the discharge of their duties there was acquiescence in the continuance of the managing agency up to the date of dismissal. The responsibility for the company *P* not having had full value for the amount of commission to which they continued to be liable lay with their directors who allowed things to drift too long. The desire of the company *P* not to pay the commission is like that of a master who allows his servant to remain idle for the whole month and objects at the end of the month to paying his salary on the ground that he did little or no work during the whole month. *P* was therefore liable to pay the commission. [P 94 C 1]

(b) Principal and agent — Agent entering into understanding with third party—Agent must disclose such understanding to principal—Contract Act, S. 215 — Companies Act, Ss. 91-A and 91-C (*Obiter*).

Where there is conflict between duty and interest, the servant or agent must disclose any understanding likely to result in gain to him, arrived at between the servant or agent and a third person who enters into a contract with the master or principal, otherwise such a secret bargain being a fraud on the master or principal will entitle him to rescind the contract with such third person: *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.* (1914) 2 *Ch.* 488; *Penama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.* 10 *Ch.* 515; *Shipway* v. *Broadwood*, (1899) 1 *Q. B.* 369 and *Hukman* v. *Kent*, (1915) 1 *Q. B. D.* 881, *Foll.* [P 94 C 1, 2]

(c) Specific Relief Act, S. 21 (b)—Contract of service dependent on personal qualification cannot be specifically enforced.

Certain persons were employed as managing agents of a company on account of their reputation in commercial circles. Afterwards those persons lost their previous reputation.

Held: that such contract of service was not specifically enforceable. [P 96 C 2]

(d) Contract Act, S. 205 — Certain company appointing another company as Managing Agents for twenty years, incentive to do so being latter company's commercial reputation — Latter company losing its previous reputation—First company terminating contract before expiry of twenty years—Resolution dismissing latter company's services passed at meetings held irregularly—Irregularities not material—Dismissal is valid —No damages can be claimed as loss of reputation of company was sufficient cause to end contract.

One company *S* appointed another company *P* for a term of 20 years as their managing

agents, the chief incentive to do so being the great reputation of that company in commercial circles. Afterwards company *P* came to be discredited and as the company *S* felt that their association with *P* was rather a hindrance than a help to them terminated by a resolution their contract with *P* and dismissed them as managing agents. The meetings at which the resolution removing *P* from office as managing agents was passed, were irregular. But the irregularities complained of were not material and the result would have been the same, even if the irregularities would not have happened.

Held: that the company *S* were justified in removing *P* as their managing agents, even before the expiry of the time stipulated, for hencewas sufficient cause for them to do so and there the company *P* were not entitled to claim any damages, and as the resolution would have been passed even if the irregularities complained of had not happened. For the dismissal, if otherwise justified, could not be characterised as wrongful because the means adopted to bring about that perfectly legitimate end were not warranted by the rules of procedure applicable to the case unless it would be shown that the non-observance of those rules itself resulted in harm to the party dismissed: *Pearce* v. *Foster*, 17 *Q. B. D.* 536, *Rel. on.* [P 96 C 2]

(e) Specific Relief Act, S. 42 — **Proviso — Mere declaration cannot be granted if consequential relief is not claimed.**

Where a company sued for declaration that they were the managing agents of another company but omitted to claim the consequential relief of injunction to restrain the other company to interfere with the discharge of their duties as managing agents, no declaration could be granted. [P 98 C 1]

Tej Bahadur Sapru, *P. N. Sapru* and *Bishwa Nath Tholal*—for Appellants.

N. N. Sircar, *Kailas Nath Katju* and *Vikarmajit Singh*—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiff-appellant Messrs. Boulton Bros. & Co. (India) Ltd., against the defendant, The New Victoria Mills Co. Ltd., for certain reliefs on the basis of a contract of agency entered into by the parties, under which the plaintiff company were made the managing agents of the defendant company.

The plaintiff company came into existence early in 1921 with its office at No. 10 Alipore Road, Delhi. Although it was a separate legal entity having been incorporated in India (as its name indicates) under the Indian Companies Act of 1913 it may be regarded as an Indian branch of the English Company, Messrs. 'Boulton Bros. Ltd.' which was considered a few years before as a premier business concern with a well-established reputation in high commercial circles. The Memorandum of Association issued by the plaintiff company advertised as one of its objects the carrying on of

"all kinds of agency business in relation to the investment of money, the sale of property and the collection and receipt of moneys and to take part in the management, supervision or control of the business or operations of any other company, association, firm or person and to act as the managing agents, agents, secretaries or other officers of any such company, association, firm or person, and in connexion therewith to appoint and remunerate any directors, accountants and other experts or agents."

W. W. Boulton and R. G. H. Boulton, the two brothers who were at that time dominating personalities in the business were its only directors. There can be no doubt that the plaintiff company derived its importance from the name it bore, from its supposed control by the two brothers and from the connexion popularly believed to exist between it and the English company of the same name.

The defendant, New Victoria Mills Co. Ltd., was started in October 1920 with a capital of 5 crores of rupees. It took over the assets and liabilities of its predecessor "The Victoria Mills Co. Ltd.," which ceased to exist under circumstances not material to the present case. The defendant company carried on the business of

"Spinners, weavers, manufacturers, balers and pressers of all jute, ... cotton, wools hair and other fibrous materials"

at Cawnpore where it had its registered office.

At the time the agreement of agency was executed (1st February 1922) the directors of the defendant company were:

1. Mr. A. West.
2. ,, B. West.
3. ,, A. A. Black.
4. ,, A. H. Silver.
5. ,, W. G. Clarke who retired in April 1922 and Mr. W. W. Boulton was appointed in his place.

The management of the defendant company was vested in Messrs. A. West, B. West and A. A. Black, who were in receipt of regular salaries and 5 per cent. of the profits

"after deducting depreciation but before taking anything to reserves or making any provision for income-tax, super-tax or similar charges."

Article 119 of the Memorandum of Association of the defendant company provided that

"the company by extraordinary resolution may at any time determine that the business of the company shall be carried on by managing agents, subject to the direction and control

of the directors, and such meeting may appoint any company or firm to be the managing agents of the company; should such meeting fail to make any such appointment, then the directors shall appoint such company or firm to be the managing agents of the company as they shall in their discretion determine."

At an extraordinary general meeting of share-holders held on 16th January 1922 the plaintiff company were appointed managing agents for a term of 20 years, and the agreement dated 1st February 1922 was duly executed. The plaintiff company are thereunder entitled to 10 per cent.

"on the half-yearly profits of the company after deducting interest on debentures, or other moneys borrowed but before placing anything to depreciation, reserve or other special accounts and before making any provision for income-tax, super-tax or other like impositions and with a guaranteed minimum of rupees fifteen thousand in every half year"

besides

"an office allowance of rupees one thousand per mensem payable monthly"

as remuneration for their services as managing agents. Such services are not, however, categorically enumerated in the agreement.

It is a question in the case as to whether the plaintiff company discharged their duties as managing agents of the defendant company but it is common ground that they received from the defendant company (1) Rs. 29,430 representing their share of the commission for part of the period of agency included in the six months ending on 31st March 1922 and (2) Rs. 60,829-8-10 for the six months ending on 30th September 1922.

In December 1922 suspicions were aroused as regards the reputation and credit of Boultons in commercial circles. In January 1923 the directors of the defendant company regarded the association of plaintiff company damaging to the interest of the former company. On 29th March 1923 the directors of the defendant company passed a resolution dismissing the plaintiff from the managing agency created by the agreement of 1st February 1922. This resolution was confirmed at an extraordinary general meeting of share-holders on 7th April 1923. The regularity of these meetings and the validity of the resolutions passed at them are questioned by the plaintiff. It is, however, admitted that the plaintiff company ceased to act as managing agents from that time.

In December 1923 one Mr. Treeby, a share-holder of the defendant company, instituted a suit before the Subordinate Judge, Cawnpore, challenging the legality of the aforesaid meetings and resolutions, but that suit was eventually withdrawn after some correspondence with the legal advisers of the defendant company.

The suit out of which this appeal has arisen was brought on 30th September 1924 for the following reliefs:

Firstly, for recovery of Rs. 34,666-7-0 being the commission earned by them, during the six months from 1st October 1922 to 31st March 1923, including expenses incurred by the plaintiff company in the discharge of their duties an managing agents;

Secondly, for a declaration that the proceedings of the meeting of directors held on 29th March 1923 were "ultra vires, null and void," notice of the meeting not having been given to one Mr. D'Souza who was an alternate director for Mr. W. W. Boulton, a permanent director absent from India;

Thirdly, for a similar declaration with regard to the proceedings of the meeting of the share-holders held on 7th April 1923;

Fourthly, as a result of the 2nd and 3rd reliefs, for a declaration that the dismissal of the plaintiff company resolved on by the directors and share-holders was not operative, leaving the plaintiff's position as managing agents under the agreement dated 1st February 1922 unaffected and subsisting upto the date of the suit;

Fifthly, for recovery of Rs. 54,000 being the commission and office allowance for the twohalf years ending on 30th September 1923 and 31st March 1924;

Sixthly, for recovery of rupees 16 lacs as damages for wrongful dismissal before the expiry of the term of 20 years stipulated for in the agreement of 1st February 1922, in case 2, 3 and 5 reliefs are not granted.

The defence, as put forward, in the written statement of the defendant, was that

"the plaintiff company never took over nor did it ever attempt to perform the duties required under the agreement of 1st February 1922"

and

"the business of the defendant company was carried on by Messrs. A. and B. West and A.A, Black, the directors thereof, as it always had been done,"

that the meetings held on 31st March 1923 and 7th April 1923, were duly con-

vened and the plaintiff's dismissal decided on at those meetings was justified under the circumstances of the case.

The learned Subordinate Judge held against the plaintiff on all the questions raised in the case. He found that the plaintiff never acted as managing agents of the defendant company, that they were regularly dismissed and for good cause by the directors and the share-holders at their respective meetings held on 29th March 1923 and 7th April 1923.

The appeal of the plaintiff has been pressed on almost all the grounds urged before the lower Court. The execution and validity of the agreement dated 1st February 1922 being admitted it would be convenient to consider the plaintiff's right to each of the reliefs claimed by it.

As regards the first relief it should be noticed that the plaintiff claims commission and incidental charges for the half-year ending on 31st March 1923, i. e,. just after the order of dismissal passed by the directors on 29th March 1923. Two sums had been paid by the defendant company on the same account for part of the half year ending on 31st March 1922 and for the half year ending on 30th September 1922 as already mentioned. It is not suggested in the pleadings that the payments were made by the defendant company through any fraud practised on it by its directors who were responsible for the payments or that there was any collusion between the plaintiff company and any of the directors of the defendant company. No attempt has been made to account for what would appear to be most extraordinary conduct of the directors of the defendant company if we assume that the plaintiff company never acted in any manner as managing agents and that the agreement of 1st February 1922 remained throughout a dead letter. On a careful consideration of the evidence adduced in the case we are led to the conclusion that the agreement was intended to be immediately operative and that the plaintiff company did enter on their duties as managing agents. It may be that after 14 months' experience of the agency the defendant company realized that it had made a bad bargain and in view of altered circumstances it was justified in terminating the contract of agency, a question which has to be dealt with at its proper place.

Articles 119 and 120 of the memorandum of association of the defendant company run as follows:

"119. The company by extraordinary resolution may at any time determine that the business of the company shall be carried on by managing agents, subject to the direction and control of the directors, and such meeting may appoint any company or firm to be the managing agents of the company; should such meeting fail to make any such appointment then the directors shall appoint such company or firm to be the managing agents of the company as they shall in their discretion determine."

"120. The terms of the appointment of such managing agents shall be embodied in an agreement between the company and that such managing agents and the directors shall execute such agreement for and on behalf of the company and carry the same into effect with full liberty nevertheless to agree to any modification thereof either before or after the execution thereof."

As we read the articles they provide, in effect, that once the company by extraordinary resolution determines to have its business carried on by managing agents and fails to nominate the agency, the directors are bound to appoint some "company or firm" as managing agents. A duty has been thrown on the directors to have the agreement of agency executed and "carry the same into effect." Liberty has been reserved to the directors "to agree to any modification" of such agreement "either before or after the execution thereof." These duties and powers of the directors have an important bearing on the conduct of the directors and the legal consequences thoreof after the agreement, dated 1st February 1922, came into existence. The language of these articles clearly indicates that the agreement of agency when entered into is to have immediate effect and that the directors should enforce it.

On 6th January 1922, a notice was issued calling an extraordinary general meeting of tbe share-holders for 16th January 1922, for considering the resolution

"that as on and from the 1st day of February 1922 the business of the company be carried on by managing agents subject to the direction and control of the directors, and that Messrs. Boulton Bros. and Co., (India) Ltd., a company duly incorporated under the Indian Companies Act and having its registered office at No. 10 Alipore Road, Delhi, be and they are hereby appointed to be the first managing agents of the company with effect as on and from the said 1st day of February 1922, and upon the terms set forth in the draft agreement submitted to this meeting."

The exact terms of the resolution actually passed are not known as a copy of it has

not been produced, at least it is not part of the printed record but it was probably passed in terms of the notice which makes it clear that the plaintiff company were to act as managing agents "with effect from the 1st February, 1922". This was followed by a letter addressed by the defendant company to the plaintiff company enclosing a draft of the agreement and intimating that the latter had been appointed managing agents 'from the 1st February 1922.' The agreement was executed in due course. It purports to be in pursuance of Art. 119 of the memorandum of association of the defendant company and provides :

"(1) The company hereby appoints the managing agents to be the managing agents of the company as on and from the 1st day of February one thousand nine hundred and twenty-two upon the terms and conditions hereinafter expressed and the managing agents hereby accept the said appointment."

"(2) The managing agents shall be the first managing agents of the company and they and their successors in business whether under the same or any other style shall continue and be the managing agents of the company (unless they shall voluntarily resign that office) for the period of 20 years certain from the said first day of February one thousand nine hundred and twenty-two and thereafter until they shall be removed therefrom by an extraordinary resolution of the company passed at an extraordinary general meeting specially convened for that purpose, and of which not less than twelve calendar months' notice shall be given, and at which persons holding or representing by proxy or power-of-attorney not less than ¾th of the issued ordinary capital of the company for the time being shall be present."

"(3) Until otherwise mutually arranged the remuneration of the managing agents shall be firstly a commission at the rate of 10% on the half yearly profits of the company after deducting interest on debentures, or other moneys borrowed, but before placing anything to depreciation reserve or other special accounts, and before making any provision for income-tax, super-tax or other like impositions and with a guaranteed minimum of Rs. 15,000 in every half year ; the said commission shall be payable half yearly immediately after the audit of the companies' accounts for the half year has been completed, and, secondly, an office allowance of Rs. 1,000 per mensem payable monthly to be increased at the discretion of the directors if and whenever the directors shall consider any such increase justified."

"(4) In consideration of the said remuneration the managing agents shall provide a suitable office and office establishment for the company but at the expense of the company and the managing agents shall be entitled to charge and be paid for office rent and the cost of office establishment and for all actual postages. telegrams, stationery and the like expenses, and the company shall pay all salaries and commission, if any, payable to all persons employed solely in the company's business and shall also bear and pay such proportion of the salaries and commission, if any, of any expert or other person employed by the managing agents, partly in connexion with the business of the company and partly in connexion with other business as the directors may from time to time determine."

"(5) The managing agents may also in addition to their duties as managing agents of the company perform any other duties and work for the company which the directors may decide and shall receive such reasonable and proper remuneration for such work as shall be from time to time agreed upon between the said managing agents and the directors, such remuneration being in addition to the remuneration as aforsaid."

"(6) The managing agents shall have power to make, draw, endorse, sign, accept, negotiate and give all cheques, bills-of-lading, drafts, orders, bills of exchange, Government of India and other promissory notes and other negotiable instruments required in the business of the company, and may also sign and give all receipts, releases and other discharges for money payable to the company and for the claims and demands of the company and to exercise such of the powers of the directors as may from time to time be delegated to them.

That the agency is to take effect from the 1st February 1922 is laid down in clear terms in the first clause."

We have laid stress on the agreement taking effect from its date because it has been argued brfore us that in so far as specific powers were not delegated to the managing agents the agreement should be deemed to have remained in abeyance. Reference is made to a sentence occurring in the proceedings of a meeting of directors held on 16th January 1922 recording the resolution passed at the extraordinary general meeting of share-holders by which plaintiffs were appointed managing agents. That sentence runs thus :

"An informal discussion took place regarding the delegation of powers to the managing agents and the matter was deferred to a later date."

We are unable to accede to the contention that the effect of this action of the directors was to shelve the whole arrangment, in spite of the provisions of Art. 119 and 120, the resolution passed at the extraordinary general meeting, and the agreement. The duties to be performed by the managing agents were well understood in a general way by the parties to the agreement which, therefore, makes no attempt to enumerate them categorically but refers to them in Cl. 5. The business was carried on by Messrs. A. West, B. West and A. A. Black

and it is admitted that their duties were not at any time defined. The subsequent conduct of the parties which is hereafter discussed altogether refutes this suggestion.

The terms of the agreement are indeed very favourable to the managing agents and one is struck by the remarkable readiness with which the defendant company accepted them. The explanation is furnished by Mr. Silver one of the directors who piloted this transaction on behalf of the defendant. He says:

> Two main advantages were held out, firstly the worldwide influence of the Boultons to find new markets for the mill product. Mr. Boulton claimed that through one of his connected companies they had special facilities for trading with Roumania. I knew it to be a market which bought that class of goods largely. I asked him how he was going to get the goods in as India did not supply that market. He said that he had special credit arrangements there. He further said that he had arranged to buy further 15 lacs worth of ordinary shares of the defendant company and this added to their present holding or the holdings of friends controlled by them of 26 lacs meant that they would then be controlling a total of 41 lacs or more than half of the total ordinary capital of the defendant company."

Whether the representation which is here attributed to Mr. Boulton was really made by him and whether it was true or otherwise we do not pause to consider. They did subsequently purchase shares of defendant company to the value of 15 lacs only to pass them on the Halwasias. No case of fraud or misrepresentation vitiating the agreement was made either in pleadings or arguments. That the directors believed in almost unlimited powers of Boultons and were dazzled by the great reputation which Boultons were believed to enjoy in the commercial world in those days is not disputed by the respondent whose learned counsel himself relied on the evidence of Treeby to the effect that Boultons 'had a reputation of being great financiers' and had 'grand connexions' in Europe. How far this belief was created by Boultons themselves and how far the directors verified the information through other sources are immaterial. The disillusionment of the defendant company occurred about a year later when it was realized by the directors, specially Mr. Silver, that their relations with the plaintiff company were not to their advantage. But in the beginning of 1922 the directors of the defendant company, in common with many other business men, attached exaggerated value to the association of the name of Boultons with their company as managing agents. W. W. Boulton was elected a director of the defendant company with effect from 1st October 1921 and was appointed to act as 'London director when in England.' It was with an expression of regret that his resignation was accepted on 16th January 1922. He was re-elected on 22nd March 1922. The Boulton Bros. and Co., Ltd., (India) were founders and managing agents of a number of companies most of which had a short existence and had to go in liquidation in 1923 or thereabout. The Alliance Bank of Simla came to grief partly, at any rate, through the business activities of Boultons. There is no doubt, however, that Boultons had a great and wide reputation as financiers and for their resourcefulness in promoting the interests of companies. (The judgment then discussed evidence and continued.) It was not long before the disillusionment came and the directors realized that the defendant company had to pay too much in the shape of commission to the plaintiff company for no substantial gain to themselves. This occurred when they lost faith in the magic of Boultons' name and in their supposed influence in the commercial world. The first eye-opener was the failure of Halwasias, the selling agents appointed by the plaintiff company. We have little doubt that the choice of plaintiffs fell on Halwasias not because they were expected to revolutionize the sale of accumulated production in the godowns of the defendant company, but the selection was prompted by the readiness of Halwasias to take over the 15 lacs worth of shares of the defendant company, which the plaintiffs had undertaken to buy and did buy. The failure of Halwasias as selling agents may be partly attributed to the unfavourable conditions of the market in those days but it does not appear that there was any reason for the plaintiffs to think that their nominee would be an improvement on the former selling agents in any respect.

The disappointing results of the change in selling agency for which the plaintiff company were responsible might not have brought matters to a head but by Decem-

ber 1922 the downfall or exposure of Boultons in England was so far known in commercial circles in India that Mr. Silver "began to consider the desirability of removing the managing agents in the latter part of December 1922." This idea materialized on 29th March 1923. In the meantime the Boultons became so discredited that a number of companies with which they had been associated either went in liquidation or otherwise came to grief. Mr. Silver seems to have taken prompt and commendable steps to dissociate the defendant company from the managing agency which undoubtedly subsisted and which was regarded as positively harmful. Ex. 57, p. 301, Ex. 21, p. 305, Ex. 22, p. 307 and Ex. 74 p. 309 afford interesting reading and illuminate the situation as it was in the beginning of January 1923 when Mr. R. G. H. Boulton was desirous of coming to Cawnpore to discuss certain matters concerning the affairs of the defendant company and Mr. Silver, who was 'not prepared to accept his suzerainty,' suggested contrivances to Mr. Black to have the discussion in the presence of Mr. Silver as he did not apparently consider Mr. Black equal to the task of holding his own against Mr. Boulton. At the meeting of the directors held on 29th Juue 1923, the question of terminating the agency of the plaintiff company was openly mooted in the presence of Mr. R. G. H. Boulton. The minutes of those proceedings contain the following :

"Mr. R. G. H. Boulton suggested the appointment of Mr. C. E. Treeby to a position on the staff of the company to supervise on behalf of the managing agents the accounts and books of the company. The Chairman pointed out that the company's present staff is adequate for the present and that they would not be prepared to approve of any expenditure in such connexion. He further asked Mr. Boulton whether he thought it would be in the interests of the company that the connexion of the managing agents with the company should thus be made more apparent ; the Chairman went on to say that in the best interests of the company its affairs had been conducted for the past year by the directors themselves, and all operations had been in the name of the company itself. Mr. Boulton admitted that under the present conditions the association of the name of Boulton Bros. with the affairs of the New Victoria Mills Co. could not be advantageous to the company, although he hoped that at some future date he would be in a position to show that their name might be useful to the company. The Chairman said that when such a time arrives the Board would very gladly reconsider the position and Mr. Boulton accordingly dropped his proposition ".

Eventually the managing agents were dismissed on 29th March 1923 at a meeting of directors. The proceedings of that day in which Mr. Silver took a leading part further emphasize the fact that the managing agents were considered then to be a really functioning body. They may here be quoted with advantage. They run thus :

"The minutes of the last meeting having been approved the Chairman Mr. Silver said he desired to make it clear that in proposing certain actions to be taken with regard to the managing agents he was doing so in his capacity as an elected director of company and not as ex-officio representative of the managing agents, on the Board. He explained that certain large and influential share-holders had urged upon him the necessity in the best interests of the company of forthwith removing from office the present managing agents Boulton Bros. & Co., (India) Ltd. After full discussion of the position and careful consideration the Board unanimously passed the following resolutions :

(1) Resolved that it is expedient in the interests of the company that Messrs. Boulton Brothers & Co. (India) Ltd., be removed from the office of the managing agents of the company and that they be not permitted hereafter to act as such agents.

(2) Resolved that the share-holders be asked to empower the directors to appoint Messrs. Allen Brothers & Co. (India) Ltd., as managing agents of the company on terms to be agreed upon the directors and confirmed by the share-holders in due course.

(3) Further resolved that the notice be issued forthwith to share-holders convening an extraordinary general meeting for the 7th day of April. The notice convening this meeting produced before the directors is approved.

The notice is hereto appended."

The above brings out fully (1) the fact that Mr. Silver was an officio representative of the managing agents which capacity, he warned, should not be confused with the one in which he professed to act, viz., as "an elected director" and (2) the fact that the managing agency of the plaintiff company was admitted to be existing till that day and they were "not permitted hereafter to act as such agents" who are described as "present managing agents." It is unfortunately too late for Mr. Silver to maintain that the plaintiff company did not at all function as managing agents and for the defendant company to plead that they did not enter on their duties so as to entitle them to receive the commission which the terms of the agreement dated 1st February 1922 entitle them to. It is

true the services rendered by the plaintiff company were not of a substantial character but the responsibility for the defendant company not having had full value for the amount of commission to which they continued to be liable lies with their directors who allowed things to drift too long. They ought to have insisted on the managing agents putting forth their best endeavours, prescribed their duties, and if they failed to show signs of activity the agency should have been terminated long before 29th March 1923. But so long as the agency subsisted the defendant company remained under their contractual obligation to pay the commission in terms of the agreement which created mutual rights and obligations of a continuing nature. S. 39, Contract Act, provides that :

"When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."

In the case before us there was acquiescence in the continuance of the managing agency up to 29th March 1923, inspite of all the shortcomings of the plaintiff company in the discharge of their duties under the agreement. The defendant company desire to act towards the plaintiff company like a master who allowed his servant to remain idle for the whole month and objects at the end of the month to paying his (the servant's) salary on the ground that he did little or no work during the whole month.

The learned counsel for the defendant-respondent had to fall back upon a line of argument which brought face to face with the defence as put forward in the written statement of the defendant company. It was contended that the outward management of the affairs of the defendant company was exactly as it was before the agreement, that there was concealment from the defendant company, i. e. from the share-holders, of its officers having been appointed to work for remuneration in managing its affairs, that these officers were in receipt of salaries from the company and that in so far as the directors tolerated this state of things their action was ultra vires.

A number of authorities including English cases were cited in support of the proposition that where there is conflict between duty and interest the servant or agent must disclose any understanding likely to result in gain to him, arrived at between the servant or agent and a third person who enters into a contract with the master or principal, otherwise such a secret bargain being a fraud on the master or principal will entitled him to rescind the contract with such third person. In this connexion reference was made to S. 91-A and 91-C, Companies Act, *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co-* (1), *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.* (2), *Shipway* v. *Broadwood* (3) and *Hukman* v. *Kent or Romney Marsh Sheep Breeders Association* (4) :

The general proposition of law contended for is unexceptionable but involving as it does important questions of fact a case like this is not open to the defendant company, at this stage, and it is inconsistent with the pleas laid in the written statement on which the trial of the case proceeded. Reference may be made to para. 31 of the defendani's written statement in which it is alleged that the plaintiff company never performed the functions of the managing agents and that Messrs A. and B. West and A. A. Black never worked for the plaintiff company nor received any remuneration. It has been found that they worked as sub-agents and received remuneration to the knowledge of the defendant company. They are no parties to this suit and have not been even examined as witnesses. It would be unfair to them to given effect to such a plea, (if otherwise open to the defendant company) which cannot prevail without attributing to them concealment and fraud said to have been practised by them at the time when the agreement of 1st February 1922 was entered into between the parties to this case and during the time it subsisted and without assuming that the defendant company was unaware of the arrangement which existed between the plaintiff company and the three directors of the defendant's company. If such a case had

(1) [1914) 2 Ch. 488=84 L. J. Ch. 94=59 S. J. 27=31 T. L. R. 1=112 L. T. 965= 21 Manson. 364.
(2) [1875] 10 Ch. 515=45 L. J. Ch. 121=23 W. R. 583=32 L. T. 517.
(3) [1899] 1 Q. B. 369=68 L. J. Q. B. 360= 15 T. L. R. 145=80 L. T. 11.
(4) [1915] 1 Q. B. D. 881.

been originally set up plaintiff could have controverted it by proving circumstances which take the case out of the purview of the rule and which negative concealment and fraud. There is an important circumstance not now disputed that the plaintiff company did receive commission from the defendant company for part of the half year ending on 31st March 1922 and for the half year ending on 30th September 1922. Unless it was for work done by the plaintiff company through the sub-agency of the three directors of the defendant company, it is not conceivable and it has not been explained why such payments were made. It has been shown that the three directors professed to work for the plaintiff company openly and in the office of the defendant company. There is no suggestion that the sub-agency was in contemplation at the time the agreement of 1st February 1922 was negotiated and completed. The power of attorney authorising the three directors to work for the plaintiff came into existence later though the interval is not very long. The defendant company might well have defended the action on the line attempted by its learned counsel before this Court and might have presented a formidable case but for reasons of their own they deliberately refrained from alleging fraud and collusion against their directors. Though Mr. Silver was personally free from the taint of fraud he could not have in that case felt as easy as he did in the witness-box. He represented the plaintiff company on the Board of the defendant company. The commission was paid to the plaintiff company on two occasions to his certain knowledge. Be that as it may, we are clearly of opinion that this belated case should not be entertained and that the defence succeeds or fails according as we find that the plaintiff company failed to enter on its duties or did function though not very satisfactorily and the defendant company would have been justified in terminating the contract of agency much earlier than they did. Our view is that the evidence established the latter case and that the plaintiff company are in consequence entitled to the first relief. The amount of money to which they are entitled will be found in the concluding part of the judgment.

The plaintiff's case for reliefs 2 to 6 may be disposed of together. They have reference to the proceedings of two meetings : (1) of the directors held on 29th March 1923, and (2) of the share-holders held on 7th April 1923 at which resolutions were passed terminating the managing agency of the plaintiff company and their consequent removal. The broad question is whether the plaintiff's company were effectively removed from their office. The determination of it depends in a great measure on the further question whether the defendant company were entitled to terminate the agreement dated 1st February 1923 before the expiry of twenty years stipulated for therein. In our opinion they were so entitled. It has already been stated earlier in this judgment that the great incentive for the defendant company to obtain the services of the plaintiff company as managing agents was the world-wide reputation which Boultons had at that time, deservedly or otherwise and that the defendant company considered the association of the name of Boultons with their own as a great commercial asset likely to enhance their prestige in commercial circles and had great expectations regarding the sale of their production in foreign markets and in India through the influence of Boultons. These expectations had been partly, at any rate, created or encouraged by the Boultons, a fact which might well have been relied on by the defendant company if a case of fraud or misrepresentation had been pleaded by them.

A glance at the balance-sheet of the plaintiff company shows that it lived on the reputation of Boultons but without any real capital. Of the subscribed capital of 42 lacs, 40 lacs represented its goodwill and shares of that value were held by Boulton Bros. and the remaining two lacs was held by the Alliance Bank of Simla as security and does not seem to represent any real value: see Treeby, pp. 15-16, Book II and D'Souza, pp. 26-27. The plaintiff's own witnesses Treeby and D'Souza tell us that the 'grand reputation' of Boultons had so far suffered that by March 1923 'their name carried absolutely no weight.' Mr. Silver strongly felt, and for very good reasons, that harm was being caused to the defendants by their connexion with the plaintiff company who had besides utterly failed 'to do anything constructive for the defendant company.' He made efforts to-

wards the end of December 1922 to elicit information from the plaintiff's company regarding their balance-sheet but the latter persistently withheld it. We have now seen it and the reason for its concealment is obvious. At the meeting of directors held on 29th January 1923, Mr. R. G. H. Boulton could not help admitting that the name of Boultons was odious in financial circles and that

"under the present conditions the association of the name of Boulton Bros. with the affairs of the New Victoria Mills Company could not be advantageous to the company although he hoped that at some future date he would be in a position to show that their name might be useful to the company."

The plaintiff's own witness Treeby gives a list of companies which the Boultons floated and which went in liquidation in 1922 or thereabout. He considered the credit of Boulton Brothers was very bad in February 1922 and would not

"as a shareholder of Victoria Mills agree to give the managing agency to them."

In this state of things the defendant company was clearly within its rights to terminate the agreement of 1st February 1922, regardless of the term of 20 years entered therein in consideration of the advantages then forthcoming but which were quite out of question in March 1923. A great deal of case-law was cited in course of the arguments but we content ourselves by referring to the dictum of Lord Esher, M. R. in *Pearce* v. *Foster* (5), that

"the relation of master and servant implies necessarily that the servant shall be in a position to perform his duty fully and faithfully. . . . . what circumstances will put a servant into the position of not being able to perform in a due manner, it is impossible to enumerate. Innumerable circumstances have actually occurred which fall within that proposition, and innumerable other circumstances, which never have yet occurred, will occur which also will fall within that proposition."

Lindley, L. J., who delivered a separate judgment in the same case indicated that though a servant may have been employed for a fixed number of years he can be dismissed during the term if his connexion with the employer raises a reasonable apprehension of injury to his reputation. We think that moral delinquency in the servant is not the only justification. Whatever may be the cause which so alters the position of the servant as to render his retention harmful to the master would justify his removal within the term agreed on under different circumstances. For obvious reasons a contract of service of this kind cannot be specifically enforced: see S. 21 (b), Specific Rel. Act. As regards damages S. 205, Contract Act, provides that

"where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause."

It seems to us that the Indian statute law on the subject is very elastic and damages for termination of agency before expiry of the agreed term cannot be recovered as a matter of course. It is only where such termination is without 'sufficient cause' that damages can be recovered. The circumstances of each case will determine the question whether there was sufficient cause. It will largely depend upon the nature of the business to which the agency relates, the personal qualifications which existed when the contract was entered into, the altered conditions which since came into existence and their probable effect on the interests of the employer. No hard and fast rule can be laid down for any class of cases. We feel no difficulty in arriving at the conclusion that in the circumstances which happened the defendant company was amply justified in severing their connexion with the plaintiff company, who are not entitled to any damages on that account.

It has been contended that the resolutions passed at the meetings of directors and share-holders respectively on 29th March 1923, and 7th April 1923, removing the plaintiff company from the office of managing agents were ultra vires in consequence of the aforesaid meetings being irregular. The irregularity complained of is that no notice of the meeting of the directors was given to Mr. D'Souza who was an alternate director for Mr. W. W. Boulton and as such entitled to sit and vote at the meetings. Art. 138 of the Memorandum of Association of the defendant company does provide that

"a director who is absent from India may appoint any member of the company or any other person to be an alternate director during his absence from India and such appointment shall have effect and such appointee while he holds office shall be entitled to notice of meetings of the directors and to attend and vote thereat accordingly ; ..... any appointment

(5) [1886] 17 Q.B.D. 536=55 L.J.Q.B. 306=34 W.R. 602=51 J.P. 213=54 L.T. 664.

and removal under this article shall be effected by an instrument in writing under the hand of the appointer."

Article 139 provides :

"that an alternate director shall in the absence of a direction to the contrary in the instrument appointing him be entitled to receive notice of and to vote at general meetings of the company on behalf of his appointer ....."

It is common ground that Mr. W. W. Boulton, who was a director of the defendant company, was in England in February 1923 and thereafter. His brother Mr. R. G. H. Boulton used to represent him as an alternate director for him at the meetings of the defendant company. He left India some time in February 1923. Mr. D'Souza is said to have been appointed an alternate director by a letter dated 19th February 1923 addressed by Mr. W. W. Boulton to the "Chairman New Victoria Mills Co. Ltd., Cawnpore, India," but forwarded by the plaintiff company to whom it had been apparently sent in the first instance. Its material portion is as follows :

"In the absence of Mr. R. G. H. Boulton, my present alternate on the Board, I desire that Mr. C. M. D'Souza be appointed my alternate in his place and shall be glad to have your confirmation in due course."

This letter was acknowledged on 21st February 1923 by Mr. A. A. Black for the defendant company who intimated to the plaintiff company that its covering letter with that of Mr. W. W. Boulton would be placed before the Board of Directors at their next meeting which happened to be one held on 29th March 1923 when it was resolved that the plaintiff company be removed from office. The material part of the resolution runs thus :

"(1) Resolved that it is expedient in the interests of the company that Messrs. Boulton Brothers and Company (India) Ltd. be removed from the office of the Managing Agents of the company and that they be not permitted hereafter to act as such agents."

It is noteworthy that the meeting was attended by Messrs. A. H. Silver (Chairman), B. West, A. West and A. A. Black. The plaintiff company acted as managing agents through the three persons last named who were thus parties to the decision that the plaintiff company "be not permitted hereafter to act as.....agents." It is not disputed that the plaintiff company in fact ceased to act as managing agents.

At the same meeting the letter of Mr. W. W. Boulton intimating his desire that Mr. D'Souza be appointed as alternate director was considered and the following resolution was passed :

"Resolved that the appointment be confirmed but it is to be noted that should Mr. W. W. Boulton not return to India by 1st April 1923 or obtain special leave of absence, his appointment as director will be vacated under Art. 106(d) of the Company's Articles of Association."

Article 106 (d) referred to provides that the office of director shall ipso facto be vacated if (inter alia) he be absent from the meetings of the directors during a period of three months without special leave of absence from the directors. We would point out in passing that this rule applies only to cases where the director in question did not attend in person or through his alternate and could not apply to Mr. W. W. Boulton who was represented at previous meetings by Mr. R. G. H. Boulton. The directors, however, took a different view and declared at their meeting of 6th April 1923 that Mr. W. W. Boulton ceased to be a director.

The general meeting of the shareholders came off on 7th April 1923 and the removal of the plaintiff company was confirmed.

By his letter of protest dated 10th April 1923 Mr. D'Souza pointed out that the removal of Mr. W. W. Boulton from his office as director was not justified, that he (Mr. D'Souza) was entitled to receive notices convening the meeting held subsequent to the date of the letter of Mr. W. W. Boulton appointing him an alternate director and claimed to be entitled to receive notices in future in his capacity as alternate director. The legal adviser of the defendant company traversed these allegations by his letter dated 13th April 1923.

On these facts several technical objections have been taken on behalf of the plaintiff to the regularity of the proceedings which purported to terminate the managing agency of the plaintiff company. We think that these objections, even if technically well-founded, are only of academic interest in view of our finding already arrived at, viz., that the defendant company were justified in putting an end to the agreement and did in point of fact remove the plaintiff company from their position as managing

S. N. Das
Advocate High Court

agents. The plaintiff company would not have been entitled to any damages if no irregularity had occurred. They have not suffered any loss due solely to the irregularities complained of. It is not pretended that if Mr. D'Souza had been duly present the resolutions would not have been passed by this majority, and his dissentient vote would have been of any consequence. The dismissal, if otherwise justified, cannot be characterized as wrongful because the means adopted to bring about that perfectly legitimate end were not warranted by the rules of procedure applicable to the case unless it is shown that the non-observance of those rules itself resulted in harm to the party dismissed. This being our view, we are relieved of the necessity of discussing the case-law placed before us by the learned counsel on both sides. We would, however, briefly indicate our opinion on the various points raised in arguments in this connexion. We are disposed to agree with the plaintiff's learned counsel that D'Souza's appointment as alternate director took effect from the date of the letter appointing him, viz., 19th February 1923, that he was entitled to receive notice of the meetings held on 29th March 1923, 6th April 1923 and 7th April 1923. But the plaintiff company have merely prayed for the declaratory relief :

" that the plaintiff company are and continue to be the managing agents of the defendant company on terms and conditions embodied in the agreement, dated 1st February 1922. "

They do not in fact " continue to be the managing agents " having admittedly been prevented from acting as such. If it be declared that they are entitled to act as such, the relief will be futile inasmuch as they do not claim the further and consequential relief of injunction that the defendant company be restrained from interfering with the discharge of their duties as managing agents. We think the proviso to S. 42, Specific Relief Act is applicable to the case and no declaration can be granted to the plaintiff company assuming the irregularities in question make the resolutions in question ultra vires.

Another impediment to the plaintiffs being awarded this relief is that the subsequent conduct of the defendant company as a corporate body is not in doubt. They have carried out the dismissal of the plaintiff company in practice and have defended this action by strenuously maintaining such dismissal.

The result of the findings arrived at by us is that the plaintiff company are not entitled to reliefs 2 to 6. They are entitled to the first relief in part. They have claimed thereunder the sum of Rs. 34,666-7 details of which are given in para. 26 of the plaint. A sum of Rs. 15,000 is claimed as the minimum amount of commission for the half year ending 31st March 1923 in terms of the agreement dated 1st February 1922. To this they are entitled on the view of the case we have taken.

They claim a sum of Rs. 14,000 as office allowance stipulated for in the agreement at the rate of Rs. 1,000 p. m. We are of opinion that they are not entitled to any part of it. They did not establish an office for the defendant company. It is difficult to understand the almost extravagant remuneration which the agreement allows to the plaintiff for merely maintaining an office for the defendant company who are to pay for the establishment over and above the 1,000 a month to the plaintiff company for vague and undefined supervision. The plaintiff company did not establish such an office. They were not paid the allowance for part of the 1st or for the 2nd half year. The allowance was payable every month. It was not till 23rd December 1922, that the plaintiff thought of claiming it by their letter of that date. The directors were greatly surprised at this demand and recorded a minute on 5th January 1923, in these words :

" The (?) expressed its surprise at the receipt of a letter, dated 23rd December 1922, from Messrs. Boulton Bros. and Co., (India) Ltd., claiming a sum of rupees one thousand per month as office allowance as managing agents and asking for a cheque for the amount accrued to date. This matter was fully discussed with Mr. W. W. Boulton, when the agreement was being considered and it was then verbally arranged that although the clause would not be deleted from the agreement it would not have effect so long as the company's operations continued to be conducted by the existing management and also so long as the existing offices of the company proved adequate for the business of the company. "

On receipt of this reply the plaintiff company promised by their letter dated 26th January 1926, to refer to Mr. W. W. Boulton on the subject and to write to the defendant company on hearing from him. The demand was not renewed and we do not know whether

Mr. W. W. Boulton was written to and whether he confirmed the allegation of the directors of the defendant company. The silence on the part of the plaintiff till the institution of the suit points to abandonment of their claim or what comes to the same thing, to a tacit admission of what the directors had asserted. It has been argued before us that the plaintiff company did maintain an office at Alipur Road, Delhi, which served as a virtual compliance with the agreement to establish an office. We have no hesitation in rejecting this contention. The Delhi office was the registered office of the plaintiff company who paid for its maintenance and establishment. It could not be an office for the transaction of the business of the defendant company who would have been called upon to bear the expenses incidental to it if it had been one in terms of the agreement. The plaintiff's claim under this head must therefore fail.

The plaintiff also claimed a sum of Rs. 2,719-7 entered in the books of the defendant company to the credit of the plaintiff in respect of certain subsidiary charges. The learned counsel for the respondent conceded in course of his argument that the plaintiff company are entitled to receive this sum. The learned Subordinate Judge disallowed this amount on the ground that the plaintiff company were overpaid in the shape of commission to which they were not entitled. We are unable to accept this reasoning. Moreover we have held that the plaintiff company were under the circumstances rightly paid. This sum must be awarded to the plaintiff company.

The plaintiff company have claimed interest at the rate of 6 per cent per annum on the sums due to them. Although the manner in which they acted in relation to the agreement of 1st February 1923, was unfair they cannot be denied reasonable interest by way of damages on sums which the directors of the defendant company did not pay but ought to have paid as a necessary corollary of their conduct in accepting such services as the plaintiff company chose to render under the agreement. There was no justification for detaining the sum of Rs. 2,719-7 admittedly due to the plaintiff apart from commission. We hold, therefore, that the plaintiff company should be awarded interest at the low rate claimed by them.

The result of our findings is that this appeal is allowed in part and a decree is passed in favour of the plaintiff for a sum of Rs. 17,719-7 (15000 + 2,719-7) with interest at the rate of 6 per cent per annum from 1st April 1923, to date of realization. The decree of the lower Court is upheld as regards the rest of the plaintiff's claim. Parties shall receive and pay costs of both Courts in proportion to their success and failure.

S.N./R.K. *Appeal allowed in part.*

A. I. R. 1929 Allahabad 99

DALAL, J.

Chunni Lal—Applicant.

v.

Emperor—Opposite Party.

Civil Revn. of 1928, Decided on 3rd December 1928, from an order of Munsif, Saharanpur, D/- 16th July 1928.

Civil P. C., O. 16, R. 12—Witness or party present in Court—Court directing him to do certain act—Court need not go through procedure of issuing summons, proclamation or attachment of property to proceed under R. 12.

When the witness or party is present, and the Court directs him by word of mouth to produce a document, and there cannot be the slightest mistake as to the witness or the party having received information of such direction, it will be merely making a travesty of procedure to insist upon the Court issuing a summons to a witness who is present followed by a proclamation to the witness who is still present, and then attaching his property to make the witness who is present before the Court understand the direction. On failure by witness to produce the document he can be fined without going through the cumbrous procedure. [P 100 C 1]

Akhtar Hussain Khan—for Applicant.

Judgment.—There is no substance in this application. Learned counsel expects this Court to act as an automaton, and not like a person blessed with understanding, however small it may be. The question relates to the application of R. 12, O. 16. A witness appeared before Court and was told to produce a document. He did not produce the document, and the excuse put forward by him in person was rejected by the Court. The Court thereupon proceeded to fine him Learned counsel desires me to hold that according to the terms of the Code of Civil Procedure, the Court ought to have proceeded in this way. The Court ought to have told the witness :

"Go out of the room, wait somewhere outside, so that I may be able to issue summons to you, and, after you disobey the summons, I may issue proclamation and attach your property. Then only can I take advantage of the provisions of R. 12."

This is bad sense, and I am certain that it cannot be good law. All the previous directions of the Code to issue summons, then a proclamation, and then an order of attachment are all given to make sure that the person who was directed to produce a document had information of the direction. It may be possible that summons may not have reached him, or service may have been tampered with, or the proclamation may not have reached his ears, but when his property is attached he cannot possibly fail to learn what is expected of him by the Court. That is the reason why all these proceedings are directed in the case of an absent witness or a party from whom a Court has to obtain a document. When the witness or party is present, and the Court directs him by word of mouth to do a certain act, and there cannot be the slightest mistake as to the witness or the party having received information of such direction, it will be merely making a travesty of procedure to insist upon the Court issuing a summons to a witness who is present followed by a proclamation to the witness who is still present, and then attaching his property to make the witness who is present before the Court understand that a document is wanted from him.

The procedure of the trial Court was not faulty, and I dismiss this application.

S.N./R.K. *Application dismissed.*

** A. I. R. 1929 Allahabad 100

MUKERJI, J.

Shiam Lal and *another*—Defendants—Appellants.

v.

Mt. Hukum Kuar and *others*—Plaintiffs—Respondents.

Second Appeal No. 1643 of 1926, Decided on 26th November 1928, from decree of Sub-Judge, Agra, D/- 14th June 1926.

**** Limitation Act, Art. 148—Redemption decree in favour of all mortgagors—Only some paying entire mortgage money—Paying mortgagors recorded in revenue papers proprietors as to portion and mortgagees as to rest—Others suing them within sixty years from original mortgage for recovery on payment of their shares—Suit is not barred by limitation—Mortgagors who paid on behalf of others became mortgagees while others remained as mortgagors—Transfer of Property. Act, S. 95.**

A redemption decree was obtained by all the mortgagors, but the redemption money was paid by only some of them. The mortgagors making the payment were recorded as mortgagees in revenue records in respect of a portion of the mortgaged property and in respect of the remaining as proprietors. Representatives of the mortgagors not making the deposit sued for recovery of their shares on proportionate payment within sixty years from the original mortgage.

Held : that the position of those mortgagors who did not pay the mortgage money remained that of mortgagors, while that of those who paid the share of others became of mortgagees and the sixty years' rule was not cut down by the mere fact that some of the mortgagors had effected a redemption. The suit, therefore, was not barred by limitation : 14 *All.* 1 (*F B.*), *Rel. on.* [P 101 C 1]

Kedar Nath for *N. P. Asthana*—for Appellants.

B. Malik—for Respondents.

Judgment.—Two points have been argued in this appeal. One is one of limitation and the other as to the nature of possession held by the defendant-appellants. The fourth ground of appeal could not be explained to me and it must therefore be taken that it was abandoned. The admitted facts are very briefly these : Certain persons, who occupied the position of co-mortgagors, and who were seven in number, sought the redemption of an ancient mortgage, made sometime in 1868. The suit succeeded and it was ordered that on payment of the mortgage money, the then plaintiffs would be put in possession of the property and in case of their failure to pay, the suit would stand dismissed. It so happened that only four out of the seven plaintiffs deposited the entire mortgage-money. The result was that those four plaintiffs, who deposited the mortgage-money, came into possession of the entire property mortgaged in 1868. It is admitted before me, with respect to a portion of the property redeemed, the persons who had deposited the mortgage-money, were recorded as proprietors and in respect of the remaining portions they were recorded, in the revenue papers, as mortgagees.

The representatives of some of the original plaintiffs who did not pay in the mortgage-money under the terms of the decree, raised the present suit, for recovery of their share on proportionate payment, from persons who now hold under

those plaintiffs of the earlier litigation who had paid up the mortgage-money.

The suit has succeeded in both the Courts and now in second appeal the two points already mentioned have been raised. On the point of limitation, it is clear that on the authority of this Court, the limitation starts from the date of the mortgage and 60 years' rule spplies. The mortgage is usufructuary and the fact that some co-mortgagors have redeemed does not make any difference to the original mortgage. The 60 years' rule is not cut down by the mere fact that some of the mortgagors have effected a redemption : vide *Ashfaq Ahmad* v. *Wazir Ali* (1).

As to the second point, on the statement of facts made above, the position of the plaintiffs in the former litigation, who were unable to pay the mortgage-money, remained that of mortgagors, while the position of those plaintiffs who had paid up, became that of mortgagees, so far as the shares of those plaintiffs' who had failed to pay, were concerned. There is no question of adverse possession in the circumstances. Further, the rule of limitation being 60 years and the present suit being within 60 years from the date of the mortgage, there is no question of limitation. The appeal fails and is hereby dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1891] 14 All. 1=(1891) A.W.N. 211 (F.B.).

A. I. R. 1929 Allahabad 101

DALAL, J.

Gaya Prasad—Defendant—Appellant.

v.

Ram Sarup—Plaintiff—Respondent.

Second Appeal No. 436 of 1928, Decided on 10th May 1928, from decree of Dist. Judge, Bareilly, D/- 26th January 1928.

(a) Limitation Act, S. 5—Court must give reasons for rejecting appeal.

Court ought to give detailed reasons while rejecting an appeal under S. 5, for an appealable decree follows such a judgment.

[P 101 C 2]

(b) Limitation Act, S. 14—S. 14 does not apply to proceedings in totally different suits.

Time spent in carrying out a wholly independent litigation cannot be excluded from the time given to an appellant to appeal.

[P 101 C 2]

A. Sanyal—for Appellant.

Judgment.—The learned Judge of the lower appellate Court ought to have detailed reasons for which he refused to admit an appeal under S. 5, Limitation Act, and not put this Court to the trouble of finding out the facts and adjudicating upon them. The word " rejected " does not by any indulgence amount to a judgment. An appealable decree follows such a judgment. The facts are these. There was a suit for accounts against the defendant (appellant here), and a preliminary decree was passed for taking accounts against him. This decree was passed ex parte and the defendant went on taking proceedings to get the ex-parte decree set aside by reason of its being ex-parte. He did not appeal at the time on the merits under S. 96, Civil P. C. The proceedings taken by him came to an end on 19th May 1926. He submitted to the ex-parte preliminary decree, prosecuted the matter before the Subordinate Judge up to the preparation of a final decree and then appealed against the final decree to the Court of the District Judge. So as for proceedings in the suit for accounts, whatever litigation the defendant-appellant undertook as against the preliminary decree ended on 19th May 1926. It so happened that the defendant had another litigation arising out of a suit No. 177, of 1922. That suit was wholly independent of the snit for accounts. He had litigation in this Court in a first appeal subsequent to losing that suit. In this Court he found that the preliminary decree which was passed ex parte against him stood in his way and was taken as res judicata between him and the party opposed to him. Thereupon he appealed to the District Judge under S. 96 against the preliminary decree to which he had submitted after 19th May 1926. The litigation subsequent to 19th May 1926, related to a wholly different proceeding not founded upon the same cause of action as the suit in which the preliminary decree was passed.

Litigation subsequent to 19th May 1926, therefore, cannot be taken into account, and the time spent in carrying on a wholly independent litigation cannot be excluded from the time given to the appellant to appeal. Provisions of S. 14, Lim. Act, do not apply to proceedings subsequent to 19th May 1926, in a totally different suit. The appeal, even taking into account the proceedings up to 19th

May 1926, would be time barred. This second appeal is, therefore, dismissed.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 102

SULAIMAN AND KENDALL, JJ.

Darshan Singh and *others*—Plaintiffs—Appellants.

v.

Wali Khan and *others*—Defendants—Respondents.

First Appeal No. 90 of 1925, Decided on 19th November 1928, from decree of Sub-Judge, Pilibhit, D/- 19th November 1924.

(a) Hindu Law — Will — Property bequeathed to widows and subsequently to *R*—*R* to be owner after testator's death—After *R*, *R's* son to be owner—But in case *R* died without son, *D* was to get—Widows did not get Hindu widows' estate but only life-interest—*R's* son did not get vested interest in *R's* lifetime but was to succeed only after *R's* death—Bequests in favour of *R's* unborn son and *D* were not successive but alternate—Will—Construction.

A person bequeathed his property to his widows and after the death of the surviving widow to *R*, declaring that *R* would be the owner after his death. He then provided that *R's* son would be the owner after *R*, if *R* would die without leaving any son, *D* would be the owner. Before the death of the surviving widow *R* died without leaving a son.

Held: that the widows took not a Hindu widow's interest but only a life-interest under the will. [P 103 C 1]

Held further: that *R's* son was not intended to take any vested interest with his birth in the lifetime of *R*, but was to succeed only after *R's* death. Bequest in favour of *D*, therefore, was not successive but alternate to that in favour of *R's* son. [P 103 C 2]

*** (b) Hindu Law—Will—Bequest made not successive but alternate to that in favour of an unborn person is not void.**

Although a bequest in favour of an unborn person, and all those that are to follow such bequest are void, yet where a bequest is intended to be not successive but only alternate to that in favour of an unborn person in case the unborn person does not exist when the previous interest is exhausted, the bequest is not void: 9 *Beng.L.R.* 377 (*P.C.*), *Dist.*; 16 *Bom.* 492 and 15 *Cal.* 409, *Rel. on.* [P 104 C 1]

(c) Succession Act (1925), S. 120—Death of living person not being uncertain, interest to be obtained after one's death is vested interest.

If a bequest is made in favour of one person and after his death the property is directed to go to another, the second legatee gets a vested interest in the estate, because the death of a living person is not an uncertain contingency. [P 104 C 1, 2]

Peary Lal Banerji, *Uma Shankar Bajpai* and *R. C. Ghatak*—for Appellants.

Iqbal Ahmad and *Kailas Nath Katju*—for Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit for recovery of possession. The estate originally belonged to one Rai Singh who died in the year 1876. Some time before his death he had made a will, the contents of which are to be found in an application made by him on 7th October 1876, to the revenue Court. Under that will he left his moveable and immovable properties including village Mainakot which is in dispute in this appeal to his widows and after the death of the surviving widow to one Ram Lal whom he had brought up as a son. He declared that Ram Lal would be the owner of the property after his death. He then went on to provide that he who is Ram Lal's son would be the owner of the estate after Ram Lal; and if there be no son to Ram Lal, Dilsukh Singh, Hori Lal, Lachhman Singh, Lal Singh and the widow of Dilsukh Singh would be the heirs and owners of the estate. Ram Lal appears to have died about the years 1897-1898 without there having been any son born to him. By that time four of the five ultimate legatees were dead. But Hori Singh survived Ram Lal and died on 8th March 1907. Mt. Tulsha Kunwar, one of the widows of Rai Singh, had died much earlier in 1890, but the other widow Mt. Sunder Kunwar remained alive till 29th May 1917. All these facts are now settled on the findings returned by the Court below on the issues sent down by us. These facts are not now disputed before us.

The contesting defendants' ancestor had purchased the property in dispute from Dilsukh Singh and the other legatees (excluding Ram Lal) in the year 1877 and they have remained in possession of the property ever since then.

The plaintiffs' case was that the bequest never came into effect and on the death of the last surviving widow Mt. Sunder Kunwar in the year 1917, the plaintiffs as the next reversioners of Rai Singh succeeded to the estate and are entitled to its possession. The fact that the plaintiffs would be the next reversioners of Rai Singh has never been disputed. The contesting defendants pleaded that the bequest did not altogether fail

and that the plaintiffs had no locus standi to sue.

The Court below has dismissed the suit; hence this appeal. The application containing the will is printed on p. 23 of the paper book. As there was considerable dispute as regards the true interpretation and we found that parts of it were not literally translated we have ordered the translation department of the High Court to re-translate it and a corrected translation has been placed before us and perused by the counsel for the parties. The terms of it have been set forth briefly by us in the earlier portion of our judgment.

There can be no doubt that if the interest of Dilsukh and others continued to be a contingent interest till the death of Mt. Sunder Kunwar the contesting defendants acquired no interest in the property at all and the suit must succeed. On the other hand, if at any time before the death of Mt. Sunder Kunwar, the survivors of Dilsukh and others or their heirs acquired a vested interest which could be inherited by their heirs, the plaintiffs must fail. The learned advocate for the plaintiffs has first contended that the testator intended to give a Hindu widow's estate to his two widows as his legal heirs and has therefore argued that none of the subsequent bequests can amount to a vested interest following upon a Hindu widow's estate. We are unable to concede that a Hindu widow's estate was acquired by the two widows. The testator clearly intended that after the death of the survivor of the two widows the estate would not go to his heir-at-law but should go to Ram Lal. It therefore follows that the estate given to the widows amounted to life-interests and no more. There is not even any reference in the will to a power of alienation for purposes of legal necessity.

Holding that the estate taken by the widows was a limited estate there can be no doubt that Ram Lal was intended to take the estate after their deaths. Counsel for the parties are not agreed as to the nature of the estate which was given to Ram Lal. On behalf of the plaintiffs it was contended that Ram Lal was given a life-estate and his son was given a separate and independent vested interest in the property which would come into existence as soon as the son was born, even though that be in the lifetime of Ram Lal. On behalf of the defendants it is contended that the reference to the son of Ram Lal was merely intended to indicate that a heritable estate was conferred upon Ram Lal and that there was no bequest of a separate interest to Ram Lal's son.

Looking to the will we are unable to hold that it was the testator's intention that Ram Lal's son would have an interest in the property from the very time of his birth and have a vested interest in it which he could transfer even though his father Ram Lal was alive. The plain meaning of the provision of the will is that it was after Ram Lal's death that his son would succeed to the estate. If, however, there was no son born to Ram Lal who could succeed, the property was to go to Dilsukh and others after Ram Lal's death. Thus, the bequests in favour of Ram Lal's son and in favour of Dilsukh and others were both to take effect at the time of the death of Ram Lal and not before. It is impossible to say that the bequest in favour of Dilsukh and others followed the bequest in favour of Ram Lal's son in the sense that it was to take effect after the bequest in favour of Ram Lal's son had been exhausted. It was really an alternative bequest and is separable from the bequest in favour of Ram Lal's son. Both would not come into effect simultaneously and one would not come into existence if the other did.

No doubt it is settled by their Lordships of the Privy Council in the famous case of *Jotindra Mohan Tagore* v. *Ganendra Mohan Tagore* (1), that under the Hindu law a bequest in favour of an unborn person is void in law. The remarks of their Lordships at p. 410 in the judgment shows that bequests over, which in the scheme of the will are intended to follow the creation of the prior estate of inheritance, must fall therewith. It is obvious that this must be so, for, if a prior bequest is void in the eye of the law, subsequent bequests cannot be given effect to as that would be entirely contrary to the intention of the testator who intended the subsequent bequests to come into effect only if the prior bequest did not come into existence. On the other hand, if we uphold the bequest in favour of Dilsukh and others in the present case we are not in any way acting contrary to the intention of the testator because he

(1) 9 Beng.L.R. 377=18 W.R. 359=I.A. Sup. Vol. 47=3 Sar. 82 (P.C.).

himself intended that if there be no son born to Ram Lal, the property would go to Dilsukh and others. This distinction was drawn by the learned Judges of the Bombay High Court in the case of *Javerbai* v. *Kablibai* (2). The case on facts is distinguishable, but it has some bearing on the present case because there the third bequest in favour of the persons nominated by the trustees was to come into effect only if the second set of legatees, viz., the male issues of the testator were not alive at the time of the testator's death. The Bombay High Court held that the two were alternative gifts and one did not follow the creation of the other. A somewhat similar view was expressed by the Calcutta High Court in the case of *Rai Kishori Dassi* v. *Dabendra Nath Sircar* (3), whose conclusion was accepted by their Lordships of the Privy Council. The learned Judges of the Calcutta High Court had on p. 416 remarked that in the case before them there were two intentions wholly separable, the second not depending upon the first and that it was possible to give effect to one intention without entering into the question of the other.

It therefore seems to us that simply because no bequest in the eye of the law came into effect in favour of Ram Lal's son, and such a bequest from the very beginning was bad, because he was unborn, it does not follow that the bequest in favour of Dilsukh and others was also void ab initio.

So long as Ram Lal was alive there was the possibility of a son being born to him and, therefore, the interest taken by Dilsukh and others was merely a contingent interest depending on an uncertain event whether a son would or would not be born to Ram Lal. As soon, however, as Ram Lal died without a son it became absolutely certain that there would be no prior bequest coming into effect which would take precedence over the interest in favour of Dilsukh and others. The contingent interest of Dilsukh and others was therefore transformed into a vested interest although one of the widows was still alive.

The learned advocate for the appellants has not disputed the point that if a bequest is made in favour of one person and after his death the property is directed to go to another, the second legatee gets a vested interest in the estate. The death of a living person is not an uncertain contingency. Although the date of his death cannot be known beforehand, the event itself is absolutely certain. Therefore the interest taken by such a legatee is not a contingent one, but he has a vested interest in the property bequeathed to him.

The Indian Succession Act does not apply to the present case where the will was made at a time when it was not applicable to Hindus. But the illustrations 3 and 4 to S. 120 illustrate the principle which undoubtedly holds good. If an estate is bequeathed to *A* for life and after his death to *B* if *B* be then alive, but if *B* be not living to *C*, then *B* and *C* both take contingent interest so long as *A* is alive. But as soon as *B* or *C* dies and it becomes certain that the survivor only can succeed after *A's* death, he has a vested right in the estate, although *A* is still alive.

We are, therefore, clearly of opinion that after 1898 when Ram Lal was dead and Hori Singh, one of the five last named legatees, survived him, the latter acquired a vested interest which was capable of being transferred by him and inherited by his heirs. This vested interest remained in Hori Singh and passed on to his legal representatives whoever they may be although Mt. Sunder Kunwar was still alive. On the death of Mt. Sunder Kunwar there has been no reversion of this estate to the heirs of Rai Singh. The plaintiffs accordingly have no locus standi to maintain the suit.

It is unnecessary for us to consider the effect of the transfer of 1877 having been made by Dilsukh and others at a time when they had a mere contingent interest.

The appeal is accordingly dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(2) [1892] 16 Bom. 402.
(3) [1888] 15 Cal. 409=15 I.A. 37 (P.C.).

**A. I. R. 1929 Allahabad 105

Full Bench

DALAL, SEN AND KING, J.J.

Haji Anwar Khan—Petitioner.

v.

Mohammad Khan and *others*—Opposite Parties.

Second Appeal No. 4 of 1928, Decided on 7th January 1929, from order of Dist. Judge, Agra, D/- 29th October 1927.

** **Provincial Insolvency Act (1920) S. 4** —*Dalal and King JJ.*—**S. 4 empowers the Court to deal with not only all questions of title and priority but all questions of whatever nature and the decision is a bar under S. 11, Civil P.C.**-*Sen, J.*-**Title under transfer beyond two years cannot be enquired into—A paper transaction can be gone into though fraudulent transfer cannot be enquired into.**

Per Dalal and *King, JJ.*—If the matter is once decided even as against a stranger by the insolvency Court the jurisdiction of the civil Court would be barred under S. 11, Civil P. C.: Sulaiman, J. in *A.I.R.* 1926 *All.* 470 and *A.I R.* 1924 *All.* 40, *Appr.* ; *A. I. R.* 1927 *All.* 66, *Foll.*; 37 *All.* 65, *Appr.* ; *A. I. R.* 1921 *Mad.* 204. *Appr.* ; *A. I. R.* 1926 *Mad.* 363, *Foll.*

[P 106 C 1]

Section 4 deals with jurisdiction and this jurisdiction will be circumscribed only by such subsequent sections as deal with the jurisdiction of the Court. Ss. 53 and 54 do not deal with the jurisdiction of the insolvency Court, but only lay down rules as to the manner in which evidence should be considered in certain cases arising in that Court. Those sections, therefore, do not control the provisions of S. 4 though S. 56 does. Insolvency Court can try the issue whether the insolvent is entitled to the property or not after proper opportunity is given to the other side to plead to the application. [P 107 C 1,2]

Per Sen, J.—The Court of insolvency is a creature of statute. It is a special tribunal having jurisdiction over a limited range of cases within such limits as have been imposed by the statute to which it owes its existence. Unless the Insolvency Act expressly or by necessary implication (1) took away the powers of the ordinary civil Courts to adjudicate upon the validity or otherwise of certain transfers which are sought to be impugned, either upon the ground of fraud or on the ground of want of consideration etc., and (2) invested the insolvency Court with the trial of such matters the jurisdiction of the civil Courts is not affected or impaired: *Maxwell's Interpretation of Statutes, 6th Edition* 1920, *P.* 318, *Foll.*

[P 108 C 1,2]

Sections 53 and 54 do not merely lay down a rule of substantive law or a rule of evidence favouring the Official Receiver, but confer a jurisdiction upon the Court of insolvency with reference to only such transfers as are mentioned in those sections and upon the fulfilment of the conditions contained therein, without which the receiver has no right to challenge the transfers nor the Court has power to annul the same: 23 *I. C.* 924, *Foll.* 37 *All.* 65, *not Foll.*: 15 *A. L. J.* 661, *Disapproved.* 41 *All.* 378, *Expl.*, and *Appr.* ; *A. I. R.* 1922 *All.* 443, *Appr.* 22 *C. W. N.* 704, *Foll.*: *Sulaiman, J. in A. I. R.* 1924 *All.* 40, *not Foll.*: *Lindsay J. in A.I.R.* 1924 *All.* 40. *Foll.*: *Mukerji, J. in A. I. R.* 1926 *All.* 470, *Foll.*: *A. I. R.* 1927 *All.* 66, *not Foll.* ; *A.I.R.* 1922 *All.* 196 and *A. I.R.* 1921 *Mad.* 204, *Expl.* and *not Foll.*: *Ellis* v. *Silver*, (1873) 8 *Ch.* 83, *Foll.*

[P 108 C 2, P 109 C 1]

An insolvency Court cannot try a question of title relating to a transfer which has taken place more than two years before the order of adjudication having regard to the provisions of S. 53, Insolvency Act. Where the transfer was intended not to be operative from the beginning and the insolvent has remained in possession of the property, the receiver may apply for its annulment, but where the transfer was executed by a proper instrument and duly registered and was intended to put the property beyond the reach of the creditors and a third party is claiming under the transfer, such a transaction cannot be treated as a mere paper transaction. In the latter case, S. 53. Insolvency Act, will apply. [P 112 C 1,2]

K. D. Malaviya—for Appellant.

N. P. Asthana—for Respondents.

Dalal, J.—This reference to a Full Bench raises the question of jurisdiction of the insolvency Court. The questions submitted to us for decision are :

(1) Whether an insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication, having regard to the provisions of S. 53, Insolvency Act ?

(2) Would it make any difference if the receiver alleges that no transfer had been intended from the very beginning and no title had passed, the transaction being a mere paper transaction and void ?

If the answer to the first inquiry is in the affirmative the second question will not arise.

Every Judge of this Court except one who had to consider the point has decided in favour of jurisdiction of the insolvency Court, that is, the first question has been answered by him in the affirmative. The present S 4, Insolvency Act (No. 5 of 1920) is an addition to the previous insolvency statute law as laid down in Act No. 3 of 1907. The present Act came into force on 25th February 1920, and on 18th July 1921 a Bench of two Judges, Walsh and Wallach JJ., had occasion to consider the scope of S. 4 of the new Act. The case before the Court was one of a sale by the insolvent more than three years before the insolvency with intent to defraud and delay his creditors. The learned Judges observed :

"The District Judge has held, rightly, that it does not come within any of the express provisions of the insolvency law, and he has gone on to hold, erroneously, that a transaction cannot be attacked under the provisions of the Transfer of Property Act or under general provisions of the law in the insolvency Court. Here he is wrong. The insolvency Court has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by special provisions of the Insolvency Act, where, for example, a trustee is given a higher title than the original debtor. But the insolvency Court also has to apply, and to decide, all questions of general law, including such questions as are raised by S. 53, T. P. Act. That is one reason why the administration of insolvency is so onerous and imposes a very heavy burden on the District Courts. If the receiver is right in fact, clearly this transaction was void under S. 53, T. P. Act, and the property attached by the receiver ought to be distributed as a part of the estate among the creditors ..... There ought to be a full inquiry between the receiver and the creditor on one hand, and the debtor and his family on the other, as to the bona fides of this transaction. Whether you call it summary or not, it ought to follow the ordinary course of a suit. In the main, the provisions of the Code of Civil Procedure are applicable to such inquiry, and there ought to be sworn testimony and the same care used with regard to documents, and the admission or rejection of documentary evidence, as in a suit: *Shikri Prasad* v. *Aziz Ali* (1).":

Next in order comes a Bench case decided on 3rd July 1923 by Lindsay and Sulaiman, JJ. Both the Judges held that if a question of title is raised in the insolvency Court that Court has jurisdiction to decide it. Lindsay, J., stated at p. 748 of the report:

"All that S. 4 intended to provide was that if a question involving title is raised before an insolvency Court, then the insolvency Court is to be deemed to have power to decide that question of title."

The difference of opinion between the two Judges lay in this that Sulaiman, J., was of opinion that if the matter was once decided even as against a stranger by the insolvency Court the jurisdiction of the civil Court would be barred under S. 11, Civil P. C. Lindsay, J., was not prepared to take the view that a decision under sub-S. (2), S. 1, would be binding upon a stranger who is not making any claim against the debtor or the debtor's estate: *Maharana Kunwar* v. *E.V. David* (2). On 6th July 1926 the question as to the bar of the jurisdiction of the civil Court came up before another Bench composed of Sulaiman and Boys, JJ., in which Boys, J., agreed with the opinion of Sulaiman, J., expressed in the case of *Maharana Kunwar*, and held that once the question of title was decided by the insolvency Court the jurisdiction of the civil Court was barred: *Kaniz Fatima* v. *Narain Singh* (3). Finally, there was a difference of opinion between Sulaiman, J. and Mukerji, J., in *Hari Chand Rai* v. *Moti Ram* (4). As we have already seen Sulaiman, J., was of opinion that the jurisdiction of the insolvency Court extended to all transactions raising questions of title whatever their date may be while Mukerji, J., was of opinion that the provisions of S. 4 were circumscribed by the provisions of S. 53, Insolvency Act, The point of the opinion of Mukerji, J., appears on p. 420 (*of* 48 *All.*)

"If the transaction is beyond two years, the receiver must seek his remedy by an ordinary civil suit instituted under S. 53, T. P. Act."

I am in agreement with the opinion of Sulaiman, J. As that learned Judge pointed out in the case of *Hari Chand Rai*:

"Prior to Act 5 of 1920 when there was no provision corresponding to S. 4 of the new Act, a Bench of this Court held that, even if a case did not fall under S. 36 of the old Act of 1907, the Court had power to inquire whether a disputed property was the property of the insolvent or not: *Bansidhar* v. *Kharagjit* (5). The Calcutta High Court had held otherwise, that a question of title could be disposed of by a regular suit only. The enactment of S. 4 gives effect to the view which prevailed in this Court. Under S. 4 power is given to the insolvency Court to decide not only all questions of title or priority, but also of any nature whatsover, whether they involve matters of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice."

In a Bench ruling of the Madras High Court in *Kochu Mahomed* v. *Sankaralinga Mudaliar* (6), the jurisdiction of the insolvency Court was considered under the Insolvency Act of 1907. Seshagiri Aiyar, J., observed at p. 500 (*of* 62 *I. C.*) of the report:

"There was a conflict of decisions in the various High Courts, as to whether even without a provision similar to S. 7, Insolvency Act, the Provincial Insolvency Court has jurisdiction to direct delivery of property to the receiver when it is moved by a petition. S. 4 of the present Act has been so altered as to confer such a power. The amendment

(1) A. I. R. 1922 All. 196=44 All. 71.
(2) A. I. R. 1924 All. 40=46 All. 16=21 A. L. J. 737.
(3) A. I. R. 1927 All. 66=49 All. 71.
(4) A. I. R. 1926 All. 470=48 All. 414.
(5) [1915] 37 All. 65=26 I. C. 926=12 A.L.J. 1273.
(6) A. I. R. 1921 Mad. 204=44 Mad. 524.

should not be regarded as if for the first time a new power had been conferred. I am of opinion that S. 4 declares what has been the law all through."

In the same case Oldfield, J., considered the provisions of the Act of 1907 in Ss. 36 and 37 corresponding to Ss. 53 and 54 of the present Act and observed :

"Of the provisions in the Act relating to property held actually or colourably against the insolvent, Ss. 36 and 37 merely prescribe a rule of evidence applicable to two classes of alienations, those completed within particular periods before the adjudication, not, like the sale now in question after it, and it is material only that they assume and do not confer the power of cancellation, which they imply, but which must be looked for in another place." (p. 497, Col. 2.)

In *Sriramalu* v. *Ponakavira Reddi* (7), there is an interesting discussion as to the scope of Ss. 36 and 37 of the Act of 1907 by Venkatasubba Rao, J.. at p. 114 (*of* 45 *M. L. J.*) He has pointed out that the provisions of those sections corresponding to Ss. 53 and 54 of the present Act do not involve questions of jurisdiction but lay down rules of evidence under which an insolvency Court is directed to draw an absolute and irrebuttable presumption like the one contained in S. 112, Evidence Act. As remarked by Oldfield, J, in the case of *Kochu Mahomed* we must look elsewhere than in Ss. 36 and 37 for jurisdiction of an insolvency Court. Under the present Act a Bench of the Madras High Court held that it was open to an insolvency Court on a proper application being made under S. 4 of the Act to try the issue whether the insolvent is entitled to a certain property or not : *Chittammal* v. *Ponnuswami* (8)

It was argued before us on behalf of the appellant that the words "subject to the provisions of this Act" at the commencement of S. 4 (1) of the Act makes S. 4 subject to the provisions of S. 53. I am of opinion that S. 4 deals with jurisdiction, and the jurisdiction will be circumscribed only by such subsequent sections as deal with the jurisdiction of the Court. As pointed out in the various judgments of the Madras High Court, Ss. 53 and 54 do not deal with the jurisdiction of the insolvency Court, but only lay down rules as to the manner in which evidence should be considered in certain cases arising in that Court. Those sections, therefore, in my opinion, do not control the provisions of S. 4. These words are used to limit the power of the insolvency Court as it is limited, for instance, by the proviso to S. 56 that nothing in that section shall be deemed to authorize the Court to remove from the possession or custody property of any person whom the insolvent has not a present right so to remove. This limitation is excellently illustrated by the case of *Chittammal* of the Madras High Court. In this case the District Judge directed certain parties to hand over possession of the property in their possession to the Official Receiver. The Madras High Court held that this order was beyond the jurisdiction of the insolvency Court by reason of the enactment of para. 3, Cl. (3), S. 56, unless the insolvent was entitled on the date when the receiver applied for possession to the possession of such property. The Court cannot direct the person in possession to deliver up property if a title, however flimsy, is set up by the person in possession. This is the provision of the Act to which the provisions of S. 4 are subject. In the same case the High Court declared that it was open to the insolvency Court on a proper application being made under S. 4, Prov. Insol. Act, to try the issue whether the insolvent is entitled to the property or not after proper opportunity is given to the other side to plead to the application.

For these reasons, my answer to the first question is in the affirmtive. The second question, therefore, does not arise.

Sen, J.—One Afzal Khan applied for being adjudicated an insolvent on 7th July 1926. The adjudication order was passed on 25th March 1927. The Official Receiver having attached a house as the property of the insolvent, one Anwar Khan intervened and claimed title to the house by right of purchase from Afzal, under a registered sale-deed dated 1st January 1923. The receiver pleaded that the sale-deed was fictitious, that it was without consideration and that it had been executed in favour of a relation with a view to defraud the creditors. The trial Court disallowed the objection of Anwar Khan upon the findings that the sale in his favour was a mere cloak to conceal the real ownership and that the insolvent was the owner of the property. On appeal to the lower appellate Court it was urged that the sale having taken place more

(7) A. I. R. Mad. 641.
(8) A. I. R. 1926 Mad. 363=49 Mad. 762.

than two years from the date of adjudication, the receiver was not competent to challenge the sale under S. 53, Provincial Insolvency Act, and that the insolvency Court had no power to annul the same. This contention was repelled by the lower appellate Court which held that the sale was "farzi," that no transfer was as a fact made in favour of the appellant and that S. 53, Provincial Insolvency Act, did not apply to a transaction like this. The appeal was, therefore dismissed. Anwar Khan appealed to this Court and reiterated the pleas already referred to.

In view of the importance of the questions involved in the appeal, the learned Judges who heard the appeal have referred the following points for decision by a larger Bench :

"(1) Whether an insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication having regard to the provisions of S. 53, Insolvency Act ?

"(2) Would it make any difference if the receiver alleged that no transfer had been intended from the very beginning and no title had passed, the transaction being a mere paper transaction and void."

Under S. 9, Civil P. C., the ordinary civil Courts have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred. Where there has been an infringement of a legal right, the ordinary civil Courts are bound to entertain the claim, unless their jurisdiction has been ousted either by an express enactment or by necessary implication flowing either from statutory provisions or general principles of law.

Under S. 53, T. P. Act, where a transfer of an immovable property has been made with intent to defraud . . . . persons having an interest in such property or to defeat or delay the creditors of the transferrer, it is voidable at the option of any person so defrauded, defeated or delayed.

The remedy of such a person is by a suit in the ordinary civil Court of original jurisdiction.

The Court of insolvency is a creature of statute. It is a special tribunal, having jurisdiction over a limited range of cases within such limits as have been imposed by the statute to which it owes its existence. Unless the Insolvency Act, expressly or by necessary implication (1) took away the powers of ordinary civil Courts to adjudicate upon the validity or otherwise of certain transfers which are sought to be impugned, either upon the ground of fraud or on the ground of want of consideration etc., and (2) invested the insolvency Court with the trial of such matters, the jurisdiction of the civil Courts is not affected or impaired. The following statement of law is to be found in Maxwell's Interpretation of Statutes (6th Edn. 1920, p. 318) :

"Where an Act took away the right of bringing an action respecting certain disputes which were referred to the summary adjudication of justices, it was held that the subsequently established County Courts acquired no jurisdiction to try such cases, under the general authority to try all pleas."

The limited nature of the jurisdiction of the Court of insolvency is clear from the provision of the Act itself, notably from Ss. 51, 53, 54 and 55. Section 51 deprives the execution creditor of the benefit of execution in certain circumstances in favour of the general body of creditors with reference to property not sold in execution "before the date of the admission of the petition." S. 54 provides that transfers made in favour of the creditor with a view of giving that creditor a preferance over other creditors shall be deemed fraudulent and void as against the receiver and shall be annulled by the Court, if the transfer in question is within three months of the presentation of the petition for insolvency. The jurisdiction of the insolvency Court depends upon the fulfilment of the conditions contained in the section.

Section 55 affords protection to transfers made by the insolvent before the date of the order of adjudication if they are bona fide and for consideration, the transferee not having had notice of the presentation of an insolvency petition. It is to be noticed that no power is hereby conferred upon the Court of insolvency to displace a transfer which has taken place before the presentation of the petition for insolvency. S. 53 aims at only such transfers which have been made within two years of the date of the order of adjudication.

Sections 53 and 54 do not merely lay down a rule of substantive law or a rule of evidence favouring the Official Receiver, but confer a jurisdiction upon the Court of insolvency with reference to only such transfers as are mentioned in those sections and upon the fulfilment

of the conditions contained therein, without which the receiver has no right to challenge the transfers nor has the Court a power to annul the same.

Section 53, Prov. Insolv. Act (Act 5 of 1920) corresponds to S. 36 of the old Act (Act 3 of 1907). The rule of law enacted by the section is analogous to S. 42, English Bankruptcy Act, 1883 which runs as follows :

"(1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of the property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void against the trustee in the bankruptcy etc,, etc. . . ."
(3) "Settlement" shall for the purpose of this section include any conveyance or transfer of property."

It will thus appear that both under the English and Indian law, a settlement or transfer of property can be annulled by the insolvency Court at the instance of the Official Receiver or the trustee in the bankruptcy upon the transfer conforming to the conditions mentioned in the Act, one of which is that the transfer had taken place within a certain period either from the date of the settlement or the order of adjudication.

The reason is obvious for prescribing a time-limit in cases where the Act starts with a presumption against the validity of such transfers. In a suit under S. 53, T. P. Act, the ouus lies upon the transferee to prove that the transfer was not to defraud the prior or subsequent transferees or to defeat or delay the creditors But there is no presumption of law against the transferee, except where a transfer is made gratuitously or for a grossly inadequate consideration. Under S 53, Prov. Insol. Act, the question of the intent to defraud defeat or delay is outside the enquiry and the Official Receiver has the right of avoidance if the transfer is within two years of the order of adjudication.

The principle underlying the fixation of time in Ss. 53 and 54 is that where the transfer precedes the insolvency proceeding by a short period, it may be reasonably assumed that the financial difficulties of the insolvent had already commenced, that he anticipated that the crash was coming and resorted to these transfers in order to place his property beyond the reach of creditors. No presumption should reasonably be raised against his financial soundness more than two years before the date of adjudication. A time-limit in a statute must necessarily be an artificial rule, but the limit of two years is not unreasonable.

Under Act 3 of 1907, the trend of decisions on the powers of the insolvency Court has not been uniform. In *Jokhan Singh* v. *Deputy Commissioner of Faizabad* (9) Piggot, J. C. held that the intention of the legislature was only to give the Judge sitting in insolvency jurisdiction under S. 36, Act 3 of 1907, in respect of transfers made within two years of the date of his order of adjudication.

In *Bansidhar* v. *Kharagjit* (5), where the transaction had been entered into by the predecessor-in-title of the insolvent more than two years before the adjudication of the insolvency, Chamier and Piggott, JJ, held that the Court had inherent power to enquire whether the disputed property in possession of the transferee was the property of the insolvent, that it was the duty of the receiver to move the Court and the Court was competent under S. 18 of the Act to remove the transferee from the possession and to vest it in the receiver. Their Lordships noticed that the Indian Provincial Insolvency Act contained no provisions as S. 102, English Bankruptcy Act, which expressly empowered the Bankruptcy Court to decide

"all other questions whatsoever whether of law or of fact which may arise in any case of bankruptcy coming within the cognizance of Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice and making a complete distribution of property in any such case."

The judgment of the Court therefore proceeded upon the assumption of an inherent jurisdiction.

In *Pitiram* v. *Jujhar Singh* (10) Piggott and Walsh, JJ held that the insolvency Court had concurrent jurisdiction with the ordinary civil Court to enter into a question of the legality of attachment against a person who is a

(9) [1914] 23 I. C. 924.
(10) [1917] 15 A. L. J. 661=33 I. C. 798.

stranger to the bankruptcy. This would appear from the following observations :

"Now it is to be observed that in accordance with the English Bankruptcy practice a person in the position of the plaintiff in this action, who is a stranger so to speak to the bankruptcy and whose property has been seized wrongfully, according to his view of the case, by the receiver in bankruptcy is not confined to the remedy given him by the Provincial Insolvency Act. He can, if he pleases, apply to the insolvency Court inasmuch as S 22 applies in express terms to his grievance. But he can if he pleases ignore the insolvency Court and sue in a civil Court for return of his property in an ordinary action against a trespasser. . . . . "The question which is an important one is by no means free from difficulty."

It may be doubted if it was at all necessary and if the legislature could ever have intended to invest two Courts of co-ordinate jurisdiction with the same powers over the same matter. The decision in this case proceeded upon the application of the doctrine of res judicata.

In *Irshad Husain* v. *Gopi Nath* (11) Richards,.C. J. and Banerji, J. followed this ruling but with considerable reluctance. Since finality is claimed for the decision of the insolvency Court on the question of title affecting a third party, this decision is not without its relevancy to the question now under consideration. They observed :

"If we had to consider the matter in the absence of any authority, we doubt very much whether the order of the insolvency Court and the Court of appeal from that order can operate as res judicata."

Unless the object of the legislature was to invest the insolvency Court with summary powers analogous to those conferred upon the ordinary civil Courts under O. 21, R. 58, Civil P. C., no purpose could have been served in clothing the insolvency Court with powers so narrow and limited.

In *Gaura* v. *Nawab Abdul Majid* (12). Piggott and Walsh, JJ., held that where a transaction is seven years old it cannot be questioned by a receiver or creditor under S. 36, Insolvency Act, and the proper remedy is to institute a suit under S. 53, T. P. Act. They observed that this case was the converse case to that of *Pitaram* v. *Jujhar Singh* (10) already referred to.

In *Nilmoni* v. *Durga Charan* (13) a Bench of the Calcutta High Court in a comprehensive decision which examined all the authorities refused to follow the decision of this Court in *Bansidhar* v. *Kharagjit* (5). It noticed that no power was to be found in the Provincial Insolvency Act corresponding to S. 102, English Act of 1883.

In this state of authorities, it was necessary to sufficiently define the powers of the insolvency Court and when the Act was amended in 1920, S. 4 was added in consequence.

It is contended on behalf of the respondents that S. 4 confers upon the Court of insolvency full powers to decide all questions whether of title or priority or of any nature whatsoever and whether involving matters of law or fact, and it is contended that the decisions of the insolvency Court are clothed with finality under the express provision of S. 4, sub-S. (2). A Court of insolvency has ordinarily a jurisdiction to decide all matters affecting a claim between the insolvent and the creditors. But some exceptions have been grafted upon this general rule which are to be found in sections like 51, 53 and 54 which have been referred to already. The powers of the insolvency Court are controlled and restricted by these sections, and the opening words of S. 4, Cl. (1) "subject to the provisions of this Act" have been deliberately introduced by the legislature to indicate and define the extent of the jurisdiction which was intended to be conferred upon the Court of insolvency. If the insolvency Court is competent to determine the legality and propriety of transfers which had taken place more than two years before the order of adjudication there could have been no object in prescribing a shorter term in S. 36 of the Act. S. 4 is an enabling section in the sense that it defines the competence of the Court and the extent of its jurisdiction The powers of the ordinary civil Courts to entertain suits relating to the title of third parties cannot be defeated or extinguished except by statutory enactment. S. 4 does not purport to do this. Under sub-S. 2, finality attaches to only such decisions of the insolvency Court as are intra vires. I would, therefore, respectfully differ from the judgment of Sulaiman, J., in *Maharana Kuer* v. *David* (2). I share the view of Lindsay, J. at p. 748 (*of* 21 *A. L. J.*) :

(11) [1919] 44 All. 378=49 I. C. 590=17 A.L.J. 374.
(12) A.I.R. 1922 All. 443.
(13) [1918] 22 C.W.N. 704=46 I.C. 377.

"I am not prepared to take the view that a decision under sub-S. 2, S. 4, would be binding upon a stranger like the plaintiff in the present case who, in my opinion, is not making any claim against the debtor or the debtor's estate. In the present case I am satisfied: (1) that the plaintiff was under no obligation to seek any relief in the insolvency Court; (2) that she had the ordinary remedy under the civil law against the Official Receiver; and (3) that for the purpose of maintaining the suit she was under no obligation to seek any sanction from the insolvency Court."

It is to be observed that no question arose in this case as to the legality of transfer more than two years before adjudication and the observations of the learned Judges were mere obiter. But the question directly arose in *Hari Chand* v. *Moti Lal* (4), Sulaiman, J., adhered to his view expressed in *Maharana Kuer* v. *David* (2). I am not quite sure that the enactment of S. 4 given effect to the view which prevailed in this Court when Act 3 of 1907 was in force. S. 4 defines and restricts the jurisdiction of the Court of insolvency. The transferee does not represent the debtor and the debtor's estate and cannot be said to be a claimant against the debtor in the insolvency proceedings. "Subject to the provisions of this Act" ought to be construed in their natural and grammatical sense and ought not to be narrowed down to a mere right of appeal. I respectfully differ from this decision and from the later decision *Kaniz Fatima* v. *Narain Singh* (3), and agree with the decision of Mukerji, J, in *Hari Chand Rai* v. *Moti Ram* (4).

In *Shikri Prasad* v. *Aziz* (1), the construction of S. 4, Act 5 of 1920, was not in issue and the Court did not consider the meaning or effect of the words "subject to the provisions of this Act" in sub-S. (1) nor of the words:

"for 'all purposes as between, on the one hand, the debtor and the debtor's estate and, on the other hand, all claimants against him or it and persons claiming through, or under them or any of them."

These important words of limitation have evidently been lost sight of by the learned Judges who decided that case. The above remarks apply to the decision of Oldfield and Aiyar, JJ. in *Kochu Mohamed* v. *Sankaralinga* (6). Their Lordships were considering the powers of the insolvency Court under Ss. 16 and 18 of Act 3 of 1907 and were of opinion that the Court had jurisdiction to adjudicate upon the title of a third party independent of S. 4, Act 5 of 1907. "I am of opinion that S. 4 declares what has been the law all through". The limitation upon the powers of the insolvency Court within the Act have not been considered or discussed.

In *Sriramulu* v. *Ponakavira Reddi* (7) all that was decided was that the general power of the Court of insolvency was exercisable to equire into the validity of a secured debt independently of Ss. 30 and 37. Those sections were only rules of evidence applicable to particular kinds of transfer by the insolvent. Venkatasubba Rao, J., observed:

"The arguments covered a wide ground, and the question that was raised was whether the insolvency Court has jurisdiction under the Provincial Insolvency Act 3 of 1907 to adjudicate upon claims of third parties as against the insolvent or his estate represented by the receiver. I must state at once that, in my opinion, this question does not arise at all in the present case, and that the matter before us can be decided on a ground very different from the one stated".

This decision, therefore, cannot be of very great value in the present case. The learned Judge further observes:

"The Court has to prepare a schedule of creditors which may be amended from time to time and this function cannot be properly or adequately performed unless the Court has equal power to deal with secured as well as unsecured debts. To a proceeding appropriate to this enquiry the parties are not a person subject to the insolvency Court and a stranger".

The last observation is in accord with my view of the matter. In *Chittammal* v. *Ponnuswami Naicker* (8), the judgment does not proceed upon a construction of the language of sub-Ss. (1) and (2), S. 4, Act 5 of 1920, which has already been referred to. The decision, however, recognizes the fact that restrictions have been imposed upon the power of the Court of insolvency, such as under S. 56 (3). Devadoss, J., observed at p. 764:

"But where the person in possession claims adversely to the insolvent, or where he is able to show that the insolvent is not entitled to present possession the Court has no power to proceed under S. 56, etc."

Further:

"In a recent case, *Official Receiver of South Arcot* v. *Perumal Pillai*, it was decided by Spencer, J.. and myself that the power given by S. 4, Provincial Insolvency Act, is subject to the provisions of the Act, one of which is the proviso to S. 56 (3) which is in the way of the Court removing any person from the possession of property whom the insolvent has no present right to remove."

If S. 56 imposes restrictions upon the power of the Court of insolvency, why not S. 53?.

The Insolvency Acts in this country were modelled upon the English Bankruptcy Act and S. 4, Act 5 of 1920, is practically a reproduction of the corresponding section of the English Acts of 1914, 1883 and 1871. In *Ellis* v. *Silver* (14) Lord Selbourne, L. C. made the following observations:

"The effect of the provisions in the several Acts of the Parliament relating to bankruptcy is, that in these cases of arrangement-deeds, which have been registered in bankruptcy, the trustee for the purpose of adminstration under the deed has all the powers and all the rights in the Court of bankruptcy which assignees or trustees under a regular bankruptcy would have, and that for all the purposes of adminstration in bankruptcy, the Court of bankruptcy is armed with very large powers, both legal and equitable as large as may be necessary to do complete justice. But there was no case cited and no clause quoted from any Act of Parliament to the effect that whenever the trustee of a deed or the trustee or assignee in bankruptcy has a demand against a third person, which but for the bankruptcy would be proper to be prosecuted in a Court of law or in a Court of equity is against that third person transferred to the Court of bankruptcy. I apprehend that there is nothing whatever in the Acts relating to bankruptcy which in an ordinary case not governed by the special clauses of the Act has any such effect."

The eminent Judge continues:

"That which is to be done in bankruptcy is the adminstration in bankruptcy. The debtors and creditors, as the parties to the administration in bankruptcy are subject to that jurisdiction. The trustees or assignees, as the persons entrusted with that administration, are subject to that jurisdiction. The assets which come to their hand and the mode of administering them are subject to that jurisdiction: and there may be, and I believe are, some special classes of transactions which under special clauses of the Acts of Parliament may be dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of bankruptcy appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament and wholly unsupported by any trace or vestige whatsoever of authority."

These observations are applicable in their entirety to the provisions of the Provincial Insolvency Act and specially to Ss. 53 and 4.

My answer to the reference is (1) An insolvency Court cannot try a question of title relating to a transfer which has taken place more than two years before the order of adjudication having regard to the provision of S. 53, Insolvency Act.

(2) Where the transfer was intended not to be operative from the beginning and the insolvent had remained in possession of the property, the receiver may apply for its annulment. But where the transfer was executed by a proper instrument and duly registered and was intended to put the property beyond the reach of the creditors and a third party is claiming under the transfer, such a transaction cannot be treated as a mere paper transaction. In the latter case, S. 53, Insolvency Act will apply.

King, J.—I have had the advantage of studying the foregoing judgments of my learned brothers. I fully agree to the view expressed by Dalal, J., but as it is diametrically opposed to the opinion formed by Sen, J., I feel it necessary to state my reasons.

The main question is whether an insolvency Court can decide the validity of a transfer made by the insolvent more than two years before the order of adjudication.

The answer depends upon the interpretation of S. 4 (1) read with S. 53, Provincial Insolvency Act, 1920.

Section 4 (1) appears to me to give to the insolvency Court the widest possible powers to decide all questions of title arising in a case of insolvency. In the present case the question was whether certain property belonged to the insolvent, notwithstanding the fact that he purported to have sold the property to the objector more than two years before the order of adjudication. This was a question of title arising in a case of insolvency, and was moreover a question which the Court might have deemed it expedient or necessary to decide for the purpose of doing complete justice, or of making a complete distribution of the property. Prima facie therefore the insolvency Court undoubtedly was empowered under S. 4 (1) to decide the question.

The question then arises whether the opening words of S. 4 (1) namely "subject to the provisions of this Act," when read with S. 53, have the effect of restricting the jurisdiction of the insolvency Court, so as to prohibit it from deciding the validity of a transfer made by the insolvent more than two years before the

(14) [1873] 8 Ch. 83=42 L. J. Ch. 666=21 W. R. 346=28 L. T. 156.

order of adjudication. In my opinion this question must be answered in the negative.

Section 53 is one of a group of sections namely Ss. 51 to 55 (both inclusive) which come under the heading "effect of insolvency on antecedent transactions." They lay down certain rules of law applicable to transactions effecting the property of a person who is subsequently adjudged an insolvent. Under S. 53, for instance, a sale of the insolvent's property if made within two years before the order of adjudication can be set aside, as against the receiver, unless the sale was made in good faith and for valuable consideration. This merely lays down a rule of law affecting transactions that fall within its scope. It shows that an order of adjudication affects certain transactions entered into within a period of two years, but no longer. The insolvency Court will of course apply this rule to any case that falls within its scope, but I am unable to interpret this rule as restricting the jurisdiction conferred upon the Court by S. 4 (1)

"to decide all questions whether of title or priority, or of any nature whatsoever."

In my opinion Ss. 51 to 55 do not restrict, or purport to restrict, the wide jurisdiction conferred by S. 4 (1). They merely enact rules which define the effect of insolvency upon antecedent transactions and which must be followed by insolvency Courts whenever the rules are applicable.

In the present case S. 53 does not apply, since the sale was transacted more than two years before the order of adjudication. Hence the insolvency Court certainly cannot annul the sale under S. 53, but I see no reason why the insolvency Court should not annul it under the general law (e. g., under S. 53, T. P. Act) if it is liable to annulment by a civil Court.

The intention of the legislature in enacting S. 4 (1) seems to have been to confer upon the insolvency Court full powers of deciding all questions of title that arise for decision in cases of insolvency, so that there should be no necessity for having recourse to the ordinary civil Courts. The object probably was to avoid multiplicity of suits and proceedings. Before that section was enacted in 1920 there was a conflict of judicial opinion as to whether the Court had power to determine whether a disputed property belonged to the insolvent or not. The Calcutta High Court held that the question of title could only be determined by a regular suit. I take it that S. 4 was enacted so as to make it clear that questions of title could be determined by the insolvency Court and that there was no necessity to have the questions determined by a regular suit.

But, it is urged, what is the meaning of the words "subject to the provisions of this Act" in S. 4. Are they not intended to restrict the jurisdiction of the Court to dealing with special cases in which the special provisions of the Act are applicable? I am unable to read the words in this restrictive sense. They may refer to the rules of procedure and appeal laid down in the Act itself. They doubtless refer to the special rules laid down in Ss. 51 to 55 meaning that the Court should follow those rules whenever they are applicable. They may also refer to S. 81 under which the Local Government can bar the application of many provisions of the Act, including (for instance) the provisions contained in Ss. 51 to 55. They may also refer to such limitation of the power of the Court as is contained in the proviso to S. 56 (3). I see no difficulty, therefore, in giving a meaning and effect to the words "subject to the provisions of this Act" without construing them in the restrictive sense suggested by my learned brother Sen, J. In my opinion they do not bar the jurisdiction of the insolvency Court to decide a question of title under the ordinary law when the special provisions of the Act do not apply.

I am fortified in this opinion by the previous decisions of this Court. As pointed out by my learned brother Dalal, J.:

"Every Judge of this Court, except one, who had to consider the point has decided in favour of jurisdiction of the insolvency Court."

I approve the decisions in *Shikri Prasad* v. *Aziz Ali* (1), *Maharana Kunwar* v. *David* (2), *Kaniz Fatima* v. *Narain Singh* (3), and the opinion of Sulaiman, J., in *Hari Chand Rai* v. *Moti Ram* (4). I must record my respectful dissent from the opinion expressed by Mukerji, J., in the last mentioned case, that

"if the transaction is beyond two years, the receiver must seek his remedy by an ordinary civil suit instituted under S. 53, T. P. Act."

I agree with Dalal, J., that the first question submitted to this Full Bench

should be answered in the affirmative, and that the second question does not arise.

By the Court.—In the opinion of the majority of the Judges of this Full Bench the first question submitted to them should be answered in the affirmative, and, in consequence, the second question does not arise.

V.V. *Reference answered.*

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* A. I. R. 1929 Allahabad 114

BOYS AND BANERJI, JJ.

Bhagat Ram—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 367 of 1928, Decided on 26th November 1928, made by Sess. Judge, Moradabad.

*** Criminal P. C., S. 133 Para. (2)—"Remove" does not include restoring status quo.**

It would be manifestly straining the meaning of the word "remove" in para. (2), S. 133, to hold that removal of the trade or occupation includes ordering the person carrying on the trade to restore the status quo. *A* bought some land for the purposes of brick kilns just outside the municipal limits of a town and proceeded to dig pits in the ordinary course of the trade or occupation of brick-making. It was complained that those pits constituted a breeding ground for mosquitoes ; and further that the smoke and the sparks from the chimneys constituted a nuisance and a danger. The Magistrate ordered the making of the bricks to cease and the pits to be filled up.

Held : that the portion of the order requiring *A* to fill up the pits ought to be set aside.

[P 115 C 1]

Saila Nath Mukherji—for Applicant.

M. Wali Ullah—for the Crown.

Judgment.—This is a reference from the Sessions Judge of Moradabad. We are now at 26th November 1928, and these proceedings have dragged along from 22nd December 1925, very nearly three years. This has been almost entirely due to the fact that the Joint Magistrate of Moradabad in February 1926, passed at the outset an order directing the opposite party to cease excavating and burning bricks and to fill up the existing pits, without taking the trouble to read the section under which he had to proceed. The result was that this Court set aside the proceedings, and a fresh notice had to issue. This notice was issued on the 1st April 1926, by Mr. Sayid Abu Mohamad, again a Magistrate of the First Class who did not take the trouble to see that the notice he issued conformed to the terms of one or other of the paragraphs in S. 133. The result of this omission of both Courts to be precise as to the law under which they were proceeding has led to much waste of time and trouble, and has also made it very difficult for us in this Court to know whether the orders eventually passed were such as we ought to uphold.

We do not propose to detail the whole of the subsequent procedure. The substance of the complaint against Mr. Bhagat Ram, a Civil Engineer, is that he having bought some land for the purposes of brick kilns just outside the municipal limits of Moradabad, proceeded to dig pits in the ordinary course of the trade or occupation of brick-making, and that those pits constituted a breeding ground of mosquitoes ; and further that the smoke and the sparks from the chimneys constituted a nuisance and a danger. The Magistrate ordered the making of bricks to cease and the pits to be filled up. We have no information before us as to when the digging of the pits began, how much of the excavations had been made before the first notice was served on Mr. Bhagat Ram, and how much subsequently. But this latter matter would only concern this Court as influencing the exercise of discretion. We have first to make it clear under what paragraph of S. 133 these proceedings would apparently fall. There is no suggestion before us that any nuisance that may have occurred occurred on :

"any way, river or channel which is or may be lawfully used by the public, or on any public place."

It is contended that the circumstances are covered by the second paragraph ; that we have here a trade or occupation injurious to the health or physical comfort of the community. We have to see what order the Magistrate could pass in such circumstances. He could order the opposite party :

"to desist from carrying on, or to remove, or regulate in such manner as may be directed such trade or occupation."

It is, of course, possible to suggest that power to order the "removal" of a trade must be held to include power to remove anything connected with that trade, or to restore the status quo before that trade commenced. But we do not think that that is the natural and straightforward

meaning of the paragraph, and we have no right to strain the natural and straightforward meaning merely because an order that might be passed by so doing would possibly be very desirable. The powers given clearly suggest three different things: that the Magistrate may simply order the opposite party to stop carrying on the trade or occupation in question; he may think on the other hand that the carrying on of the trade or occupation would not be injurious if it were removed perhaps a short distance away, and he may order it to be so removed; or, thirdly, he may think that there will be nothing injurious if the occupation or trade is carried on at the same spot provided certain conditions are fulfilled. We think that it would be manifestly straining the meaning of the word "remove" to hold that removal of the trade or occupation includes ordering the opposite party to restore the status quo in the manner now in this case considered by the authorities desirable. The only power given to the Magistrate—we are speaking only of the circumstances of a case similar to this—which is given to the Magistrate in reference to an excavation is to order it to be fenced. If there were any question of a nuisance on a public way, coming under para. 1 of S. 133, the power of the Magistrate might or might not include power to fill up a pit which was causing such nuisance. That we have not to decide.

We are not prepared to hold that where there is a case, as in the present, of a person being ordered to desist from a particular trade or occupation, or to remove that trade or occupation, or it is desired to regulate that occupation, the Magistrate has any power to order him to fill up the pits. We have, of course, not failed to appreciate the grave danger said to arise to the inhabitants in the neighbourhood of these pits and the desirability of there being some such power in a suitable authority to control the commencement and conduct of these brick-making concerns. We entirely agree with the remark of Mr. Kidwai in in the order of 10th February 1926, in which he made an abortive effort to control this brick-kiln that:

"it is a great pity that there are no bye-laws of the District Board which could at the very commencement put a stop to the starting of such work within so close a distance of habitations".

Mr. Kidwai himself seems to have felt the desirability of more explicit powers existing in somebody. We agree. But that would not justify us in straining the language of S. 133 to meet the case.

Another observation which we must make is that even if the Magistrate had the power to order the filling up of the pits, it is open to doubt whether in the circumstances of this case it would have been a proper order. Mr. Abu Mohammad in his order of the 3rd June 1926, the present order, the propriety of which we are now considering, says:

"In the case of the railway barrow pits, of which the existing pond (that is, a railway pond, other than the barrow pits now in dispute) is a tangible monstrous example, the railway authorities have had their attention drawn to the desirability of filling them up some years ago, but the task has become too stupendous to be feasible."

The meaning of this can only be that the railway having once been allowed to make these barrow-pits it would not be reasonable or practicable to order the railway to fill them up. It would be perhaps even more unreasonable to order Mr. Bhagat Ram, a private individual, to fill up pits which he has been allowed to make. If we had any evidence before us as to how far he had proceeded with the making of these pits after notice that it might involve him in trouble, other considerations might apply; but we have no such information. The order of the Magistrate directing the cessation of the brick-making and of digging pits will stand, but that portion of his order directing the opposite party to fill up the pits is set aside.

D.D. *Reference partly accepted.*

** A. I. R. 1929 Allahabad 115

MUKERJI, J.

Gomti—Applicant.

v.

Kanhaiya Lal and *another*—Opposite Party.

Appln. in Second Appeal No. 800 of 1928, Decided on 14th December 1928.

*** * Civil P. C., O. 39, R. 1 (a) (Amended by Allahabad) — *G* successfully resisting attachment—Decree-holder getting declaration in subsequent suit that the property was attachable—*G* applying for stay of execution in appeal against the declaratory decree—**

Application was rejected — (Cf. Civil P. C., O. 41, R. 5).

One *K* obtained a money decree against *M*, the husband of *G*. In execution of the decree a building was attached but *G* successfully objected to the attachment claiming the building as her property. *K* subsequently brought a suit for declaring that the property was attachable in execution of his decree and succeeded. In appeal against this decision *G* applied for stay of execution: [P 116 C 2]

Held: that in view of amended O. 39, R. 1 (a) the application should be rejected.

K. D. Malaviya—for Applicant.

Judgment.—This is an application by one Mt. Gomti for stay of execution of a certain decree under the following circumstances:.

Kanhaiya Lal and another hold a decree against Mt. Gomti's husband Maoon. In execution of the simple money decree a building was attached and Mt. Gomti laid claim to that building as her own property. Her objection in the execution department having succeeded the decree-holders, Kanhaiya Lal and another, instituted a suit against Mt. Gomti to obtain a declaration that the property was attachable in execution of the decree against Mt. Gomti's husband. The litigation thus started by Kanhaiya Lal and another against Mt. Gomti has come up to this stage that Kanhaiya Lal has been successful in the Court below and Mt. Gomti has filed a second appeal. Mt. Gomti's second appeal has been admitted by two learned Judges of this Court. This signifies that she has at least an arguable case. Mt. Gomti now wants that the property which she claims to be her own should not be sold in execution of the decree against her husband till the second appeal has been decided.

Mt. Gomti under the previous law had this remedy that she could apply for a temporary injunction under O. 39, R. 1 (a) (unamended) and the civil Court could grand her such an injunction. If there was any case in which an injunction should be granted, this was pre-eminently that case. Mt. Gomti has, however, been deprived of the remedy which the law allowed to her previously, on account of an amendment brought about by the Rules Committee and approved of by this Court. Mt. Gomti must now see that what she claims to be her house is to be sold up. If she is successful in second appeal, she will be thrown into another litigation with the auction-purchaser to recover the house if the auction-purchaser takes it into his head to obtain delivery of possession over the house, after the purchase. The auction-purchaser will naturally require his money's worth and try to obtain possession of the house. This is a state of things which can now only be deplored but cannot be remedied. I have no alternative but to reject the application. I order accordingly.

R.K. *Order accordingly.*

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*A. I. R. 1929 Allahabad 116

MUKERJI, J.

Mohammed Ishaq and *others*—Defendants—Appellants.

v.

Balmakund Lal and *another*—Plaintiffs—Respondents.

Second Appeals Nos. 1024 to 1027 of 1926, Decided on 5th December 1928, from decree of the Addl. Sub-Judge, Gorakapur, D/- 16th February 1926.

(a) Civil P. C., Sch. 2, P. 16 (2)—Parties agreeing to substitute local examination by Judge for oral evidence—Decision of Court is appealable.

Where parties agreed to shut out oral evidence and to substitute for it the inspection that the Judge might make of the locality, appeal from the decision of the Court is competent, because the Judge was not constituted an arbitrator: *A. I. R.* 1925 *All.* 348, *Foll.* [P 117 C 2]

(b) Civil P. C., O. 18, R. 18—Decision based entirely on local inspection should not be permitted except in exceptional cases.

A decision based entirely on local inspection is bound to be unsatisfactory and should not be permitted except perhaps in exceptional cases: 31 *Bom.* 381 (*P.C.*); 39 *Mad.* 501; 15 *C. L. J.* 138; *A. I. R.* 1925 *Cal.* 1069 and *A. I. R.* 1923 *Lah.* 546, *Foll.* [P 117 C 2]

***(c) Civil P.C., O. 18, R.18—Judge locally examining plot to see whether it was graveyard—He in his notes mentioning not facts as he saw but only his inferences—His examination is not adequate and should not be substituted for oral evidence.**

A Judge while making local examination of a plot to see whether is was a graveyard noted that a large number of graves were scattered over the plot and that old planks were also to be seen here and there. From this he concluded that the plot was used as graveyard from time immemorial, without noting the exact number of graves he saw there or without taking the trouble of digging under the planks to see whether the spots were really graves.

Held: that the Judge should really have given the facts as he exactly saw and not

merely his own inferences. His examination should not be allowed to take the place of oral evidence. [P 118 C 1]

Waliullah—for Appellants.

Haribans Sahai—for Respondents.

Judgment.—This appeal No. 1024 and the connected appeals namely 1025 to 1027, arise out of four independent suits instituted by the same parties namely the respondents who were the plaintiffs in the Court of first instance, for similar reliefs.

It appears that the plaintiffs claimed to be the owners of a plot of land bearing No. 1065, containing some trees. Adjoining this plot of land and to the east of it are two plots which are recorded in the village paper as graveyards. The plaintiffs said that plot 1065 was not a graveyard but had been used as such, at the occasions complained of, by the defendants in the four suits, without any right. The relief sought for was recovery of possession and injunction.

The defence was that the plot in question had been used from time immemorial as a graveyard and the plaintiffs had no right to stop the defendants and other Mohammedans of the community from using it as such.

The plaintiffs adduced some documentary evidence which shows that the plot 1065 was recorded as the zamindar's grove, while the two adjoining plots namely 1064 and 1089 were recorded as burial grounds. One witness was examined on commission, but before other witnesses could be examined, the parties, through their pleaders, agreed that if the Munsif would inspect the place, the parties would not adduce any oral evidence, leaving it open to the Court to decide the case on the documentary evidence and on the knowledge acquired by it, on inspection.

The Munsif did inspect the place and from what he saw he came to the conclusion that the plot 1065 was an ancient graveyard, notwithstanding the fact that the documents did not support this conclusion.

On appeal to the lower appellate Court, a preliminary plea was taken that no appeal lay. This objection was brushed aside and the appeals were heard on their merits. The learned Subordinate Judge, who heard the appeals, had before him the amin's report, the amin having previously inspected the locality and made a report. The learned Judge on the strength of the amin's report and the documentary evidence discarded the opinion entertained by the Munsif as the result of his inspection and decreed the suits.

In this Court two points have been urged namely, no appeal lay to the lower appellate Court and the lower appellate Court had misread and misinterpreted the notes of local inspection made by the trial Court.

As regards the first point, it has no force. The Munsif was not constituted an arbitrator. All that was done was to shut out the oral evidence and to substitute for it the inspection that the Munsif might make of the locality. In a similar case I held that an appeal lay: see *Raghubir Saran Das* v. *Ram Das* (1). I adhere to that opinion and hold that an appeal to the lower appellate Court was competent.

Coming to the merits of the case, it seems to me that the trial has been very unsatisfactory. No doubt O. 18, R. 18, Civil P. C. permits the Judge to make a local inspection. The rule does not say what value is to be attached to the local inspection, but there is abundant authority which establishes that a decision, based, entirely, on local inspection is bound to be unsatisfactory and should not be permitted except perhaps in exceptional cases: vide *Kessowji Issur* v. *G I. P. Ry. Co.* (2), *Ahmad Sahib* v. *Magnisite Syndicate Ltd.* (3), *Raikishori Ghose* v. *Kumudini Kanta Ghose* (4), *Bharat Chandra Chakrabarty* v. *Kiran Chandra Rai A. I. R.* 1925 *Calcutta series* 1069, *Tirath Ram* v. *Muhammad Abdul Rahim Shah A. I. R.* 1923 *Lahore series* 546.

An examination of the present case will show how unsatisfactory has been the result of the parties, allowing the inspection of the Munsif to take the place of oral evidence. The Munsif, as the result of his inspection found himself justified in overriding the documentary evidence and the report of the amin. The Subordinate Judge found

(1) A. I. R. 1925 All. 348.
(2) [1907] 31 Bom. 381=34 I. A. 115=9 Bom. L. R. 671 (P.C.).
(3) [1916] 39 Mad. 501=28 M. L. J. 598=29 I. C. 69=2 M. L. J. 460.
(4) [1912] 15 C. L. J. 139=14 I. C. 377.

the result of the Munsif's inspection insufficient to override the amin's inspection report and the records of the village. The Munsif in his notes of inspection does not take the trouble of saying what he actually saw. He records only what might be called the result of his inspection, the inferences drawn by him, and not the facts on which the inference is based. But it is the facts that should have been put on the record and not the mere inferences. The Munsif's notes are to be found at p 75-C of the record of suit No. 12 of 1925 of the Court of the Munsif. I would quote the two important paras. 3 and 4 from his notes to show how vague the record is:

"Apart from the disputed graves, a very large number are scattered hither and thither over the plot 1065."

"The raised portions of this innumerable graves do not exist at present but the planks with which they have been covered go to show beyond shadow of doubt that they are extremely old.

It will be noticed that the Munsif does not give the number of graves he observed. If he had been a witness in the case, he would surely have been questioned as to the number of graves he had observed. It will be again noticed that the learned Munsif found that the mounds over the supposed graves had disappeared. If so, it is not clear what were the indications from which the inference was drawn that there was a grave at any particular spot. The Munsif does no doubt mention that he found certain planks which were presumably used to cover the graves; but he does not say whether the planks were observable on the surface of the land, how many they were and whether they had been removed to see whether there were any graves underneath or whether simply old pieces of planks had been brought and put on the spot.

I am satisfied that the trial of the case has been extremely inconclusive. The lower appellate Court ought not to have proceeded to decide the case without letting the parties adduce oral evidence on the point or without sending some person for local investigation with direction to note all the facts which were likely to influence the judgment of the Court one way or the other.

The result is that I set aside the decrees of the Courts below and remand the suits through the lower appellate Court to the Court of first instance for disposal according to law. Parties will be at liberty to adduce oral evidence. They shall not be pinned down to the statement they made about not producing any oral evidence. The costs here and hitherto will abide the result.

S.N./R.K. *Case remanded.*

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* A. I. R. 1929 Allahabad 118

MUKERJI AND BENNET, JJ.

Indian Turpentine and *Rosin Co. Ltd. Cawnpore*, In the matter of.

Misc. Case No. 245 of 1928, Decided on 17th May 1928.

*** (a) Income-tax Act (11 of 1922), S. 10 (2) (9)—Government supplying raw material to a company on payment at a fixed rate and an additional sum if profits of company exceed certain percentage—Additional sum paid is not assessable.**

The arrangement between a company and the Government was that a certain quantity of crude resin should be supplied by the Government every year for a certain price for cost of labour and delivery and Re. 1 per maund as royalty. If the company's profits exceeded 15 per cent., then an additional royalty was to be paid to the Government.

Held; that the additional royalty paid to the Government is an expenditure incurred solely for the purpose of earning the profits of the company within the meaning of S. 10 (2) (9) and as such is not assessable. [P 119 C 2; P 120 C 1]

Per Bennet, J.—The matter is analogous to the payment of a share of profits of a business to a Managing Director. [P 120 C 1]

Per Mukerji, J.—The decision can be arrived at by considering the question as to what was the consideration for the additional royalty paid to the Government. The consideration being the price of resin supplied the money so spent is exempted under S. 10 (2) (9). [P 120 C 2]

(b) Contract Act, S. 77—Additional sum paid for supplying goods under prescribed conditions—Additional sum is price of the goods.

An additional royalty paid by a company to the Government for the supply of raw materials to the company when its profits exceed a certain percentage is price of those materials. [P 120 C 1]

Kailas Nath Katju—for Applicant.

Uma Shankar Bajpai—for the Crown.

Bennet, J.—This is a reference by the Commissioner of Income-Tax in the following terms in regard to the business of the Indian Turpentine and Rosin Company, Limited:

"Is the share of the profits of the company in 1925-26, which was paid to the Government

of the United Provinces as additional royalty in 1926-27, expenditure incurred solely for the purpose of earning the profits of the company assessable in 1926-27 within the meaning of S. 10 (2) (9) Income-tax Act ?"

The origin of this company is as follows : Originally the Government of the United Provinces owned a factory for the production of resin in Bareilly and that factory received crude resin from the Forest Department. In the year 1923 the Local Government desired to have the factory transferred to a company and accordingly it entered into a deed of sale and an annexed schedule of agreement with a certain syndicate of three gentlemen who eventually floated the company called the Indian Turpentine and Resin Company, Limited. The primary object of the Local Government was to have an assured market for the crude resin obtained from its Forest Department. Accordingly, in addition to becoming a shareholder to the extent of half the shares in the company to be floated, certain clauses were made in Sch. 2 of the agreement by virtue of which agreements were to be made each year between the Forest Department and the company as to the amount of crude resin which was to be supplied in the following season by the Forest Department. This schedule further provided in Cl. (7) that the cost of supply of the crude resin was to embrace ; (a) The estimated expenditure on materials, labour and special staff. (b) A certain allowance for delivery. (c) An allowance of Re. 1 per maund net weight of crude resin as royalty.

Clause (8) provided :

"In addition a share of the net profits of the company, as described in Cl. 30, shall be payable to the Forest Department by the company as additional royalty on the crude resin supplied."

Clause 30 provides as follows :

"In addition to the payments to be made by the company to the Forest Department under Cls. 16 and 27, a share of the net profits of the Company, as mentioned in Cls. 8 and 26, shall be paid annually by the company within three months of the close of each tapping season." This share shall be calculated as follows :

"If the profits of the company is any year exceed 15 per centum of the capital of the company ranking for dividend, then the Company will pay the Forest Department as additional royalty such proportion of 40 per centum of the amount by which the profits exceed the above-mentioned 15 per centum as the number of maunds of crude resin either supplied by the Forest Department to the company or collected and extracted by the company from the channels made available by the Forest Department in the preceding tapping season (or if the year coincides with the tapping season then in the tapping season concerned) bears to the total number of maunds of crude resin received by the company in that period."

"The profits of the company for the purposes of this agreement shall be such profits as may be ascertained by the company's auditors from year to year after deducting all working and other expenses chargeable against revenue and proper depreciation on all buildings, machinery, plant and materials. The certificate of the auditors of the company regarding the amount due to Government under this clause shall be accepted."

The arrangement, therefore, is that a certain quantity of crude resin is supplied in a certain year and for that a certain price for cost of labour and delivery and Re. 1 royalty is paid during that year. In the following year a further payment is made which varies with the profits of the company if those profits exceed 15 per cent.

The question before us is whether that extra sum paid in the following year is a distribution of profits by the company in which case it is liable to pay income-tax or whether it is to be regarded as a business expense of the company. It was held by the Income-tax Officer that as this royalty was dependent on the earnings of profits, therefore it was an allocation of profits to one of the biggest shareholders of the company. That position, however, was abandoned in the Court of appeal before the Assistant Commissioner of Income-tax, because it was pointed out that if Government sold all its shares in the company, the company would still have to pay the same amount of royalty. Therefore the payment could in no sense be regarded as an allocation of profits to one of the cosharers in the company. It is merely an unconnected fact that Government are at present shareholders in the company. The grounds on which the Assistant Commissioner of Income-tax proceeded were that the additional royalty was calculated in a certain manner and the liability to pay it arose in a certain manner both of which were connected with the profits earned by the company. He held, therefore, that it could not be considered as a payment for resin supplied nor could it be considered as an expense necessary for the earning of the profits of the company. The case has been very ably argued before us and we consider that the relevant points are as follows :

(1) We consider that the matter is analogous to the payment of a share of profits of a business to a managing director. The managing director gives his services to the business and after the close of any financial year he is given in the following year a proportion of the profit of the business. That proportion of the profits is counted as one of the expenses of the business incurred solely for the purpose of earning the profits of the business and, therefore is not liable to assessment to income-tax under S. 10 (1) (9), Income-tax Act. (2) In considering the question as to whether this payment is profit of the company or a business expenditure, we consider that the fact that in its annual balance-sheets this would not be shown as profit available for distribution to the shareholders is a relevant fact. The profit is not available for distribution to the shareholders. It is to be paid for the cost of the crude resin supplied in the previous year. (3) If the company was calculating the cost of production of its resin, it would certainly have to take into account this additional royalty paid to the Government. (4) As regards the definition of price, S. 77, Contract Act states "sale" is the exchange of property for a price. There is nothing in this definition which precludes the inclusion of this additional royalty as part of the price of the crude resin supplied to the company. In Sch. 2 it is laid down that this payment is to be made to the Forest Department. This payment is made on behalf of the crude resin supplied and is part of the price of that crude resin. It is in no sense part of the consideration for which Government sold the factory in Bareilly. (5) Looking at the origin of the agreement of sale between Government and the Syndicate which resulted in the eventual formation of the company, we notice that the primary object of Government was to obtain a market for its resin.

In the order of appeal of the Assistant Commissioner of Income-tax it is stated that the Chief Conservator of Forests stated that owing to want of previous experience in the matter the additional royalty was imposed merely by way of securing a fair price for the crude resin supplied. This indicates that at the time of entering into the agreement in Sch. 2 Government and the Syndicate were not in a position to ascertain what would be a fair charge for a royalty on the crude resin supplied. Accordingly a nominal royalty of Re. 1 per maund was taken and the agreement in Cl. 30 was made in order that if that amount proved to be too low a price in view of the market conditions, an extra sum would be paid to Government in order to bring the royalty to a proper figure. In view of all these considerations we answer the enquiry in the affirmative and we consider that the sum of Rs. 24,328-12-0 paid out of the profits of the year 1925-26 as additional royalty to the Local Government is a sum which should not be included in the assessment of income-tax on the profits of the Indian Turpentine and Resin Company, Limited. The company is allowed the costs of this reference

Mukerji, J.—I agree with my learned brother in answering the reference in the affirmative and in agreeing that the costs should be paid as directed by him. The operative portion of his judgment, therefore, stands as the judgment of the Court. The facts of the case are given in detail by my learned brother. I have only to add one thing and it is this. In my opinion the correct answer to the question put to us can be had by answering a simple question. That question is this. What is the consideration for the money paid to the Local Government (being a part of the profits earned) when the profits earned exceed 15 per cent? It is clear that the payment is not made to the Local Government as "shareholders". The payment is made on account of resin supplied. If this is not the case, then there is no consideration whatsoever for this payment. I have not the least doubt that the sum in question, paid to the Local Government, was paid as the price of resin supplied and that therefore the money so spent was a part of the expenditure incurred solely for the purpose of earning the profits of the company.

M.N./R.K. *Reference answered.*

* A. I. R. 1929 Allahabad 121

BOYS AND KENDALL, JJ.

Kallu and *another* — Defendants—Appellants.

v.

Ram Das—Plaintiff—Respondent.

Second Appeal No. 1288 of 1925, Decided on 1st July 1927, from decree of Dist. Judge, Meerut.

(a) Limitation Act, Art. 132 — Suit for enforcing hypothecation lien — Art. 132 applies.

Art. 132 is the article applicable to a relief asking for enforcement of a hypothecation lien. [P 122 C 2]

*** (b) Limitation Act, Arts. 115 and 116—Vendee undertaking to pay prior mortgage but sale-deed not stating that vendee was to pay at some future time or when he pleased but stating that vendee was responsible for future interest and was to pay before property endangered — Vendee shall be deemed to have broken the contract when he undertook to pay or within short but reasonable time**—(*Obiter*).

Where the terms of the conditions in the sale-deed were merely that the mortgage was to be paid off, and did not require the vendee to pay it off at some future time or to pay it off whenever he pleased but provided that he was responsible for future interest and was to pay it off before the property was endangered, the presumption is that he was to pay it off immediately or, if not immediately, at any rate as soon as was reasonably possible. The vendee, therefore, broke his contract when he undertook to pay the mortgage, or within a very short but reasonable period therefrom : 34 *All.* 429 ; 11 *A. L. J.* 478 and *A. I. R.* 1921 *All.* 133, *Dist.* [P 123 C 1]

Uma Shankar Bajpai and *S. S. Shastry*—for Appellants.

K. N. Katju—for Respondent.

Judgment.—This defendants' appeal arises out of a suit "for enforcement of a hypothecation lien by sale of the property specified." The only question with which we are concerned is whether Art. 132, Lim. Act or whether Art. 116/115 applies, and whether the suit is barred by limitation. The facts are as follows :

One Dewan Singh, whose heir is the present plaintiff, had two properties, which we will call *A* and *B*. On 19th September 1902, he executed a simple mortgage of both the properties *A* and *B* in favour of Ramrich Pal.

On 18th February 1905, he sold the property *A* to the present defendants for Rs. 700 leaving with them Rs. 480 to pay off the mortgage in favour of Ramrich Pal.

On 20th July 1905, Dewan Singh executed another mortgage in favour of Shamsundar, hypothecating the property *B*. The defendants did not discharge the mortgage in favour of Ramrich Pal, and accordingly properties *A* and *B* both remained subject to the mortgage. The excuse of the defendants for their default was that they did not get possession of the whole of the property ; but that excuse appears to have been merely a pretext, for the learned Judge of the lower appellate Court remarks :

"It is further urged for the appellant that the vendees did not obtain mutation of the whole of the property sold and that consequently the whole claim should not have been decreed. It appears that the vendees for a long time have lain low and have taken no steps to obtain the small area of which they did not get possession."

It is further to be noted that it is not suggested on behalf of the present plaintiff, the mortgagor, that he took any steps whatever to see that the vendees did discharge the first mortgage. So far, therefore, as responsibility for the subsequent confusion can be attributed to either, it would seem that they must both bear it equally.

The next step was taken by Ramrich Pal, the prior mortgagee of properties *A* and *B*, by filing a suit, No. 167 of 1911, in which on 1st July 1911, he obtained a decree for Rs. 1,332-2.

Shamsundar, the puisne mortgagee of property *B*, then brought a suit, No. 1049 of 1911, on his own mortgage and obtained a decree for Rs. 519-7. Shamsundar next proceeded to pay up the decree of the prior mortgagee and secured for himself a consolidated decree for Rs. 2,229-1-3. He proceeded to execute this decree, and in order to save his property the mortgagor paid, on 15th January 1918, a sum of Rs. 1,000 and on 15th April 1918, a further Rs. 400. A sum of about Rs. 700 odd remained unsatisfied, and Shamsundar proceeded to execute his decree for the balance. In pursuance of this execution the property *A* was sold at auction, and the defendants, who, it will be remembered, were the purchasers of property *A*, got the sale set aside on payment of Rs. 758. This did not, however, wholly satisfy the consolidated decree, for in the interval further interest had accumulated and there remained due at the date of the present suit to Shamsundar Rs. 377-13.

The net result was that to pay off the consolidated decree against the properties *A* and *B* the plaintiffs, heirs of the mortgagor, had paid a total amount of Rs. 1,400. The defendants had paid Rs. 758, and a balance still remained due of Rs. 377-13.

In the present suit the plaint recites these facts and the plaintiff claims that though he paid Rs. 1,400, only Rs. 707, out of the consolidated decree was due to the mortgagee of property *B* originally in favour of Shamsundar, and that that is all he should have had to pay, and that the defendants were really responsible for the balance of Rs. 693 which the plaintiff had paid and which he never would have had to pay if the defendants had, according to their original agreement of sale, paid half of the mortgage in favour of Ramrich Pal of properties *A* and *B*. Plaintiff further claims about Rs. 301 interest. He also urges that before his property *B* can be held to be perfectly secure, there is the balance of Rs 377-13 to which Shamsundar is still entitled as the unpaid balance of his consolidated dceree. Plaintiff, therefore, also claims this sum from the defendants, apparently on the allegation that he may himself at any time be called upon to pay it if he desires to save his property.

It will be noted that the sale-deed is dated 1905, and the condition that the vendee was to pay Rs. 480 to discharge the first mortgage had no condition attached to it that the Rs. 480 was to be paid at any particular time, or that the defendants could choose their own time for payment, provided that they were responsible for future interest that might accumulate and provided that they paid off the mortgage in time to save the property from being put to sale—a proceeding which would have resulted in the property *B* also being in danger of being sold which the mortgagor had kept with himself. The plaintiff has not brought his suit till 1922, and it is contended for the defendants that the suit is barred by limitation as coming within Art. 132, Lim. Act. For the plaintiff it is contended that Art. 116/115 is applicable.

We will consider first which of the two articles is applicable and then consider whether the suit would be within time even if the plaintiff's contention were to be accepted that Art. 116/115 was the appropriate article. It appears to us that the plaintiff's suit is avowedly one to which Art. 132 is applicable. The relief asked for is not for compensation for a breach of contract. It is specifically a suit to enforce payment of money charged upon immovable property. He specifically asks for "the enforcement of a hypothecation lien by sale" of the property, and that really can only have reference to S. 55 (4) (b), T. P. Act It is true that the plaintiff asks for sale of the property in satisfaction of his claim for a sum of Rs. 1,367-8, a total which he arrives at by adding together a sum which he has had to pay so far to preserve the property, interest thereon and the sum which he may be called upon to pay in the future. It may be that if his relief was properly framed as a claim under S. 55 (4) (b), T. P. Act, it should have been a claim for Rs. 480 together with interest to date. The fact, however, remains strikingly apparent in the suit as framed that it was a claim for "enforcement of a hypothecation lien" and not a suit for compensation for breach of contract. On the face of it, therefore, Art. 132 is the most appropriate article to apply. It requires very little experience of the Limitation Act to know that in many cases, in addition to the obviously appropriate article, there are other articles which can by forced reasoning be, to some extent at any rate, applicable. In our view, however, Art. 132 is clearly the article applicable to a relief asking for enforcement of a hypothecation lien. (We quote from the relief). This is really sufficient in our view for a decision of the case. Neither of the Courts below has discussed the applicability of Art. 132. They have contented themselves with giving reasons for holding Arts. 116/115 to be applicable. It is, therefore, desirable to say a few words in reference to those articles. In holding them applicable neither of the Courts has thought it necessary to consider the language of the articles themselves, but both Courts have contented themselves, with referring to certain rulings. Art. 116 merely refers back to Art. 115, and that says that limitation for a suit for compensation for the breach of a contract is to run from the date

"(a) when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted

occurs, or (where the breach is continuing) when it ceases."

Neither of the two later conditions is applicable here. We should merely have to consider "when was the contract broken." Bearing in mind the terms of the conditions in the sale-deed, which were merely that the mortgage was to be paid off, without giving the vendee the liberty to pay it off at some future time or to pay it off whenever he pleased, provided that he was responsible for future interest and paid it off before the property was endangered, the presumption is that he was to pay it off immediately or, if not immediately, at any rate as soon as was reasonably possible. It matters little whether that period he held to be 24 hours or a week. He clearly, therefore, broke his contract on 18th February 1905, when he undertook to pay off the mortgage, or within a very short but reasonable period therefrom: cf. *Raghubar Rai* v. *Jaij Rai* (1). Incidentally it may be noted that in that case Art. 116 was applied but the pleadings were admittedly not clear and both sides agreed that the suit was to be considered as one for damages on breach of the covenant.

Even, therefore, applying Art. 116/115 the suit would appear to be barred by limitation. This aspect of the case the Courts have not considered. The trial Court relied on the case of *Hakim Ali Khan* v. *Dalip Singh* (2). In that case it was held that limitation would run from the date on which the mortgagor or his successor-in-title had to pay the decretal amount. There is nothing in that case to show what were the terms of the contract between the mortgagor and his vendee. Nor is it clear how the suit was framed; nor was there any discussion as to the applicability of Art. 132 or Art. 116/115. In *Ishri Pershad* v. *Muhammad Sami* (3) the contract between the mortgagor and a subsequent mortgagee who failed to discharge the prior mortgage with the money left in his hands for that purpose was wholly different to that in the present case. In the contract there the mortgagee had undertaken all responsibility for further interest and could pay the prior mortgage at any time he pleased, and it was held that the cause of action, therefore, did not accrue on the date of the contract but arose only when the mortgagor was damnified.

The result is that we set aside the decree of both the lower Courts and dismiss the suit with costs throughout.

S.N./R.K. *Decree set aside.*

(1) [1912] 34 All. 429=14 I.C. 244=9 A.L.J. 534.
(2) [1913] 11 A.L.J. 478=19 I.C. 676.
(3) A.I.R. 1921 All. 133.

A. I. R. 1929 Allahabad 123

SULAIMAN, AG. C. J. AND BENNET, J.

Sumer Chand—Objector—Appellant.

v.

Beni Prasad and *another*—Decree-holders—Respondents.

Execution First Appeal No. 214 of 1928, Decided on 16th July 1928, from decree of 1st Sub-Judge, Saharanpur.

Civil P. C., S. 2 (2)—Order striking off objection of judgment-debtor for default is not appealable (*obiter*)**—Remedy is S. 151 or O. 47.**

Order under S. 47 dismissing for default an objection of judgment-debtor is not appealable because S. 2 (2) when defining a decree and stating that it includes the determination of any question within S. 47 expressly states that it shall not include any order of dismissal for default (*obiter*): If order was not covered by O. 9 judgment-debtor should have applied under S. 151 or O. 47.

[P 123 C 2; P 124 C 1]

S. B. Johri—for Appellant.

S. G. Goyle—for Respondents.

Sulaiman, Ag. C. J.—This is an appeal by the judgment-debtor arising out of certain execution proceedings. Objections were taken to the execution and attachment of the decree but on the date fixed the objector was absent; his pleader stated that he had no instructions to proceed with the objections. The Court ordered that the objections be struck off for default. It is from this order that this appeal has been preferred.

The learned advocate for the appellant argues that the proceedings were not governed by O. 9, Civil P. C., and that the dismissal for default did not come under that order so as to compel him to apply for restoration. His contention is that this is an order under S. 47 of the Code and is a decree and as such appealable. We are unable to accept this contention. S. 2 (2), when defining a decree and stating that it includes the determination of any question within S. 47, expressly states that it shall not include any order of dismissal for default. The order in ques-

tion, therefore, is not appealable as a decree.

If the order was not covered by O. 9 the dismissal certainly was under the inherent jurisdiction of the Court. The proper remedy for the appellant would have been either to apply for review of judgment or to invoke such inherent power. In any case no appeal lies to us. The appeal is dismissed under O. 41. R. 11.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 124

SULAIMAN, J.

Bansi Ram and *others*—Plaintiffs—Applicants.

B. N. W. Ry. Co., and *another*—Defendants—Opposite Parties.

Civil Revn. No. 205 of 1928, Decided on 16th November 1928, from order of Small Cause Court Judge, Deoria, D/- 17th April 1928.

*** (a) Railways Act, S. 72 —Risk-Note A — Shortage in weight is covered.**

The expression "loss arising from the same" in Risk-note A means "loss arising from the condition in which the goods are delivered," and shortage in weight is a condition in which the goods are delivered and is covered by the saving clause. [P 124, C 2]

(b) Railways Act, S. 72 — Risk-note A— Burden of proof.

Burden of proving misconduct on the part of the companies' servants lies on the consignor. [P 124, C 2]

A. P. Pandey—for Applicants.

B. Malik—for Opposite Parties.

Order.—This is a revision from a decree of Court of Small Causes dismissing the plaintiffs' suit for damages against the defendant railway company. A consignment consisting of three bundles of corrugated iron sheets was despatched from Calcutta to Deoria. Its weight as noted at Calcutta was 8 maunds 4 seers. The consignment when weighed at its place of destination was found to be 2 maunds 7 seers short in weight. The plaintiffs took delivery under protest.

The Court below has dismissed the claim. holding that the plaintiffs have failed to prove wilful negligence of the defendant or misconduct of the servants of the defendant.

The risk-note which has to be considered is in form A, as recently amended. It is used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit. The consignor admitted that the goods were in such condition and agreed to hold the railway company

"harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the railway administration's servants."

It is not now open to the plaintiffs to urge that the consignment was neither in bad condition nor defectively packed. There is no doubt that the railway company is not liable for the condition in which it was delivered or from any loss arising from the same except on proof of the misconduct of the company's servants.

The learned advocate for the applicants has argued that the burden was on the railway company to prove that the loss arose on account of leakage, damage or wastage in transit. His contention is that the company has failed to prove that the shortage in weight was due to any such cause.

In my opinion the expression "loss arising from the same', means "loss arising from the condition in which the goods are delivered." The Urdu translation of this contract, though not conclusive, also supports the view that the word "same" refers to the noun "condition." It seems to me that a shortage in weight is a condition in which the goods are delivered and is covered by the saving clause. When a bundle is insecurely packed any goods comprised in it may slip out and be lost on the way. There can be no necessary inference that it has been stolen, much less that it has been stolen by a servant of the railway company concerned. The question of wilful negligence did not really arise, on the terms of the agreement ; but that of misconduct on the part of the companies' servants did arise. The burden lay on the plaintiffs to prove the exception and the finding of the Court below is that they have failed to discharge that burden. There is no proof that the loss of some of the sheets was due to any misconduct on the part of the railway servants.

I accordingly dismiss the revision with costs.

R.K. *Revision dismissed.*

A. I. R. 1929 Allahabad 125.

DALAL, J.

Bansi Kurmi and *others*—Defendants—Appellants.

v.

Sukh Mangal Pande and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1607 of 1926, Decided on 30th November 1928, from decree of Sub-Judge, Basti, D/- 4th September 1926.

(a) Landlord and Tenant—Abadi—Tenant cannot use sahan for building purposes.

The use of the sahan as a building site is certainly detrimental to the interests of the zamindar, and a tenant cannot construct a building on his sahan (Court-yard) : 12 *A.L.J.* 175 ; 35 *All.* 292 ; 25 *I. C.* 59 and *A. I. R.* 1924 *All.* 723, *Rel. on.* : *Allahabad Second Appeal N.* 1090 *of* 1924, *Expl* and *Dist.* [P 125 C 2]

(b) Landlord and Tenant—Acquiescence.

There can be no acquiescence where a kachcha house is put up in a short time costing little to put up or to pull down. [P 125 C 2]

S. S. Sastry—for Appellants

N. Upadhya—for Respondents.

Judgment.—The plaintiffs zamindar sued for the demolition of a certain construction made by the defendant-tenants on a plot of land in front of their house. This plot of land No. 149, is a court-yard (sahan) of the defendants. The defence was that an old cattle-shed existed on the land, and that the present construction was made in place of the old construction. The old construction, it was alleged, was a cattle-shed. The lower appellate Court held as a finding of fact that no old construction existed there, that the land was used by the defendant-tenants as their sahan (court-yard), and that the present construction in dispute was entirely a new building constructed on an open plot of land. The claim was for demolition of the building, and, rightly, not for the possession of the land on which the construction is made. The zamindar is prepared to permit the defendants to use the land as heretofore as their court-yard.

It was argued that granting that the piece of land was the court-yard of the defendants and appurtenant to their house, they were entitled to build thereon. A Single Judge unreported ruling of this Court in Second Appeal No. 1090 of 1924 in a case decided on 3rd February 1927 was quoted. The learned Judge delivered this dictum that a tenant may build either a house or well inside his house or on land actually appurtenant to and adjoining his house which forms part of the site on a portion of which his house stands, provided, at any rate, that such construction is not detrimental to other interests of the zemindar. The lower appellate Court has not gone beyond this dictum Being an Indian himself he has put finger on the real difficulty of the zemindar. It is impossible for an Indian tenant to live in a house without a court-yard, to sit out and sleep out in the open, and the lower appellate Court has rightly pointed out that after the tenants build on this present sahan of theirs they will require another plot of open land in front to use as a fresh sahan. The use of the sahan, therefore as a building site, is certainly detrimental to the interests of the zamindar. A distinction has always been drawn by this Court between the construction of a well which is necessary for agricultural purposes and the construtions of a building. There is a large number of reported rulings to prevent a tenant from building on his sahan. There are two of 1913, *Kehri Singh* v. *Hulasi* (1) and *Bhagwan Das* v. *Muhamad Yahia* (2), one of 1914, *Chhaterpal* v. *Gajadhar Upadhya* (3), and one of 1924, *Muhamad Taqi Husain* v. *Dori A. I. R.* 1924, *Allahabad* 723. The lower appellate Court was fully justified, according to the opinion long held by this Court, that the zamindar was entitled to have the construction removed from the open court-yard.

It was next argued that questions as to limitation and acquiescence had not been decided. No question of limitation arose as the lower appellate Court distinctly held that the building in dispute was an altogether new building. There can be no acquiescence, in a matter of this nature where a kachcha house is put up in a short time costing little to put up or to pull down.

I dismiss this appeal with costs.

R.K. *Appeal dismissed.*

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(1) [1914] 12 A. L. J. 175=21 I. C. 967.
(2) [1913] 35 All. 292 = 18 I. C. 928 = 11 A. L. J. 301.
(3) [1914] 25 I. C. 59.

A. I. R. 1929 Allahabad 126

BENNET, J.

Ram Swarup and *others*—Defendants —Appellants.

v.

Bunyad Ali and *others* — Plaintiff — Respondents.

Second Appeal No. 832 of 1928, Decided on 26th June 1928, from decree of Addl. Sub-Judge, Muzaffarnagar, D/- 6th February 1928.

(a) U.P. Land Revenue Act, Ss. 40 (3) and 44—Scope.

It is open to any one to go to the civil Court who is aggrieved by an order of the revenue Court in mutation. [P 126 C 2]

(b) Civil P. C., O. 34, R. 1, S. 11—Prior usufructuary mortgagee not made a party in suit by subsequent mortgagee against mortgagor for possession—Decree in such suit cannot bind prior mortgagee.

Where subsequent usufructuary mortgagee sues mortgagor for obtaining possession but does not make prior usufructuary mortgagee party and even after getting decree in his favour allows the latter to remain in possession, his decree cannot affect the prior mortgagee. [P 127 C 1]

(c) Transfer of Property Act, S. 68 (c)—Deed of usufructuary mortgage requiring mortgagee to pay off prior mortgagee in possession—He failing to do so and not getting possession—He cannot require mortgagor to redeem his mortgage before obtaining possession.

The subsequent usufructuary mortgagees neglected to carry out part of the contract in their deed of mortgage by which they undertook to pay off prior usufructuary mortgagee in possession. Not having done so they failed to obtain possession.

Held : that they could not insist on the mortgagor redeeming their mortgage before mortgagor could obtain possession. [P 127 C 1]

Gopinath Kunzru—for Appellants.

Judgment.—This is a second appeal by defendants first party against a decree of the lower appellate Court. The plaintiff originally sued for possession of the property detailed in the plaint. The first ground in second appeal is that as the plaintiff sued for possession the lower appellate Court was wrong in holding that the plaintiff was in possession and in granting the plaintiff a decree for declaration only. But as noted in the judgment of the Court of first instance an amendment of the plaint was allowed which changed the suit from one for possession into a suit for declaration only. The facts of this case are as follows : On 17th March 1866, Mt. Najiban, owner of the property, made a usufructuary mortgage for Rs. 250 to Gobind Sahai, the predecessor of defendants second party.

On 20th July 1873, Mt. Najiban made a second usufructuary mortgage of the same property and some other property for Rs. 1,900 to Bul Chand, etc., predecessors of defendants first party. That mortgage contained a stipulation that the mortgagees were to pay off the Rs. 250 due on the first mortgage and then obtain possession. It is admitted that Bul Chand etc. did not pay off this Rs. 250.

In 1916 defendant 16, Nasiruddin redeemed the first mortgage, deposited Rs. 250 in Court, and obtained possession. In January 1925 the plaintiff (a transferee of a share from Mt. Najiban) deposited his rateable share of Rs 250 and redeemed his share of the mortgage. An application for mutation was made and it was ordered that defendants first set, the present appellants, should be entered as mortgagees in possession. The plaintiff. therefore, sued in the civil Court, and the lower appellate Court has granted the plaintiff a declaration to the effect that the plaintiff holds the property in his possession as a mortgagor and that the defendants first set appellants are entered in the khewat only in the capacity of mortgagees and not in the capacity of mortgagees in possession. It was argued by the learned counsel for the appellants that when the revenue Court had declared that the appellants were in possession it was not open to the civil Court to reverse this finding. No authority was shown for that proposition, and on the contrary S. 44 and S. 40 (3), Act 3 of 1901 state that it is open to any one to go to the civil Court who is aggrieved by an order in mutation of the revenue Court.

The second ground of appeal is that the question of possession is res judicata between the parties by virtue of the decision of the Subordinate Judge of Saharanpur in "suit No. 20 of 1875." Bul Chand, etc., sued for possession in suit No. 25 of 1875 against Mt. Najiban and that suit was dismissed by the Court of first instance but decreed in appeal No. 20 of 1875. The lower appellate Court states that it was admitted that the prior mortgagees Gobind Sahai, etc., were entered till 1916. These prior mortgagees were not a party to the litigation in 1875 and that litigation cannot have

affected them. At most it appears to have been a collusive suit between Mt. Najiban and the second mortgagees. No actual possession was obtained by Bul Chand, etc., on that decree. I do not consider, therefore, that the decree can have any bearing in the present case. It is to be noted that the matter was not represented before either of the lower Courts, and no issue on res judicata was framed. Presumably the reason was that because the first mortgagee was not party to that litigation, it could not be considered a matter of any weight.

The ground on which the lower appellate Court has proceeded apparently is that because Bul Chand, etc., the subsequent mortgagees, did not pay off the prior usufructuary mortgage and obtain possession they cannot claim that the plaintiff must redeem their mortgage before the plaintiff gets possession. Redemption is a remedy of obtaining possession from a mortgagee in possession by paying off the mortgage money. The defence put forward in the lower Courts by the appellants was that the plaintiff could not get possession till he redeemed the mortgage of 1873. Therefore, the question centred on who was actually in possession. It is contended in second appeal that the trial Court was wrong in recording oral evidence on a question of actual possession but no reason is given for this contention. The finding of fact that the plaintiffs are actually in possession is a finding which cannot be disturbed by this Court in second appeal. There was evidence on which the lower appellate Court could base such a finding. The appellants neglected to carry out part of the contract in their deed of mortgage by which they undertook to pay off the usufructuary mortgagee in possession. Not having done so the appellants failed to obtain possession. The legal remedy of the appellants, therefore, is not to insist on the plaintiff redeeming their mortgage before plaintiff can obtain possession. The decree of the lower appellate Court appears to be correct. The appeal is dismissed summarily.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 127

SULAIMAN, J.

Kali Prasad Tewari—Defendant—Applicant.

v.

Parmeshwar Prasad Marwari—Plaintiff—Opposite Party.

Civil Revn. No. 222 of 1928, Decided on 26th November 1928, from order of Small Cause Court Judge, Gorakhpur, D/- 13th April 1928.

Civil P. C., O. 9, R. 4—Time to file application under R. 4 cannot be extended under Limitation Act. S. 5.

Where an application for restoration of the case under O. 9, R. 4, is filed more than 30 days after the date of the dismissal, time cannot be extended under S. 5, Lim. Act, as there is no express provision in that order which makes S. 5 applicable to such application: *A. I. R. 1925 Rang. 187, Rel. on.* [P 128 C 1]

Sri Narain Sahai—for Applicant.

Order.—This is a defendant's application in revision from a decree of the Court of Small Causes. The suit had been adjourned on several occasions on account of the nonpayment of process-fee by the plaintiff. On 7th December 1927, the Court dismissed the suit for the plaintiff's default of the payment of the process fee. The expression used by the learned Judge was "thrown out for plaintiff's default." On 13th February 1928, the plaintiff applied under O. 9, R. 4, Civil P. C., for the setting aside of the dismissal. The report of the office also indicated that the suit had been dismissed on account of the nonpayment of the process-fee. On 24th February 1928, the suit was restored to its original number on the file and on that date the process fee was paid by the plaintiff. Although the language used by the Judge of Small Cause Court was not explicit there is no doubt that the suit was dismissed on account of the nonpayment of the process fee. The plaintiff himself treated the dismissal as such because he applied under O. 9, R. 4. The application for restitution of the case was filed more than 30 days after the date of the dismissal, and was beyond time under Art. 163, Lim. Act.

The only point that remains for consideration is whether the time could be extended by the Court under S. 5, Lim. Act. That section does not apply to all applications but only to those that are expressly provided for therein It ap-

plies to an application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force. The application in question was made under O. 9, R. 4 and there is no express provision in that order which makes S. 5 applicable to such application, as for instance is to be found in O. 22, R. 9. sub-Cl. (3).

I must therefore hold that the Court had no jurisdiction to extend the period of 30 days which had expired. A somewhat similar view has been expressed by the Rangoon High Court in *Ma Naw Naw* v. *E. S. S. M. Somasundaram Chetty* (1) with regard to applications under O. 9, R. 13 Civil P. C., which are governed by Art. 164.

I accordingly allow this revision and setting aside the decree of the Court below dismiss the plaintiff's suit with costs.

R.K. *Revision allowed.*

(1) A. I. R. 1925 Rang. 187=2 Rang. 655.

A. I. R. 1929 Allahabad 128

SULAIMAN, AG. C. J. AND KENDALL, J.

Ram Narain and *another* — Plaintiffs —Appellants.

v.

Mt. Nandrani Kunwar and *others*—Defendants—Respondents.

First Appeal No. 411 of 1925, Decided on 10th April 1928, from decree of Sub-Judge, Bareilly, D/- 17th July 1925.

Hindu Law—Alienation by widow—Recitals in a deed are not evidence of legal necessity—Representation of necessity to the transferee and his honest belief in it will be sufficient—Recitals of necessity are sufficient proof of representation — Where sale-deed is very old, detailed evidence of circumstances cannot be expected.

Recitals in a deed of sale with regard to the existence of legal necessity for an alienation by a Hindu widow are not in themselves evidence of such necessity without substantiation by evidence aliundi. [P 129 C 1]

It is not absolutely necessary for a transferee to establish the actual existence of family necessities, or to show that the money advanced by him was utilized for such purposes. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper enquiry to satisfy himself or its existence. The recital in the document is clear evidence of a representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible the recital coupled with such circumstances would be sufficient evidence to support the deed : [P 129 C 1]

Where a sale-deed is of a very old date, it is not reasonable to expect that full and detailed evidence would be forthcoming as to the state of things which gave rise to the sale-deed. In such circumstances presumptions are permissible to fill in the details which have been obliterated by time : *A. I. R.* 1916 *P. C.* 110 ; *A. I. R.* 1914 *P. C.* 38 and *A. I. R.* 1920 *P.C.* 64, *Foll.* [P 129 C 2]

Iqbal Ahmad and *S. N. Gupta*—for Appellants.

P. L. Banerji and *Parmeshwar Sahai* —for Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit for recovery of possession of property which was transferred so long ago as 16th January 1865 under a sale-deed executed by Mt. Chunni, the mother, and Mt. Tursa Kunwar, the widow of Jawahir Lal, deceased, whose reversioners the present plaintiffs are. The learned Subordinate Judge found that the sale could not have been without legal necessity, and the transferees had discharged the burden that lay on them. It appears that Jawahir Lal, when he died, left a mother and a widow named above and a daughter Mt. Jhamman Kunwar. Probably Mt. Jhamman Kunwar's son Jagannath Prasad was not born then. Jhamman Kunwar was married to Raghabar Dayal who was the son of Chhote Lal. If Jagannath Prasad who was born subsequently had survived Mt. Jhamman Kunwar his mother, the plaintiffs would have had no locus standi to sue. As it happened he died on 9th March 1917 and his mother died after him on 14th July 1921. Succession accordingly opened on the death of Mt. Jhamman Kunwar and the plaintiffs are entitled to challenge this old alienation. The fact that this is a very old transaction as to which oral evidence has by mere lapse of time become almost extinct is patent. It would be very hard on the representatives of the original transferee to expect complete and exhaustive evidence showing the way in which the money obtained by the ladies was utilized for purposes of necessity.

The deed, however, contains an express recital to the effect that decretal amounts of certain named creditors and others were due by the executants' ancestor, and they had borrowed money under bonds

and pro-notes from Chhote Lal and made payments to those creditors. The sale consideration, which was Rs. 4000 was set off against the entire amount which had been so borrowed for the payment of the debts. The executants acknowledged that they had applied the amount towards the payment of their ancestral debts. Recitals in a deed of sale with regard to the existence of legal necessity for an alienation by a Hindu widow are not in themselves evidence of such necessity without substantiation by evidence aliundi, *Brij Lal* v. *Mt. Inda Kunwar* (1). But even though the onus lies upon the legal representatives of the transferee to prove the necessity for the sale yet having regard to the great lapse of time, it would not be reasonable to expect that full and detailed evidence would be forthcoming as to the state of things which gave rise to the sale-deed in question, as would be the case if alienations made at more or less recent dates were concerned. In such circumstances presumptions are permissible to fill in the details which have been obliterated by time: *Chintamanibhatka Venkata Reddi Pantulu Garu* v. *Rani Saheba of Wadhwan* (2). Furthermore, it is not absolutely necessary for a transferee to establish the actual existence of family necessities, or to show that the money advanced by him was utilized for such purposes. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper enquiry to satisfy himself of its existence. The recital in the document is clear evidence of a representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible the recital coupled with such circumstances would be sufficient evidence to support the deed: *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chawdhuri* (3).

We have therefore to consider whether the circumstances of this case are such as would justify us in holding that the recital contained in the sale-deed was correct and that the representation made to the transferee was true, or that reasonable enquiry would have shown that it was well-founded.

In 1865, several years after Jawahir Lal's death, when Mt. Jhamman Kunwar must have been alive, and indeed it is the plaintiffs' case that she was at that time the daughter-in-law of Chhote Lal, there could be no reasonable expectation that she would not give birth to any male child, so that after the death of the two ladies the property would go over to distant reversioners. It is therefore impossible to presume in favour of the plaintiffs as the learned counsel for the appellants asks us to presume, that Chhote Lal might have had a design in his mind to protect the interest of his son who had married the daughter of Jawahir Lal.

It is also clear to us that there is no force in the contention strongly urged on behalf of the appellants that the estate in the hands of the widows was large, and that the income which they derived from it were ample and adequate for the purpose of paying off all the outstanding debts of the deceased owner in addition to maintaining the ladies. Two villages Ulaithapur and Maheshpur had been usufructuarily mortgaged under a deed dated 16th July 1859, and were not redeemed till within a couple of months of the execution of the disputed sale-deed. The ladies therefore could not have accumulated any income arising out of this property which would have sufficed for the purpose of paying off the debts that might have been outstanding. Village Katni had been sold in the lifetime of Jawahir Lal, and its sale consideration realized not long after August 1861. Whether the ladies utilized this consideration in paying off certain other old debts, or whether they spent it for some other purpose, is not a question which is capable of a definite answer now. The transferee, however, was not responsible for any past mismanagement by the Hindu widows. There remained village Gularia. The learned advocate for the appellants has drawn our attention to the khewat and the khatauni printed on pp. 115 and 128 of the book and tried to show that the net profit is considerable. But these documents are not a safe guide to the profits of this village in the year 1864, for they are documents which were prepared in 1919 to 1920. On the other hand the receipt printed at p. 151 shows that the

(1) A. I. R. 1914 P. C. 38=36 All. 187 (P.C.).
(2) A. I. R. 1920 P. C. 64=43 Mad. 541=47 I. A. 6 (P.C.).
(3) A. I. R. 1916 P. C. 110=44 Cal. 186=43 I. A. 249 (P.C.).

village was leased out in 1863 and the total annual income then was about Rs. 325. This would hardly have been sufficient to maintain the two widows and their daughter. That the income was found insufficient by Jawahir Lal himself is clear from the circumstances that during his lifetime he was borrowing from time to time small sums of money on registered documents. On 12th December 1859 he borrowed Rs. 200, and created a further charge on the mortgaged property, and agreed to allow the mortgagee to deduct Rs. 24 yer pear out of the taufir payable to him. On 26th May 1860 he again borrowed a further sum of Rs. 200 with interest at 1/12 per cent per mensem. On 1st March 1861, Rs. 300 bearing interest at 2 per cent per mensem were borrowed by him and a share in village Gularia was hypothecated. On 10th March 1861 he had to borrow a sum of Rs. 100 by executing a bond. Then on 22nd March 1861 he borrowed a further sum of Rs. 200. It is not by any means clear that these are the only documents which he executed and the only loans he took. But they do indicate that even Jawahir Lal found himself driven to borrowing small sums of money from time to time in order to meet his necessities. It was therefore not at all strange if at his death his widows were faced with the same difficulty, particularly when they had to discharge the previous debts which had been left uupaid by Jawahir Lal. There was some dispute between Mt. Chunni and Mt Tursa Kunwar, and they referred their dispute to arbitration, and the arbitrators delivered an award on 18th August 1861. That award provided that they should take the property half and half and pay the debts due from Jawahir Lal half and half, and that so far as possible the payment of the debts should be made out of the profits; but that both the parties had power to sell or mortgage the property belonging to each of them to such an extent as was needed to pay off the debts due as well as to meet some purely household wants.

The contention before us is that this award somehow or other curtailed the powers which Mt. Tursa Kunwar possessed as a Hindu widow. We are unable to go to this length. No doubt Mt. Chunni and her legal representative might have been in a position to enforce the terms of this award against Mt. Tursa Kunwar, but it is difficult to hold that by virtue of this award the powers of Mt. Tursa Kunwar were curtailed and that she was deprived of the ordinary rights of a Hindu widow to transfer property for legal necessity. The plaintiffs cannot claim to be the representatives of Mt. Chunni and as such entitled to enforce the terms of this award against her. Apart from this the award itself provided for their right to transfer the property in case of necessity and for the purpose of paying off the debts of the deceased, though no doubt it directed that as far as possible the debts should be paid off out of the profits. The defendants have produced documentary evidence to show that Jawahir Lal was heavily indebted. They do not profess to supply an exhaustive list of all the debts owing from him. These debts can be classified into two groups, (a) those due to Chhote Lal and (b) those due to other creditors. The endorsement on the back of the bond of 12th December 1859, shows that the entire amount of principal due on it was paid off by Chhote Lal. It came to Rs. 200. Again the endorsement on the mortgage-deed dated 1st March 1861 shows that Rs. 425 were paid to the mortgagee by Chhote Lal. Similarly the bond dated 10th March 1861 shows that Rs. 100 were borrowed from Chhote Lal in addition to the sum of Rs. 1500 which was due to him from Jawahir Lal. Lastly the endorsement on the mortgage-deed dated 22nd March 1861, shows that Rs. 280 were paid by Chhote Lal. These documents alone show that Rs. 2505 were due to Chhote Lal. It is possible that there might have been other pro-notes and bonds which are not now forthcoming. The rate of interest mentioned in the deed of 10th March 1861 was 2 per cent per mensem. If that rate applied to the previous loan of Rs. 1500 also the total amount due to Chhote Lal would be well over Rs. 4000. Even if a lower rate had been fixed for this amount, the amount due to Chhote Lal on these documents alone would not have been very much under Rs. 3000.

In addition to this indebtedness we find that Rs. 2000 were due to the mortgagees which were paid off shortly before the sale-deed was executed. There were Rs. 200 with interest at Rs. 1/12 per cent per mensem as debt due on 26th May 1860 on which a decree was subsequently obtained. There was also another decree

for Rs. 424-12-0. This being the state of affairs of the family, there is no ground for suspecting that the recital in the sale-deed of 1865 was false and had been made intentionally with some ulterior motive. After a lapse of 60 years the defendants have succeeded in showing that at least Rs. 3000 out of Rs. 4000 would have been due to Chhote Lal. Under these circumstances they cannot be expected to lead complete evidence showing the necessity for the entire sum of Rs. 4000. That a representation was made to him by the two widows is clear from the deed itself. That Mt. Jhamman Kunwar, who remained alive till 1921, did not seek to get the deed avoided in her lifetime is also a circumstance which cannot altogether be ignored. The other reversioners, viz., the ancestors of the present plaintiffs also did not think it fit to obtain a declaration that this transfer would not be binding on the reversioners beyond the lifetime of the widows. They have waited for all these years and now call upon the great grandsons of Chhote Lal the original transferee, to justify the alienation. In view of the pronouncements of their Lordships of the Privy Council we agree with the view taken by the Court below that the defendants have under the circumstances of this case discharged the burden which lay upon them. The mere fact that Chhote Lal was connected with the ladies through the marriage of his son or that he belonged to the legal profession can at best raise a mere suspicion in one's mind, which cannot be made the basis for a finding that he had, either through undue influence over the widows or in some other improper way, managed to get entered in the sale-deed false recitals for the protection of his own family. In view of the long interval of time the evidence no doubt is meagre, but we are convinced that no case has been made out for interference with the decree of the Court below.

We accordingly dismiss this appeal with costs including fees in this Court on the higher scale.

N.K., R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 131

WEIR, J.

Govind Prasad—Plaintiff—Applicant.

v.

Har Kishen and *others*—Defendants—Opposite Parties.

Civil Revn. No. 70 of 1928, Decided on 20th April 1928.

Civil P. C. O. 9, R. 4—Suit dismissed for default of both parties—Application to restore the same dismissed—Plaintiff can bring a second suit on the same cause of action.

A plaintiff is entitled to bring a second suit when an application to restore his first suit which was dismissed under O. 9, R. 3 in consequence of default of both parties, had been dismissed : 20 *O. C.* 66 and 63 *I. C.* 239 *Rel. on.* [P 131 C 2]

Shabd Saran—for Applicant.

M. N. Kaul—for Opposite Parties.

Judgment.—This is an application by the plaintiff in a civil suit to review an order of the Small Cause Court Judge of Meerut dismissing the plaintiff's suit. The facts are these : The plaintiff, who is the applicant in these proceedings, brought a suit against the defendants, who are the respondents in these proceedings, on 20th May 1927. That suit was dismissed under O. 9, R. 3, in consequence of neither party having appeared when the suit was called for hearing. The plaintiff applied to the learned Judge on 3rd September 1927, to have the suit restored, and the learned Judge dismissed that application. The plaintiff then brought a new suit upon the same cause of action on 17th October 1927. In that suit the learned Judge has passed the following order :

"The application for restoration was dismissed. The present suit is not maintainable. Dismissed with costs."

In my opinion the learned Judge was clearly wrong in holding that the plaintiff was not entitled to bring a second suit, when an application to restore his first suit had been dismissed. Two authorities have been cited to me, namely, *Daya Shankar* v. *Raj Kumar* (1) and *Bhudeo* v. *Baikunthi* (2). I entirely agree with the leaned Judge who decided both those cases, and I, therefore, set aside the order of the Small Cause Court Judge and direct him to proceed with the trial of the suit No. 6390 of 1927.

Application allowed. Costs will be costs of the case.

N.K./R.K. *Application allowed.*

(1) [1917] 20 O. C. 66=39 I. C. 191.
(2) [1921] 63 I. C. 239.

** A. I. R. 1929 Allahabad 132

MUKERJI, J.

Jwala Debi—Plaintiff—Appellant.

v.

Amir Singh — Defendant — Respondent.

Second Appeal No. 185 of 1927, Decided on 14th December 1928, from decree of Addl. Dist. Judge, Moradabad, D/- 2nd September 1926.

**** Civil P. C., S. 11 — Decision as to jurisdiction does not act as res judicata.**

A question of jurisdiction, although it may be raised by the defendant, is a question that virtually arises between the plaintiff and the Court itself. A decision on the question of jurisdiction does not affect in any way the status of the parties or the right of one party to obtain redress against the other. A decision as to jurisdiction, therefore, is not binding on the parties in a subsequent litigation. A previous decision of revenue Court holding that a suit was not maintainable in revenue Court does not act as res judicata in a subsequent suit in revenue Court between the same parties regarding the same land.

[P 132 C 2]

Baleshwari Prasad and *Maharaj Bahadur*—for Appellant.

A. P. Baghchi—for Respondent.

Judgment.—This appeal raises a point of law which is very interesting and which is not covered by any authority which may have been laid down before me, though many cases to be presently mentioned have been cited before me.

The facts are these: The appellant who was the plaintiff in the Court of first instance instituted the suit for ejectment of the respondent, on the ground that he was her (plaintiff's) tenant by virtue of holding certain lands, as pasture ground. The suit involved certain plots which had been the subject of a previous litigation between the plaintiff's predecessor-in-title and the defendant. In that suit, the plaintiff's predecessor, Mt. Mubarak-un-nissa, was denied any relief, on the ground that the suit was not maintainable in the revenue Court. The defendant pleaded that the judgment in the former suit of 1912 operated as res judicata in so far as the lands common to the two suits were concerned. This contention found favour with the learned Assistant Collector and he accordingly dismissed the suit, except with regard to two plots of land which were not covered by the previous litigation.

On an appeal by the plaintiff, the judgment of the Court below has been affirmed. Hence the appeal by the plaintiff. On behalf of the appellant, the case of *Ramnath* v. *Emperor* (1) a decision by Sulaiman, J., of this Court has been relied on. That case was very similar to the present case and the learned Judge held that the fact that, in the earlier litigation, the revenue Court had denied itself jurisdiction did not operate as a bar to the maintenance of the subsequent suit in the revenue Court: The learned Judge relied on a Calcutta case of *Alimunissa Chawdhurani* v. *Shama Charan Roy* (2). That decision has since been overruled by a Bench of five Judges of the Calcutta High Court, vide *Tarini Charan Bhattacharjee* v. *Kedar Nath Haldar* (*A. I. R.* 1928 *Calcutta p.* 777). The learned District Judge has relied on a decision of this Court in which it was held that a decision on a point of law operates as res judicata between the parties, just as much as a decision on a fact.

There can be no doubt that a decision on a point of law is as much binding on the parties, in a subsequent litigation, provided other ingredients for a principle of res judicata to apply are present, as a decision on a point of fact. The question whether the previous decision was right or wrong is entirely irrelevant; but these considerations do not apply where a question of jurisdiction, arises. Looked at closely, a question of jurisdiction, although it may be raised by the defendant, is a question that virtually arises between the plaintiff and the Court itself. The plaintiff invokes the jurisdiction of the Court. The defendant may or may not appear. If the Court finds that it has no jurisdiction to entertain the plaint, it will order the return of it for presentation to the proper Court, The defendant, if he appears, and if he so chooses, may point out to the Court that it has no jurisdiction. A decision on the question of jurisdiction does not affect in any way the status of the parties or the right of one party to obtain redress against the other. The fact that a decision as to jurisdiction is not binding on the parties in a subsequent litigation will be apparent from this.

(1) A. I. R. 1926 All. 231.
(2) [1905] 32 Cal. 749=1 C. L. J. 176=9 C. W. N. 466.

Suppose, instead of instituting the present suit in the revenue Court, the appellant had gone to the civil Court and asked for redress. She could not rely on the decision of the revenue Court in order to induce the civil Court to exercise jurisdiction in the matter of her suit. She could not say that because the decision was given as between herself and the defendant, the presiding officer of the civil Court was bound to exercise jurisdiction although he had not got it. She would not be heard if she said that the defendant was precluded from saying that the revenue Court had no jurisdiction to enterain the suit.

As I have said, looked at closely, it will be found that a question of jurisdiction is not a question which may be said to have arisen between the parties.

The matter may be considered from another point of view. What is the result of the decision of the former suit? Nobody has yet said that the defendant was not liable to be ejected. Nobody has yet said that the plaintiff has no title. All those questions are still standing out for decision. If those matters are yet unsettled, the plaintiff must have her redress somewhere in some Court. It is conceded that the civil Court has no jurisdiction in the matter. The plaintiff, therefore, cannot, acting under the decision of the former suit in the revenue Court, go to the civil Court and obtain redress. If she goes to the revenue Court, which alone can take cognizance of the suit, she is told that she won't be heard, because of the previous judgment. This state of things cannot be correct and there must be some flaw somewhere in the argument. In my opinion, the flaw lies in this that the decision is not a decision "between the parties" within the meaning of S. 11, Civil P. C. It is a decision which does not affect either of the parties, as such. It simply affects the then plaintiff, for the time being, inasmuch as he was denied redress at that moment.

I hold that the decision in the former suit does not operate as res judicata.

The result is that I allow the appeal, modify the decrees of the Courts below and remand the suit through the lower appellate Court to the Court of first instance for disposal according to merits. The costs in this Court and in the lower appellate Court must be paid by the respondent. The rest of the costs will be at the discretion of the Court of first instance.

R.K. *Case remanded.*

A. I. R. 1929 Allahabad 133

WEIR, J.

Chandrika Lal and *others*—Defendants—Applicants.

v.

Sami Nath and *another*—Plaintiffs—Respondents.

Civil Revn. No. 64 of 1928, Decided on 20th April 1928, from order of 2nd Addl. Sub-Judge, Gorakhpur.

Civil P. C., O. 23 R. 1 — Plaintiff wishing to give formal proof of a document essential to his success—Permission should be given.

There is a marked distinction between a case where the plaintiff wants time to prepare what would be more or less a new case, and a case where a plaintiff merely wishes to give formal proof of a document which was essential to his success. In the latter case permission should be granted to withdraw the suit with liberty to bring a fresh suit : 40 *All.* 612, *Foll.* ; *A.I.R.* 1927 *All.* 522, *Disl.*

D. P. Malaviya—for Applicants.

Rama Nama Prasad and *Binod Behari Lal*—for Respondents.

Judgment.—This is an application to review an order of the additional Subordinate Judge of Gorakhpur by which he granted to the respondents in this application permission to withdraw a suit which they had brought against the applicants, and granted them liberty to bring a fresh suit. The ground on which permission was granted was that the respondent had not put in evidence a mortgage decree under which they had purchased the land in suit. The learned Subordinate Judge ordered the respondents to pay the costs of the applicants. In the course of the argument I have been referred to several decisions. In my opinion I am bound by (and I shall follow) the decision of a two Judges' Bench of this Court, namely, *Jhunku Lal* v. *Bisheshar Das* (1). In that case the plaintiff was permitted to withdraw the suit and to bring a new suit, the ground being that he had failed to give formal proof of a document which was essential to his success. The only other case which I need notice is a decision of a Judge of this

(1) [1918] 40 All. 612=46 I.C. 71=16 A.L.J. 495.

Court, *Baij Nath Pande* v *Babban Pande* (2). In that case an order of the Judge granting the plaintiff permission to withdraw from a suit and to institute a fresh suit was set aside. The grounds on which the order was made were that the plaintiff had not produced sufficient evidence and that he thought that, if he had more time, he would be able to produce evidence which would counteract the documentary evidence produced by the defendant. That appears to me to be an entirely different case from the present. There is, in my opinion, a marked distinction between a case where a plaintiff wants to get time in order to produce a large body of fresh evidence to counteract evidence given by the defendant, i. e., where the plaintiff wants time to prepare what would be more or less a new case, and a case where, as here, and in *Jhunku Lal* v. *Bisheshar Das* (1), a plaintiff merely wishes to give formal proof of a document. I, therefore, decline to interfere on revision, as I think that the Additional Subordinate Judge had jurisdiction to act as he did. The application is dismissed with costs.

N.K. *Application dismissed.*

(2) A.I.R. 1927 All. 522=49 All. 459.

** A. I. R. 1929 Allahabad 134

SEN AND WEIR, JJ.

Mul Chand-Nandu Mal—Plaintiffs—Appellants.

v.

Kanhaiya Lal and *another*—Defendants—Respondents.

First Appeal No. 516 of 1925, Decided on 3rd August 1928, from decree of Sub-Judge, Meerut, D/- 7th September 1925.

**** (a) Civil P. C., S. 35.—Costs—Either party must produce all material documents in his possession although other party does not apply for their production—High Court would deprive party of costs for failure to do so—Practice.**

Apart from the question of the onus of proof, it lies upon a party, whether he be plaintiff or defendant, to produce all such material documents relating to the suit as may be in his possession, even though no application has been made for their production by the other party. High Court would deprive party of costs for failure to do so : *A. I. R.* 1917 *P. C.* 6, *Rel. on.* [P 136 C 2, P 137 C 1]

*** (b) Precedents — Interpretation of statute is meant to dispel doubts and difficulties regarding a particular statute and to serve as guide to subordinate Courts —Subordinate Courts must, therefore, implicitly follow High Court's decisions until overruled.**

The interpretation of statute is not merely to be law in the particular case, but it is intended to dispel all doubts and difficulties attending the construction of the statute concerned and to serve as a guide to the subordinate judiciary. All Courts of law subordinate to the High Court must, therefore, implicitly and without question follow the decisions of the High Court so long they are not overruled. [P 138 C 1]

(c) Contract Act, S. 30—Parties agreeing to speculate in differences—No intention of delivery of goods—Agreement is of the nature of wager.

Where the parties, by common consent, agree to speculate only in differences, according to the rise and fall of the prices in the market, and the delivery of the goods is not in the contemplation of either, the transaction is of the nature of a wager or gamble ; and a contract relating to the same although not illegal, is not enforceable under S. 30. [P 138 C 2]

K. N. Katju—for Appellants.

P. L. Banerji, *Hamid Hasan* and *K. C. Mital*—for Respondents.

Judgment.—This is an appeal by the plaintiffs from the judgment and decree of the Subordinate Judge of Meerut, dated 17th September 1925, disallowing the plaintiffs' claim for recovery of Rs. 6,804-13-6. Plaintiffs carry on business in the City of Delhi under the name and style of Firm Mulchand-Nandumal. The suit was instituted through Lala Hari Ram, one of the partners of the firm.

The defendants are the proprietors of the Firm Kanhaiya Lal-Lakshmi Narayan, situate in Mandi Qaisargunj in the city of Meerut, and their chief business is that of commission agents.

The plaintiffs' firm employed the defendants to purchase 151 grain pits of wheat on their account ; and the defendants purchased these grain pits between the 4th June 1921 and 12th August 1921. These grain pits were sold by the defendants, under instructions received from the plaintiffs between 5th July 1921, and 13th August 1921. The plaintiffs had paid Rs. 2,000 to the defendants by way of earnest money. The plaintiffs allege that these transactions resulted in profits and they were entitled to receive Rs 29,422-10-6, from the defendant, that between 10th August 1921 and 2nd September 1921, the defendants made several payments to the plaintiffs, aggregating to Rs. 26,037-11, that on Magh Badi, 12th

Sambat, 1978, corresponding to 25th January 1922, the defendants sent an account slip to the plaintiffs' firm which showed a balance of Rs. 2,430-6-3 in plaintiff's favour that this amount remains unpaid and the plaintiffs claim the recovery of .this sum together with interest at 9 per cent per annum.

Out of the 151 khattis (grain pits) 111 were khattis of taiyar mal or ready goods. The contract relating to the remaining 40 khattis was wada sowda, which term the plaintiffs interpret to mean forward contract. (The defendants assert that the contract, relating to these was of the nature of a speculation in differences.) These 40 khattis were sold on 13th August 1921. The defendants had intimated to the plaintiffs that the transaction had been carried through at the rate of Rs. 8-4-6 per maund. In the final account, submitted by the defendants to the plaintiffs, there was an entry showing that the sale had been concluded at the rate of Rs. 8-2 per maund. Each of these grain pits was supposed to represent grain of the uniform weight of 400 maunds. After deducting the commission etc., the plaintiffs were entitled to recover from the defendants Rs. 2,773-1-9 on account of the 40 grain pits. The plaintiffs claim to recover this sum in addition to Rs. 2,430-6-3 already referred to. The plaintiffs also claimed certain other items, which need not be set out in detail, because the claim, with reference to them, was not pressed before this Court.

As to the sum of Rs. 2,430-6-3 the contention of the defendants was two-fold. They alleged that the plaintiffs had two khatas or accounts with the defendants' firm, one in the name of Mulchand-Nandumal of Delhi and the other in the name of Nainumal-Hari Ram of Hapur. The defendants credited Rs. 2,493, in the khata of Mulchand-Nandumal, on Asarh Sudi 4th Sambat 1979, and Rs. 167-11-6 were credited in the khata or account of Nandumal-Hari Ram, after deducting Rs. 18, the expenses relating to grain pits. Nandumal-Hari Ram were indebted to a firm of the name of Umrao Singh-Kanhaiya Lal for large sums of money. The plaintiffs directed the defendants to pay the amount of both the khatas to Umrao Singh-Kanhaiya Lal. Thereupon the defendants debited Rs. 2,600-14-3 to the plaintiffs on 28th June 1922, and credited the said sum to the account of Umrao Singh-Kanhaiya Lal. Thus the plaintiffs are not entitled to recover Rs. 2,430-6-3 as claimed.

The defendants deny having sent any account to the plaintiffs on 25th January 1922. They contend that their last account was sent to the plaintiffs on 27th August 1921, when, according to them, the agency was brought to a close and the relation of the parties took a new aspect, namely, that of debtors and creditors. The present suit, having been instituted on 4th September 1924, was therefore, barred by statute.

As to the sum of Rs. 2,773-1-9, the defendants contended that the contract with reference to the purchase and sale of the 40 khattis of Bhadon wada was a gamble in differences ; that no delivery of the grain was ever intended ; and that the buyers and sellers were speculating in differences consequent upon the rise and fall of prices in the market. The defendants assert that to save the buyers and sellers from their improvidence the dealers in grain of the Qaisergunj market held a panchayat on 17th August 1921, and decided that the wada sowdas should be settled at the uniform rate of Rs. 8-2 per maund ; that the plaintiffs were cognizant of this and made no protest, either when the matter was communicated to them immediately and at once by means of a telegram, or when the account was submitted to them on 27th August 1921 ; that the plaintiffs were entitled to recover from the defendants only such sums of money as came into their hands as their commission agents on account of these 40 khattis, and that, as the defendants did not receive from the plaintiffs' purchasers payment at a higher rate than Rs. 8-2 per maund, the claim at the rate of Rs. 8-4-6, for these grain pits was not maintainable. The defendants further pleaded that the plaintiffs' claim as regards this amount was barred by limitation.

The learned Subordinate Judge held that the defendants sent their last account to the plaintiffs on 27th August 1921 ; that the defendants did not send the account dated 25th January 1922, (Ex. 4) ; that Rs. 2,430-6-3 was paid by the defendants to Umrao Singh-Kanhaiya Lal on plaintiffs' account on or about the 18th June 1922, under instructions received from the plaintiffs ; and that by the said payment the defendants'

liability to the plaintiffs was discharged; that the agency terminated on the 17th August 1921, when the last account was sent by the defendants to the plaintiffs; and that the claim was barred under Art. 90, Lim. Act. As to the sum of Rs. 2,773-1-9, the learned Subordinate Judge held that the deal about the 40 khattis was a mere gamble in differences; that the defendants could not enforce the contract to pay at the rate of Rs. 8-4-6 per maund, that the defendants did not recover from the purchaser at a rate higher than Rs. 8-2-0 per maund, that the plaintiffs were bound by the decision of the panches of the Qaisargunj market reducing the rate from Rs. 8-4-6 to Rs. 8-2-0 per maund, and that, assuming that the defendants were guilty of neglect or misconduct in not preparing their account upon the basis of Rs. 8-4-6 as the stipulated rate of purchase, the present suit against them was barred under Art. 90, Lim. Act. We need not reproduce the findings of the Court below on the other points, raised in the suit, as the pleas relating to them were abandoned by the learned advocate for the appellant. The learned Subordinate Judge dismissed the suit. The appellants contest the findings of the Court below relating to the two principal items namely, Rs. 2,430-6-0 and Rs. 2,773-1-9. (Judgment here discussed evidence and proceeded). There are certain facts, which render it highly improbable that the sending of the account should have been delayed till 25th January 1922.

We have already seen that, out of 151 khattis (grain pits), the contract relating to 111 pits was of taiyar mal or ready goods. Of these 25 were sold on 5th July 1921, and an account was sent by the defendants to the plaintiffs (Ex. 1), which shows that the balance to the credit of the plaintiffs on account of these 25 khattis was Rs. 5,245-1-0. According to the plaintiffs, this document was only a memorandum of account, which the plaintiffs call a katcha parcha as distinguished from a pucca parcha or final and complete account. The terms katcha and pucca parcha have been explained by Nandumal as follows :

"In katcha parcha only the name of the purchaser and the transaction are entered, but the pucca parcha includes the whole expenses and the money received and spent."

We shall presently examine the undisputed parchas to see whether they come within the definition of a katcha parcha as given by the plaintiffs.

Forty-one khattis were sold on 8th August 1921, and 45 khattis on or about the 13th August 1921. Exhibit 3 is an account relating to two out of 86 khattis which was admittedly received by the plaintiffs. This is dated 14th August 1921, and closes with following entry :

"Balance due to you carried over to another account Rs. 462-9-9."

Nandumal, plaintiff, admits having received a parcha of the purchase and sale of 84 khattis in the end of Sawan or beginning of Bhadon. The defendants allege that the last account relating to the 84 khattis was sent by them to the plaintiffs on 27th August 1921. This statement is supported by the sworn testimony of Lakshmi Narain. As already stated, the plaintiffs have received a third account slip of 84 khattis; but the plaintiffs state that this was merely a katcha parcha. This was a very material document, which the plaintiffs ought to have produced in evidence; but appear to have studiously withheld. If it was a katcha parcha, and not the final account, that fact could be ascertained, easily and at once, by reference to the document itself. Apart from the question of onus of proof, it lies upon a party to the suit, whether he be plaintiff or defendant, to produce in Court all such material documents relating to the suit as may be in his possession, even though no application has been made for its production by the other party. The non-observance of this salutary principle must be strongly deprecated. In *Murugesam Pillai* v *M. D. Gnana Sambanda Pandara Sannadhi* (1) the Judicial Committee make the following observation :

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the Courts the best materials for its decision. With regard to third parties this may be right enough; they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

(1) A. I. R. 1917 P. C. 6=40 Mad. 402=44 I. A. 98 (P..C.).

The form of advocacy, which produces such untoward result ought to be discouraged by the Courts below and where a lapse or omission of this kind is brought to our notice in the course of an appeal, we may deprive the party of costs as mark of our censure even where the party succeeds on other grounds.

Upon comparing the contents of Exs. 1 and 3 which are alleged to be katcha parchas with those of the disputed document Ex. 4, we do not find any structural differences or what is more important any difference in the entries of the details. The accounts have been shown in both sets of documents in two columns, representing the credit and the debit side, with details of the weight of the grains in the pits sold, the prices received, the commission charged, the dues paid to the weighman, the brokerage paid and amounts debited under the heads of charity, goshala and ticket. It is impossible to contend that the Exs. 1 and 3 are katcha parchas any more than the disputed document is a katcha parcha, Exhibits 1 and 3 completely satisfy the definition of a pucca parcha, as given by Nandumal himself. We hold that the distinction between the katcha and pucca parcha is a baseless invention.

The plaintiffs' firm had been receiving money from the defendants' firm with regularity and at short intervals. They received Rs. 6,000-15 on 10th August 1921, Rs. 5,000 on 11th August 1921, Rs. 10,000 on 20th August 1921, Rs. 5,000 on 3rd September 1921 and Rs. 36-12-0 on 20th September 1921. The letter dated Bhadon Badi 1st Sambat 1978, corresponding to 19th August 1921, shows that they were making demands for money. It does not stand to reason that, if any money was due to them, they would have allowed their account to stand over till 25th January 1922.

Exhibit 6 states that money and account were to be sent shortly. Para. 2 of the plaint show that Rs. 10,000 were sent on 20th August 1921

Purchase and sale was closed on 13th August 1921. Why should the plaintiffs have waited for the bought and sold notes for 84 grain pits up till 25th January 1922? As we have already noticed, the plaintiffs admitted having received an account relating to the 84 khattis in the end of Sawan or the beginning of Bhadon.

The sum of Rs. 462-9-0 should have been carried over from Ex. 3. The plaint shows that Rs. 5,245 had already been received by the plaintiffs. It was not till 18th August 1922, that the accounts were finally entered up in the plaintiffs' books. It is plain that these books were not kept in a regular course of business.

The balance shown in the last account is Rs. 2,600-14-3. This amount is conclusively proved to have been paid to Kanhaiya Lal-Umrao Singh on 18th June 1922. There are entries in the account books of that firm and also the entries in the defendants' firm dated 28th June 1922, to bear this out. There is overwhelming evidence on the record to establish that Mulchand-Nandumal of Delhi had continuous dealings with Umrao Singh-Kanhaiya Lal of Hapur, and that Nandumal-Hari Ram of Hapur were almost their second self.

We have not any ground for imputing dishonesty to the defendants in respect of a relatively small sum of money when admittedly they paid over to the plaintiffs more than Rs. 26,000. The plaintiffs deny that Nandumal-Hari Ram of Hapur were indebted to Kanhaiya Lal-Umrao Singh. On the other hand they allege that Kanhaiya Lal-Umrao Singh owed them over a lakh of rupees. The account books of Nandumal-Hari Ram have not been produced on the pretext that they had a partner of the name of Lakhimal, who turned dishonest and said that the account books had been stolen. The story is a pure invention. If Kanhaiya Lal-Umrao Singh owed them a large sum of money, these account books were of the greatest value to the plaintiffs; and they would not submit to being robbed by Lakhimal so easily. The plea is too transparent to require any further criticizm. We hold on the evidence that Rs. 2,600-14-3 was paid to Kanhaiya Lal-Umrao Singh at the plaintiffs' instance because they owed them the said sum of money.

On these findings the plaintiffs' claim as regards Rs. 2,430-6-3 was clearly not maintainable. The plaintiffs have already received this amount through Kanhaiya Lal-Umrao Singh.

No question of limitation, therefore, arises with regard to this amount and

it is not necessary to consider the question whether the agency continues after the work entrusted to the agent had been substantially completed and accounts rendered but the amount due to the principal had not been paid. The learned Subordinate Judge has preferred to follow the case of *Venkatachalam Chetty* v. *Narayanan* (2) in preference to a direct authority of this Court in *Babu Ram* v. *Ram Dayal* (3). It is not merely a matter of judicial etiquette but one of principle that the Courts of law subordinate to this Court must implicitly and without question follow the decisions of this Court so long as the same has not been overruled either by this Court or by a superior Court. The interpretation of a statute is not intended merely to be the law in the particular case ; but has this further useful purpose in view, that it is intended to dispel all doubts and difficulties attending the construction of the Statute concerned, and to serve as a guide to the subordinate judiciary. We are not called on to pronounce any opinion as regards the correctness or otherwise of the decision of this Court already referred to. As a Division Bench we are bound to follow that ruling. But as we have already said, in view of our decision on the merits, the question of limitation does not arise.

The second item of the claim related to a sum of Rs. 2,773-1-9 concerning the 40 khattis of Bhadon wada. These khattis were sold on 13th August 1921, at the rate of Rs. 8-4-6 per maund (vide Ex. 5).

There appears to be a sort of a trade guild in the city of Meerut, and powers have been assigned to the panchayat to regulate the rates of wada khattis. It is proved that a meeting of the panchayat was held on 17th August 1921, and the panches settled the rate at Rs. 8-2-0 per maund. It was contended by the defendants that there was a custom prevailing in the Qisargunj Mundi of Meerut which authorized the panches to regulate the rate of the wada khattis. The evidence as to this custom rests upon the statement of Ghasi Ram, who was one of the panches, Lachmi Narain, defendant, Babu Ram and Bisheshar Nath and also Jainti Prasad one of the plaintiffs' witnesses. We consider this evidence to be too meagre and scanty to support the finding of the Court below in favour of the custom.

Immediately after the panchayat the defendants sent a telegram to the plaintiffs that the rate settled by the panchayat was Rs. 8-2-0 per maund. The account books of the defendants show that a telegram was sent and a receipt of the Post Office has been produced to support the entry in the account book. The plaintiffs deny having received any such telegram ; but the plaintiffs have told so many falsehoods in this case, that their denial in the present instance is not calculated to inspire us with confidence. We hold that the matter was communicated to the plaintiffs by wire, and the plaintiffs never protested about the rates till they instituted the present suit.

There is, however, another aspect of the case which is decisive. The contract relating to these 40 khattis was not a commercial transaction. No earnest money was paid. It is significant that the weight of the khattis is uniformly 400 maunds the remaining 111 khattis, forming in this respect a striking contrast, because the weights of these latter khattis vary to a great extent. It is proved by overwhelming evidence that the intention of the parties was to settle differences in the rates according to the fluctuations of the market ; and that neither party contemplated actual delivery of the goods. Out of these 40 khattis, 7 were sold to one Bisheshar Nath, the remaining 33 khattis were sold by the plaintiffs to the defendants. Bisheshar Nath pledges his oath that the khattis purchased by him were cancelled by the edict of the panchayat, and that he did not pay anything to the defendants on account of the 7 khattis. The defendants' bahis do not show that they realized any sum by way of profit for the 33 khattis purchased by them. Where the parties, by common consent, agree to speculate only in differences, according to the rise and fall of the prices in the market, and the delivery of the goods is not in the contemplation of either, the transaction is of the nature of a wager or gamble ; and a contract relating to the same, although not illegal, is not enforceable under S. 30, Contract Act. If the plaintiffs were to institute a suit for recovery of differences at the rate of Rs. 8-4-6 per maund their claim would

(2) [1916] 39 Mad. 376 = 26 I. C. 740 = 28 M. L. J. 140.
(3) [1890] 12 All. 541=(1890) A. W. N. 99.

be bound to fail. If the defendants, as the commission agents of the plaintiffs, were to launch a suit against the purchasers with the same object, the suit would be infructuous. In transactions like these, where speculators are conscious of the weakness of their cause, one can very well understand that they should be ready to avoid going to a Court of law but to have their differences settled by the decision of a domestic tribunal. The defendants appear to have done this in the interests of the plaintiffs and this was the very best thing that they could have done to safeguard the interest of their principal. In any case the defendants are not proved to have received from any customers any amount of difference at a higher rate than Rs. 8-2-0 per maund. This, they have accounted for; and the plaintiffs admit having received the profits at the rate of Rs. 8-2-0 per maund Under the circumstances, the claim for recovery of Rs. 2,773-1-9 is absolutely misconceived. The claim was unenforceable in law and the plaintiffs are not entitled to recover the amount. In view of this decision, it is not necessary to consider the question of limitation as regards this amount. The result is that this appeal is dismissed with costs, as entirely devoid of merits.

S.N./R.K. *Appeal dismissed.*

** A. I. R. 1929 Allahabad 139

MEARS, C. J. AND MUKERJI, J.

Kishen Sahai and *others*—Plaintiffs—Appellants.

v.

Raghunath Singh and others—Defendants—Respondents.

First Appeal No. 380 of 1925, Decided on 7th November 1928, from decree of Sub-Judge, Meerut, D/- 21st May 1925.

**** (a) Hindu Law—Alienation by father—Legal necessity—Money borrowed for paying purchase money under pre-emption decree is not for paying antecedent debt or for legal necessity.**

To find whether a certain transaction is binding on the family or not, its nature must be examined at the date of the transaction and it should not be judged by what happened later. (*A. I. R.* 1928 *All.* 403, *Foll.*) A mortgage of ancestral property by a father to pay the purchase money under a pre-emption decree is not for paying an antecedent debt or for legal necessity and is not justified : *A. I. R.* 1928 *All.* 454 (*F.B.*), *Expl.*; *A. I. R.* 1925 *All.* 333, *Appl.*; *A.I.R.* 1923 *All.* 298, *Rel. on.* 32 *All.* 242 and 36 *All.* 17, *not Foll.* [P 140 C 2]

*** (b) Specific Relief Act, S. 41—Mortgage by Hindu father for paying pre-emption money set aside at son's instance—Money can be charged on pre-empted property—Hindu Law—Alienation by father.**

Where money is borrowed by a Hindu father by mortgaging ancestral property for pre-empting another property and the mortgage is subsequently set aside at the instance of the sons, the amount advanced can be charged on the pre-empted property. [P 141 C 2]

(c) Limitation Act, Art. 116—Money payable on demand—Right to personal decree against mortgagor is barred after six years.

Where a suit is instituted more than six years after the making of the mortgage, and the mortgage money is payable on demand a personal decree is barred. [P 141 C 2]

K. N Katju—for Appellants.

N. C. Vaish—for Respondents.

Judgment.—This appeal is connected with First Appeal No. 437 of 1925, both of which arise out of the same suit.

The suit was instituted by Lala Kishan Sahai and two others as mortgagees against defendant 1, Raghunath Singh, his brother Khair Singh a minor, and Raghunath Singh's son, Bhopal Singh also a minor. There were two other defendants who were made parties as subsequent transferees.

The suit arose out of a mortgage executed on 12th July 1916 by Raghunath Singh, defendant 1, and his father Sewak Ram, who has since died. The amount borrowed was a sum of Rs 4,000. The plaintiffs pleaded that the mortgage was executed for legal necessity and was therefore binding not only on Raghunath Singh, one of the mortgagors, but on his minor brother Khair Singh, and also his minor son Bhopal Singh. Bhopal Singh alone contested the suit through his guardian. His contention was that the mortgage was not supported by legal necessity.

The learned Subordinate Judge found that there were four items which went to make up the entire mortgage money. These were the sums of Rs. 1,586, Rs. 1,800, Rs. 64 and Rs. 550.

As regards the first sum the learned Judge found that it was borrowed to pay an antecedent debt payable by the mortgagors. Accordingly he found that both defendants 2 and 3 were liable to pay the sum. He found that the sum of Rs. 64 had been obtained to meet the costs of the execution of the mortgage bond. In his opinion this amount was

for legal necessity. The learned Judge accordingly made a decree for the sale of the property mortgaged to recover these wo sums.

As regards the sum of Rs. 1,800, the learned Judge found that it had been borrowed to pay the purchase money for a pre-emption decree, and he thought that the members of the joint Hindu family could not jeopardize the ancestral family property in order to purchase fresh property. He accordingly held that the mortgage for the sum of Rs. 1,800 was not binding on the family.

As regards the sum of Rs. 550, the learned Judge found that it had been paid by the mortgagees, but that there was no legal necessity to support the same. The learned Judge accordingly granted a personal decree for the sums of Rs. 1,800 and Rs. 550 against the defendants. Evidently the learned Judge meant to pass a decree against Raghunath Singh alone, but the decree passed ran against all the first three defendants.

Appeal No. 380 is by the plaintiffs, and appeal No. 437 is by defendant 3, Bhopal Singh.

In appeal No. 380 of the plaintiffs appellants contend that on the evidence the entire mortgage money was borrowed, either for legal necessity, or for payment of antecedent debts. The first question that therefore arises, with respect to the sum of Rs. 1,800, is this : Was there a debt existing at the date of the mortgage which Sewak Ram and Raghunath Singh were bound to pay ? The learned counsel for the plaintiffs-appellants has relied on two cases, namely the case of *Nathu* v. *Kundan Lal* (1), and the case of *Kapildeo* v. *Thakur Prasad* (2), as laying down the proposition that where a Hindu father borrows money to pay the purchase money under a pre-emption decree, he borrows money to pay an antecedent debt. This opinion has been dissented from in later cases and they are *Bhagwan Das Naik* v. *Mahadeo Prasad Pal* (3), and *Shankar Sahai* v. *Baichu Ram* (4).

We have considered the point and we are clearly of opinion that no debt, in the proper sense of the word, existed on foot of the pre-emption decree. The pre-emption decree gave the option to the pre-emptor to obtain property on payment of money. A pre-emption decree does not carry any order for payment. The decree is always conditional, namely, in case of payment, certain property would belong to the plaintiff, and in case of nonpayment the suit would stand dismissed, probably with costs. The mere fact that in the case of nonpayment of the purchase money a decree for costs would be passed against the pre-emptor, cannot invest the whole transaction with the character of a debt. It may be pointed out that the amount of costs is usually very small as compared with the purchase money. The appellants' case therefore, so far as it is based on the principle of antecedent debt. cannot be maintained.

Next it was argued by the learned counsel for the appellants that accroding to the recent Full Bench case of *Jagat Narain* v. *Mathura Das* (5), a head of a joint Hindu family is entitled to make a fresh purchase of property. It was argued that this case has shaken the authority of the case of *Shankar Sahai* v. *Baichu Ram* (4), and other cases which decided that a transaction by one member of a joint Hindu family which can bind others must be of a defensive nature. We have accordingly read the Full Bench case and we are of opinion that the facts of the case actually bring themselves within the purview of the decision in the case of *Shankar Sahai* v. *Baichu Ram* (4)

The facts of the Full Bench case were these. A Hindu family possessed property which was situated far away from the place of residence and it was found to be inconvenient to manage the property. The adult male members of the family sold the property with the express purpose of purchasing nearer home so that the purchased property might be better managed. As a matter of accident, it happened that the purchase money was lost because the bank, in which the money had been put for safe custody, had closed its doors. As has been laid down by the Privy Council and in the case of *Inspector Singh* v. *Kharak Singh* (6), to find whether a certain transaction is binding on the family or not, its nature must be examined at the date of the transaction and it should not be judged by what happened later. On this princi-

(1) [1910] 33 All. 242=8 I. C. 836=7 A. L. J. 1182.
(2) [1913] 36 All. 17=21 I. C. 868=11 A. L. J. 961.
(3) A. I. R. 1923 All. 298=45 All. 390.
(4) A. I. R. 1925 All. 333=47 All. 381.
(5) A. I. R. 1928 All. 454 (F.B.).
(6) A. I. R. 1928 All. 403.

ple the fact that the money was lost owing to the bank having collapsed had no bearing. The transaction was found by the learned Judges to have been for the benefit of the family. It was in fact in its inception, an act which was designed to protect or defend the family from an inevitable recurring loss, the property by reason of its situation yielding less than nearer property would do. As we have stated, the facts bring the case within the principle enunciated in the case of *Shankar Sahai* v. *Baichu Ram* (4). Indeed it has been put forward by the learned counsel for the parties before us that a particular purchase which involves the mortgaging of the family property may in very special circumstances amount to a legal necessity. For example, there may be a small patch of land situate inside a larger area owned by the family and the owner of that patch of land may be a constant source of trouble to the family. In the circumstances the purchase may be justified. We need not express any opinion on a hypothetical case. It is sufficient to say that each case will have to be judged on its own merits, and on the law as it stands, we are of opinion that this particular transaction cannot be upheld and that the appeal must fail as regards this point.

The learned counsel for the appellants prayed that we might remit the case for further enquiry to the lower Court. The ground of his prayer was that when the learned Subordinate Judge decided this suit the appellants did not adduce evidence on the merits, necessity, and financial advantages of the transaction, because the case of *Shankar Sahai* v. *Baichu Ram* (4), was sufficient for the purpose. It was argued that the plaintiffs might have, in view of the Full Bench case of *Jagat Narain* (5), *Supra* led evidence to show that there did exist circumstances which justified the father and the son to make the purchase by the pre-emption suit, but we find that no such ground was taken in the memorandum of appeal, and we are also of opinion that a remand of an issue is likely to encourage the parties to adduce false evidence. We therefore cannot accede to this request.

For the plaintiffs-appellants it was then contended that in any case the amounts of Rs. 1,800 and Rs. 550 ought to come out of the pre-empted property. As to this there can be no doubt. The minor members of the family repudiate the transaction of the purchase of the pre-empted property. In the circumstances they cannot possibly object to a mortgage by Sewak Ram and Raghunath Singh of the property which they had acquired by pre-empaion.

We now take up the cross-appeal No. 437 of 1925. As already stated the learned Subordinate Judge gave a personal decree against the first three defendants. The suit was instituted more than six years after the making of the mortgage. The mortgage money was payable on demand, and, therefore, the personal decree was barred, at the date of the suit. This was overlooked by the learned Subordinate Judge. The decree therefore will have to be amended so far as it gives a personal right against the first three defendants to recover the money.

The result is that we partly allow both the appeals. The decree so far it permits recovery of the sum of Rs. 1,650 and interest out of the ancestral property will stand, and the sums of Rs, 1,800 and Rs. 550, the total of which comes to Rs. 2,350, will be recovered with proportionate costs out of the pre-empted property. This sum will bear interest at the stipulated rate up to the date of payment and thereafter at 6 per cent per annum. This sum of Rs. 2,350 with interest and proportionate costs will be the first charge on the pre-empted property. If any thing is left out of the pre-empted property after satisfying the two sums and the interest and proportionate costs, it will be appropriated towards the balance of the decree. If the pre-empted property be insufficient to pay the two sums of Rs. 1,800 and Rs. 550 and interest and proportionate costs, the balance will not be recoverable by the plaintiffs. The personal decree granted by the Court below is hereby set aside. A fresh decree will be prepared in this Court giving effect to the directions given above. Six months are allowed for payment. The plaintiffs will have their costs which will be added to the mortgage money. The costs will be split up in proportion to the sums which have been declared recoverable from the pre-empted property and the ancestral property.

The appeal of Bhopal Singh succeeds, but having regard to the false statement made in the written statement of Bhopal Singh, we do not award him any costs in

this appeal, nor do we give to the plaintiffs-respondents any costs of the appeal. The result will be that in first appeal No. 437 of 1925 the parties will bear their own costs.

R.K. *Appeals party allowed.*

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* A. I. R. 1929 Allahabad 142

SEN AND NIAMATULLAH, JJ.

Mohammad Zahur Ahsan and *others*—Plaintiffs—Appellants.

v.

Mt. Maimuna and *others*—Defendants—Respondents.

First Appeal No. 527 of 1925, Decided on 4th December 1928, from decree of Sub-Judge, Muzaffarnagar, D/- 16th September 1925.

(a) Mahomedan law—Dower.

To support a claim for dower very satisfactory evidence is absolutely essential : 7 *W. R.* 495, *Foll.* [P 143 C 1]

***(b) Limitation Act, S. 7—Wife of a mahomedan predeceasing her husband—Suit by sons for share of her dower debt—S. 7 does not apply.**

The right to recover dower of Mahomedan lady descends to her heirs. The position of the sons *qua* their right to the dower debt is not that of joint tenants but is that of tenants-in-common. Where the right to recover the dower debt was inherited in part by the debtor himself, viz., the husband, S. 7 will not apply to a suit by the minor sons on attaining majority. 7 *All.* 313 (*F.B.*), *Dist.* [P 143 C 2 P 144 C 1]

M. L. Agarwala—for Appellants.

K. N Katju—for Respondents.

Judgment.—This is plaintiffs' appeal arising out of a suit for recovery of Rs. 8,250 as the plaintiffs' share in a dower debt.

One Hakim Sadruddin Ahmad died on 20th October 1924 leaving three sons by his first wife Mt. Umm-i-salama, a widow Mt. Maimuna, who is defendant 1 and her three sons and two daughters who are defendants 5 and 6. The plaintiffs alleged that the contracted dower between Hakim Sadruddin Ahmad and Mt. Umm-i-salama was Rs. 11,000. Mt. Umm-i-salama died in 1907. Her heirs under the Mahomedan law were her husband Sadruddin and her three sons who are the plaintiffs in the suit.

The suit was contested on the ground that the claim was statute barred and that the amount of dower of Mt. Umm-i-Salama was not Rs. 11,000 but was only Rs. 2500.

The learned Subordinate Judge held that the claim was not barred by limitation but that the plaintiffs had failed to prove that the dower of Mt. Umm-i-Salama was Rs. 11,000. Since, however, the defendants admitted that her dower was Rs, 2500 he gave the plaintiffs a decree for their share out of Rs 2500 "against the whole assets of Sadruddin in the hands of both the parties."

The plaintiffs in their appeal contend before us that the Court below ought to have held on the evidence that the amount of the dower of Mt. Umm-i-Salama was Rs. 11,000.

There is no instrument in writing evidencing the amount of dower which was agreed upon between Sadruddin and Mt. Umm-i-Salama at the time of their marriage. The case of the plaintiff rests mainly upon oral evidence. Reliance is placed upon the judgment of the Subordinate Judge dated 24th August 1922 (Ex. 2). It is alleged that a decree was passed in favour of Mt. Amatul Bari who was a lady belonging to the family of Umm-i-Salama for Rs. 11,000 as her dower debt This judgment is not entitled to any weight in view of the fact that the suit was not contested and the finding of the Court below rested upon the uncorroborated testimony of a single witness.

The plaintiffs examined five witnesses to prove the amount of dower debt. These witnesses did not impress the trial Court favourably Munshi Fazal Ahmad is the brother of Mt. Umm-i-Salama. He is no doubt in a position to know the dower fixed for his sister, but he cannot be considered to be an independent witness ; and as the learned Subordinate Judge remarks, he is obviously interested in helping the plaintiffs, who are his sister's sons. The learned Subordinate Judge noticed some discrepancies between the statements of this witness and the other witnesses for the plaintiffs. Having regard to the lapse of time, we are not prepared to attach very great importance to these discrepancies. We, however, consider that the learned Subordinate Judge was justified in not attaching importance to the statements of either Fazal Ahmad or the other witnesses who are not men of such character and social status as would inspire confidence. Ghasi, Zahur Hasan and Sheikh Ahmad are strangers to the family. They could

not be expected to have been invited to join a marriage which was arranged at a very short notice and in very great hurry. The learned advocate for the appellants tried to make out from the orial evidence produced on their behalf that Rs. 11,000 was the customary dower of the girls belonging to the family of Muhammad Umar. He argued that having regard to the position in life of Sadruddin Ahmad and to the fact that the lady belonged to a respectable family it would not be unlikely for a girl of the family of Muhammad Umar, her father, to have Rs. 11,000 for her dower. Not uncommonly, the amount of dower is fixed irrespective of the status in life of the husband and without any regard to the extent of his worldly possessions. It is not unfrequently the case, that an amount of dower, entirely disproportionate to the means of the husband, is agreed upon not as the result of calculation but of impulse and excitement of the moment and as a mark of courtesy to the bride. An instrument in writing evidencing the amount of dower such as a kabinama is extremely rare in the province of Agra. An entry of the amount in the Qazi's register is also a rarity; and even where such an entry exists, it is not always safe to accept it with implicit confidence. When a controversy arises as to the amount of dower, the place of documents is, in great many cases, sought to be supplied by a mass of oral evidence. At times, it becomes extremely difficult for a Court of law to disentangle the truth from the conflicting statements of witnesses, many of whom are not generally free from the taint of partiality or prejudice. In the case of *Mt. Huseena* v. *Mt. Hasmatoonissa Bibi* (1) their Lordships observe that to support a claim for dower, very satisfactory evidence was absolutely essential. In the present case, the evidence adduced by the plaintiffs is of a very weak and uncertain character. Agreeing therefore with the Court below, we hold that the plaintiffs have failed to establish that the amount of dower of Mt. Umm-i-Salama was Rs. 11,000.

We think that this appeal is without any force and we dismiss it with costs.

The respondents have filed a cross-objection and contend that the plaintiffs' suit is barred by limitation and that the plaintiffs are not protected by S. 7, Lim. Act.

Upon the death of Mt. Umm-i-Salama, the right to recover her dower descended to her heirs. These were the three plaintiffs and Sadruddin her husband. From the very nature of the case, Sadruddin could not be treated as one of several persons jointly entitled to institute a suit for recovery of the dower debt. The Judge of the Court below has overruled the plea of limitation and relied upon the decision of this Court in *Kandhiya Lal* v. *Chandra* (2) in which it has been held that when upon the death of the obligee of a money bond, the right to recover the money has devolved upon his heirs in specific and defined shares, each of such heirs is not competent to sue separately for recovery of his share of the money due on the bond. The position of the sons of Mt. Umm-i-Salama qua their right to the dower debt is not that of joint tenants but is that of tenants-in-common. They were entitled to recover their share of the debt out of the estate of Sadruddin. The question is whether the plaintiffs, under these circumstances, are entitled to the benefit of S. 7, Lim. Act, which runs as follows :

"Where one of several persons jointly entitled to institute a suit ..... is under any such disability, and a discharge can be given without the concurrence of such persons, time will run against them all : but, where no such discharge can be given, time will not run as against any one of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased."

The Court below has found and its findings in this respect have not been disputed before us that of the three plaintiffs, plaintiff 1, Mohammad Zahur Ahsan was born on 18th May 1904, that plaintiff 2 was a born imbecile and his imbecility continues right up to the present time and that plaintiff 3, Mohammad Muzaffar Uddin attained his majority many years before the present suit and that he is about 30 years old at the present time. The learned Judge of the Court below held that all the three plaintiffs had a joint right to maintain a suit for recovery of the dower debt and that it was not open to any one of the plaintiffs to give a discharge without the concurrence of the rest. There could be no question of concurrence on the part of

(1) 7 W. R. 495.

(2) [1885] 7 All. 313=(1885) A. W. N. 34 (F.B.).

Muzaffar Uddin, plaintiff 2 who is a lunatic. The Court below held that so long as plaintiff 1 had not attained his majority it was not possible for plaintiff 3 to give a valid discharge of the dower debt on behalf of himself and the other plaintiffs. He therefore held that as the suit had been instituted within three years of the attainment of the majority of the plaintiff 1, the claim was within time. In *I. L. R. 7 All.* 313 (2), the suit was for enforcement of a money claim due on a bond which was executed in favour of one Shambhu Singh. Upon his death a four and a half anna share in the bond devolved by right of inheritance upon his two nephews, Gudri Singh and Bishnath Singh who sold the said share to the plaintiff in that case. The question for determination in the case, was as to whether Gudri Singh and Bishnath Singh were entitled to maintain an action for their share in the bond. This bond created a single and indivisible liability. This liability was not disrupted by reason of the death of the original creditor. In the present case the circumstances are *toto caelo* different because ex hypothesi upon the death of the original creditor the right to recover the dower debt was inherited in part by the debtor himself.

R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 144

SEN AND NIAMATULLAH, JJ.

Jagannath Sahu—Applicant.

v.

Chedi Sahu—Opposite Party.

Civil Revn. No. 181 of 1928, Decided on 7th December 1928, from order of Sub-Judge, Basti, D/- 29th May 1928.

*** (a) Civil P. C., Sch. 2, R. 5 — Matter referred to named arbitrator—That arbitrator refusing to act — Defendant supplying list of persons for choosing arbitrator — Plaintiff unwilling to proceed with arbitration—Court appointing one from defendant's list as arbitrator and ordering parties to pay costs equally—Order appointing arbitrator as also to pay costs was illegal.**

An arbitrator is a Judge chosen by the parties themselves and a Court should not thrust an arbitrator on an unwilling party except under circumstances laid down in R. 5. [P 145 C 1]

During the pendency of a suit the parties agreed to refer their dispute to the arbitration of *B*. An order of reference was accordingly made. *B*, however, refused to act as arbitrator. The defendant then submitted a list of persons, any one of whom he desired to be appointed as an arbitrator in place of *B*. Plaintiff was not willing to have the case decided by an arbitrator. He, therefore, prayed that the arbitration be superseded and the case tried before the Court. The Court thereupon appointed *G* to act as arbitrator in place of *B* on payment of Rs. 100 by the parties half and half.

Held; that it was irregular to make the summary appointment of an arbitrator. Plaintiff could not be legally ordered to pay the costs. [P 145 C 1]

(b) Civil P. C., S. 115 — Arbitrator appointed but refusing—Dispute as to whether arbitration should be superseded or continued—Court ordering to continue and appointing new arbitrator — Order is one deciding a case and is revisable — Civil P. C., Sch. 2, R. 5.

Where the controversy between the parties is whether the arbitration should be superseded or should be continued and the sole arbitrator refusing to act and the Court settles that controversy by directing that the arbitration should continue and appointed another person to act as arbitrator, the order is one deciding a case within the meaning of S. 115. [P 145 C 2]

Harnandan Prasad—for Applicant.

Gadadhar Prasad—for Opposite Party.

Judgment. — This is an application for revision arising out of a suit brought by the applicant before the Subordinate Judge of Gorakhpur for a declaration of his right to certain property impugning a sale-deed executed by him in favour of the defendant. On 5th May 1928, parties agreed to refer their dispute to the arbitration of Babu Bhagwati Prasad, vakil. They moved the Court for an order of reference which was accordingly made. Babu Bhagwati Prasad, however, refused to act as arbitrator and by an application, dated 29th May 1928, the defendant nominated no less than nine persons, any one of whom, he desired to be appointed as an arbitrator in place of Babu Bhagwati Prasad. The plaintiff was not willing to have the case decided by an arbitrator. He, therefore, prayed that the arbitration be superseded and the case tried before the Court. The learned Subordinate Judge passed what appears to be a most extraordinary order, He appointed, Babu Ganesh Prasad, vakil, to act as arbitrator in place of Babu Bhagwati Prasad on payment of Rs. 100 by the parties half and half. The plaintiff expressed his inability to make any payment. The Court recorded an order dated 5th June 1928, in these terms :

"The applicant will have to pay the fees otherwise it will be recovered by attachment of his property."

Aggrieved by the order of the Subordinate Judge insisting on the arbitration and on payment of Rs. 50 by the plaintiff the latter has applied in revision to this Court.

We are of opinion that the order of the learned Subordinate Judge cannot be sustained. That a Court can appoint an arbitrator in certain circumstances is laid down by Sch. 2, R. 5, but this can only be done after certain formalities have been gone through by the party desirous of continuing the arbitration. R. 5 provides :

"Where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator..... any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or...."

"If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator..... is appointed....., the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator... or make an order superseding the arbitration, and in such case shall proceed with the suit."

Having regard to these provisions, the order of the Court, dated 29th May 1928, referring the matter in dispute to the arbitration of Babu Ganesh Prasad passed immediately on the application of the defendant, who desired to continue the arbitration, was in our opinion without jurisdiction or at least tainted with material irregularity. It should be borne in mind that an arbitrator is a Judge chosen by the parties themselves and a Court should not thrust an arbitrator on an unwilling party except under circumstances laid down in, the rule quoted above. It is obvious that the plaintiff was no longer willing to proceed with the arbitration and in any case seriously objected to payment of any fee to the arbitrator. In the original agreement of reference arrived at between the parties there was no provision for any remuneration being paid to the arbitrator. We think that it was irregular, to say the least of it, that the learned Subordinate Judge not only made the summary appointment of an arbitrator, but also saddled the plaintiff with certain costs, which he could not be legally ordered to pay. If the learned Subordinate Judge felt that the services of a legal practitioner were necessary for the arbitration of the dispute before him and that no legal practitioner was willing to discharge the duties of an arbitrator without sufficient remuneration, his clear duty was to supersede the arbitration and proceed to try the suit himself.

The learned advocate, who appears on behalf of the opposite party, has raised a preliminary objection that an application for revision is incompetent. He maintains that no "case" within the meaning of S. 115, Civil P. C., having been decided by the Court below no revision lies. We think this contention is not sound. On 29th May 1928, the controversy between the parties was whether the arbitration should be superseded or should be continued and another arbitrator appointed in place of Babu Bhagwati Prasad as desired by the defendant. The Court settled that controversy by its order of that date, which directed that the arbitration should continue and appointed Babu Ganesh Prasad to act as arbitrator. The controversy thus terminated. We think that the order of the learned Subordinate Judge in that connexion was clearly an order deciding a case within the meaning of S. 115, Civil P. C. We, therefore, overrule the preliminary objection.

In the view we take of the order dated 29th May 1928, of the lower Court, this revision must succeed. The only question is whether we should quash the order and direct that the procedure laid down by Sch. 2, R. 5, Civil P. C., be followed in making the appointment of a new arbitrator. Having regard to the circumstances of the case, we do not think it desirable to prolong the matter any further. Since the defendant himself did not follow the procedure laid down by law and did not obtain the appointment of a new arbitrator in a regular manner, the better course is that the arbitration be superseded.

We, therefore, quash the order of the learned Subordinate Judge dated 29th May 1928, directing the appointment of Babu Ganesh Prasad to act as arbitrator in place of Babu Bhagwati Prasad and direct that the arbitration be superseded and the suit tried out by the Court. The plaintiff-appellant will have his costs of this revision.

R.K. *Revision allowed.*

* A. I. R. 1929 Allahabad 146

BOYS, J.

Gobardhan Pande and *others*—Plaintiffs—Appellants.

v.

Debi Bux Kurmi and *another*—Defendant—Respondents.

Second Appeal No. 1808 of 1926, Decided on 6th December 1928, from decree of Addl. Sub Judge, Basti, D/- 14th September 1926.

*** Landlord and Tenant—Tenant giving or giving up nothing as consideration for permission to plant trees—Zamindar is entitled to trees.**

Where the planter gives or gives up something in return for the permission to plant the tree, ordinarily, i. e., in the absence of other special considerations, the tree becomes his property but where he gives or gives up nothing the property in the tree is in the zamindar: *A. I. R.* 1923 *All.* 417 ; *A. I. R.* 1921 *All.* 168, *Dist.*; 5 *I. C.* 253 and 25 *I. C.* 152, *Foll.* [P 147, C 1]

U. S. Bajpai for *G. S. Pathak*—for Appellants.

R. K. Malaviya for *S. N. Gupta*—for Respondents.

Judgment.—This is one of those cases of village disputes, superficially petty but which arise with great frequency and the principles governing them are therefore of some importance. I am afraid that no principle laid down by this Court will ever penetrate to the ordinary villager or petty zamindar, and he will still proceed to litigation in each case according to his lights. The plaintiff appellant as zamindar sued for a declaration of his right to two trees planted on parti land with damages for some wood sold from the trees. The defendants claimed to be the owners of the trees and that they had been planted by them. It is admitted that the trees are growing on parti land. Though the defendants did not plead that they had planted the trees by permission some evidence was apparently led without objection, and the case was decided in the lower Courts on the basis that the trees were planted by the defendants with the permission of the zamindar on parti land, and I have to determine in this appeal whether the zamindar is entitled to the trees and the defendants entitled only to the fruits, or whether the defendants are entitled to both. The trial Court gave the plaintiff a decree, but the lower appellate Court has dismissed the suit. The latter was of opinion that while formerly the decisions were in favour of the zamindar the trend of the more recent decisions was to hold the property in the trees to be in the tenant. It has relied for this proposition on the decision of Daniels, J., in *Ramnath* v. *Mata Sahai* (1). That was a case of trees planted on an abadi site. Daniels, J., remarked :

"The lower Court relies on the ruling in *Jaleshwar Sahu* v. *Rajmangal* (2); and I agree with the lower Court that whatever views may formerly have been held the presumption now is that a tenant has a right to cut and sell trees planted by him."

Now it is to be noted that the case *Jaleshwar Sahu* v. *Rajmangal* (2) which was followed was a case in which a tenant had by the permission of the zamindar substituted trees, in fact a grove, for the agricultural cultivation. It is clear then that in that case the man who planted the grove was giving up somethiug. In exchange for his agricultural cultivation he was planting trees. In other words, he was not a gratuitous gainer by the permission to plant the trees. How far the decision in that case really supported a decision in favour of the tenant in a case where he had planted trees on an abadi site occupied by him, is a question into which I need not enter. It is sufficient to note that that case was the basis of the decision of Daniels, J., in (1) and it is this decision of Daniels, J., that is relied upon by the lower appellate Court in upsetting the decree of the trial Court. It appears to me that there is a manifest distinction between the case of an occupancy tenant substituting a grove for his agricultural cultivation with the permission of the zamindar and the case of a person planting a tree on waste land with the permission of the zamindar without any proof of nazrana or other consideration given. If the zamindar is not to have a right in the wood then, unless it be proved that he got some nazrana or other consideration, he would be getting nothing at all for the permission which he has given to plant trees. It would seem, then, prima facie reasonable that he should get something; and when I find that the previous authorities to which I shall presently refer have supported the zamindar's right in such circumstances in the trees I am not prepared to deny that right in consequence

(1) A. I. R. 1923 All. 417.
(2) A. I. R. 1921 All. 168 = 43 All. 606.

of the judgment in *Jaleshwar Sahu* v. *Rajmangal* (2), which was on a quite different set of facts. In the present type of case the planter of the trees was giving and giving up nothing. The principle that the zamindar is entitled to the timber was followed in the case of *Juggdip Narain* v. *Jokhan* (3): where permissfon had been given to plant on waste land, and that case was followed in *Ramsarup* v. *Jagannath* (4); also a case of planting on waste land, though in the latter case it is not very apparent that the question of permission was raised or considered. Those two cases are directly in point and the decision in *Jaleshwar Sahu* v. *Rajmangal* (2), does not detract from them; all these are in accordance with a reasonable principle though that may not have been specifically stated, that where the planter gives or gives up something in return for the permission to plant the tree ordinarily, i. e,, in the absence of other special considerations, becomes his property but where he gives or gives up nothing the property in the tree is in the zamindar.

In the present case it is not suggested that the planter, the defendant, gave or gave up anything in return for the permission. For these reasons I set aside the decree of the lower appellate Court and restore that of the Court of first instance. The appellant will have his costs throughout.

S.N./R.K. *Decree set aside.*

(3) [1910] 5 I. C. 256.
(4) [1914] 25 I. C. 152.

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* A. I. R. 1929 Allahabad 147

DALAL, J.

Sattar and *others*—Defendant—Applicants.

v.

Nazir Khan and *others*—Plaintiff and Defendants—Opposite Parties.

Civil Revn. No. 247 of 1927, Decided on 16th May 1928.

*** Civil P. C., S. 152—Judgment including property of person other than judgment-debtor owing to accidental slip—Judgment can be corrected to avoid abuse of process of Court—Civil P. C., S. 151.**

There was a clear accidental slip in including in the judgment, property belonging to somebody other than the judgment-debtor, and to correct the slip, the map had to be revised.

Held : that S. 152 applies both to judgments and decrees and the slip in the judgment can be corrected and for that reason the map also can be revised in order to avoid the abuse of the process of the Court under S. 151.

[P 147 C 2, P 148 C 2]

B. Malik—for Applicant.

Zahur Ahmad, *A. M. Khwaja* and *Majid Ali*—for Opposite Parties.

Judgment.—A final judgment for the preparation of a final decree was passed in this suit on 26th November 1924. According to the judgment, and also according to the decree, certain defendants, who are applicants here, were exempted, and the decree was passed only against defendants 1 to 10, 13, 27, 28, 29 and 30. The plaintiff was decreed possession against these defendants only, and his suit against the other defendants was dismissed. It is not necessary to dwell on the reasons for the dismissal. To find out over what property the plaintiff should be given possession, the Court ordered the amin on 8th November 1924, to prepare a plan of the portion of the house over which the plaintiff was to receive possession. The amin prepared a plan containing the property in possession of the defendants-applicants who were specially exempted from the operation of the decree. Parties and pleaders were negligent as usual, and no one discovered the mistake. Negligence went so far that when the plaintiff Nazir Khan applied some years later for the correction of the decree when he discovered that wrong property was decreed to him, the defendants-applicants themselves objected, suspecting a pit was dug somehow for them to fall into. When Nazir Khan executed the decree, and the defendants-applicants found that it was over their property that Nazir Khan had obtained possession, they came rushing to Court to get the decree amended. The learned Judge of the Court denied jurisdiction under Ss. 151 and 152, Civil P. C , saying that the matter did not relate to correction of a decree. It is true so far that the judgment will also have to be corrected. S. 152, however, applies both to judgments and decrees. The Court is given power to correct the errors arising from any accidental slip or omission.

In my opinion there was a clear accidental slip in including in the judgment somebody else's property instead of the property of the defendants against whom the decree was passed. The map will

have to be revised, but there is no reason why that should not be done by the Court in the present proceedings. S. 151 declares, what was always law, that a Court can make any such order that may be necessary to prevent abuse of the process of the Court. A more glaring case of the abuse of the process of the Court cannot be imagined than the one here, where the process of the Court was employed in doing something which the Court never intended to do. The decree has already been executed, and possibly in these proceedings the defendants-applicants may not be able to obtain restoration of possession. At the same time, so long as the judgment and decree stand, the defendants-applicants could not sue for the possession of property wrongly obtained by the plaintiff from them by process of law. I direct that the matter be reopened and the map mentioned in the Court's order of 26th November 1924, in the order-sheet be corrected. I am told that defendants 1 to 10, 13, 27, 28, 29 and 30 are already parties to these proceedings. In that case the trial Court will be able to proceed to the correction of the map so as to bring it in accord with the intention of the Court. When the map is corrected, that map shall be substituted for the map existing on the decree at present.

As it was due to the stupidity of the defendants-applicants that this litigation arose and the plaintiff had behaved quite honestly in trying to get the decree amended, I direct that costs here of the plaintiff shall be paid by the defendants-applicants. The order of the trial Court dated 6th August 1927, is hereby set aside and that Court is directed to proceed according to the instructions given above.

S.N./R.K. *Order set aside.*

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* A. I. R. 1929 Allahabad 148

SULAIMAN AND KENDALL, JJ.

Gauri Shankar—Plaintiff—Appellant.

v.

Keshab Deo and *others*—Defendants—Respondents.

First Appeal No. 440 of 1924, Decided on 9th November 1928, from decision of 3rd Addl. Sub-Judge, Aligarh, D/- 26th August 1924.

(a) Civil P. C., S. 99—Defect of multifariousness not affecting merits or jurisdiction—Appellate Court cannot interfere.

Appellate Court cannot interfere on the ground of multifariousness unless the defect has affected the merits of the case or the jurisdiction of the Court. [P 149 C 2]

*** (b) Hindu Law — Joint family as partner—Managing member dying—Partnership is not dissolved — Contract Act, S. 253 (10).**

Where a joint family is a partner, the partnership is not dissolved on the death of the managing member of the family inasmuch as a joint family does not die on the death of the manager. [P 152 C 1]

(c) Hindu Law—Joint family.

A joint family can become a partner in partnership business: *A. I. R.* 1926 *All.* 337, *Foll.* [P 152 C 1]

(d) Hindu Law—Partition—Reunion—Agreement to reunite must be proved—Such agreement can be inferred from conduct.

To establish reunion after general partition one must prove that there was some agreement to reunite, though that agreement may be inferred from subsequent conduct: 40 *Cal.* 323, *Rel. on.* [P 152 C 2]

(e) Hindu Law—Partition—One member separating—No presumption about others remaining united—But their union can be inferred from conduct.

Where one member of joint family separates, there is no presumption that others remained united. But their having remained united can be inferred from their subsequent conduct without proving any agreement to reunite: *A. I. R.* 1925 *P. C.* 49, *Rel. on.* [P 152 C 2]

(f) Hindu Law — Joint family — Whole joint family property is liable for ancestral family business—But minor member is not personally liable nor his self-acquired property.

For debts contracted for the ancestral family business, not only the property of the firm but the whole joint family property is liable. But a minor member of the family is not personlly liable nor is his self-acquired property liable: *A. I. R.* 1924 *All.* 379 and 34 *Bom.* 72, *Rel. on.* [P 153 C 1]

(g) Civil P. C., O. 32, R. 2—Persons sued as members of firm—Minor member impleaded as major—Decree passed in suit is not bad for that reason.

Where certain persons were sued as partners of a firm, the decree passed in the suit is not bad simply because one minor member of the firm was impleaded as major when really he was a minor. [P 154 C 1]

(h) Practice—Ground of attack not raised in lower Court cannot be allowed.

It would be unfair if the High Court allows a new ground of attack not raised in the Court below. [P 154 C 2]

Judgment.—First Appeals Nos. 450, 101, 520 and 544 are all connected and we propose to dispose of them by one principal judgment. Gauri Shankar filed two suits for omnibus declarations that a large number of documents like simple

mortgages. usufructuary mortgages, sale-deeds and releases and decrees obtained on the basis of other documents as well as certain auction-sales which have taken place are not binding on the plaintiff. Some of the mortgagees have sued for their money. The persons interested in the various transactions which amounted to about 51 in number were numerous. About 65 defendants were impleaded in the Court below in the first instance and the number has swelled considerably in consequence of the deaths of several of them, and their representatives having been brought on the record in the Court below and in this Court. Briefly speaking the plaintiff's case was that he was a minor, and during his minority his uncle Keshab Deo started an entirely new shop styled Keshab Deo Gauri Shankar in 1915 to which the plaintiff on account of his minority could not be legally made a partner so as to be liable for the obligations; that his uncle Keshab Deo has executed a large number of documents and raised money on the security of the plaintiff's share in the family property which is by no means liable. The plaintiff's case rested on the assertion that the plaintiff and his uncle were not members of a joint Hindu family. Although a long list of the various transactions was attached to the plaint they were not separately and specifically dealt with, and the necessary particulars were not supplied. The Court called upon the plaintiff to supply further particulars, which were given in the application dated 9th July 1923, but even there the plaintiff did not deal with the various deeds separately, nor point out the irregularities in the previous suits on which he was going to rely.

The defence raised by the various defendants had one common feature about it, viz., that there was an assertion that the plaintiff and Keshab Deo, defendant were members of a joint Hindu family and that the firm Keshab Deo Gauri Shankar, on account of which most of the debts were iucurred, was a joint family business, the liability of which was binding on the plaintiff. There was of course a denial that there had been any irregularity in obtaining the various decrees, and also a denial that the plaintiff had in any way been prejudiced. Several defendants also took the plea that the suit was bad for multifariousness inasmuch as numerous causes of action had been wrongly jointed together.

The learned Subordinate Judge framed several issues including the one as to the question of multifariousness. Unfortunately he postponed the decision of the last mentioned issue till all the evidence had been recorded and then summarily disposed of it, holding that the suit was not defective.

No doubt the joining together of so many causes of action and impleading such a large number of defendants was very inconvenient and embarrassing. But now that the whole evidence has been recorded it is too late for us to consider the defect of multifariousness, as under S. 99, Civil P, C., an appellate Court cannot interfere on this ground unless the defect has affected the merits of the case or the jurisdiction of the Court. As regards some of the decrees the Court below has found that no cause of action has arisen within its jurisdiction, but the suit with regard to them has been dismissed and not decreed. It is, therefore, not possible for us to dismiss the suit in appeal on the preliminary ground that it is bad for multifariousness.

In his plaint the plaintiff admitted that a firm styled Sham Lal Gokul Chand was started about 1860 at Hathras and another one was opened at Patna. In para. 4 of the plaint it was admitted that both these shops are still going on. The plaintiff's case was that so far as this business is concerned it was the family business of the plaintiff and Keshab Deo, and there was no suggestion that it has been dissolved owing to the death of either the plaintiff's father or grandfather. In the Court below, as noted by the learned Subordinate Judge on p. 116, the plaintiff did not deny his liability to pay the debts of this firm Sham Lal Gokul Chand, nor challenged the transfers made to pay off the debts of that firm. His whole case was that a firm styled Keshab Deo Gauri Shankar was an entirely new firm, started by Keshab Deo at a time when the plaintiff was a minor, and though in that firm the plaintiff was a partner so as to be liable for its debts, the plaintiff could not be taxed with the indebtedness of this new firm.

There is no direct evidence to show when the firm Sham Lal Gokul Chand was established. Some of the defendants

however, admitted the plaintiff's allegation that it was started in 1860. We may take it that the plaintiff admits that it was started at least as early as that year. At that time admittedly the plaintiff was not born, but his grandfather Sham Lal was alive and so was his great-grandfather Ganga Ram. Sham Lal had three brothers Mukand Lal, Gokul Chand and Salig Ram. As to Mukand Lal, it is admitted on behalf of all the parties that he went out of the family on being adopted by a stranger. The oral evidence on behalf of the plaintiff is to the effect that there was a complete separation between Ganga Ram and his four sons, and there was an actual partition of the existing assets. This is alleged to have taken place some time about 1860, although no definite date is fixed, and there is no direct documentary evidence to prove any such partition. On the other hand, on behalf of the defendants it was alleged that there was no partition or separation at all, and that the family has continued to be joint and the plaintiff is still joint with his uncle Keshab Deo. It may, however, be taken for granted that the documentary evidence as well as the oral evidence on both sides go to show that Salig Ram did not get any share out of the profits of the business Sham Lal Gokul Chand.

The plaintiff's case is that Salig Ram actually separated at the time of the general partition of the family property. The suggestion on behalf of the defendants is that Salig Ram might himself have walked out of the family which did not involve a disruption of the joint status of the remaining members of the family. (Here the judgment discussing evidence found that a new firm styled as Keshao Deo Radha Ballabh was started, and concluded that the firm styled as Keshab Deo Radha Ballabh was a firm in which, to say the least, the main firm Shamlal Gokul Chand was a partner and for the liabilities of which that firm was responsible and proceeded). The plaintiff does not dispute that his grandfather Shamlal and he himself were interested in the main firm and were liable for the debts of the main firm.

The firm Keshab Deo Radha Ballab continued to exist up to the year 1915. This firm was closed down on Katik Badi 15, Sambat 1972. On that date a balance of the amount due by this firm to the main firm Shamlal Gokul Chand was struck in the account books of the latter firm and it was found that Rs. 11,042-4-3 were due. On the same date and at the same place a new firm styled Keshab Deo Gauri Shankar was started and the liability of Keshab Deo Radha Ballabh for Rs. 11,042-4-3 was transferred to Keshab Deo Gauri Shankar in the account books of the main firm. The learned counsel for the appellant contended that this circumstance showed that the firm Keshab Deo Radha Ballabh had not been prosperous and there was a net loss of over Rs. 11,000 suffered by it. In the absence of the account books of the firm Keshab Deo Radha Ballabh we are not prepared to draw any such inference. The entry merely indicates the extent of the outstanding liability of Keshab Deo Radha Ballabh to the main firm Sham Lal Gokul Chand.

In other words it represents the capital invested by the main firm in this other shop. It does not in any way indicate that that firm had no assets, nor does it show that it in any way represents the net loss. Had we the account books of these two firms we would then have been in a position to know whether that firm had any assets. We only know that the liability of the old firm Keshab Deo Radha Ballabh to the main firm was transferred to the firm Keshab Deo Gauri Shankar. This fact is consistent with the defendants' theory that the new firm was really a continuation of the old firm, the stranger partner going out.

It was also suggested on behalf of the plaintiff that from the very start the new firm Keshab Deo Gauri Shankar was suffering loss and that the liability to the main firm went on increasing. For this reliance is placed on the entries, not in the account books of Keshab Deo Gauri Shankar, but in the account books of Sham Lal Gokul Chand. For the reasons above-mentioned such entries cannot be conclusive. They cannot in any way show the exact position of the firm Keshab Deo Gauri Shankar. As a matter of fact the entries on pp. 353 to 354 rather indicate that the balance on the credit side of Keshab Deo Gauri Shankar increased in the course of the first year and not decreased. In any case that point is not very material for the purposes of this appeal.

It is important to note that in 1915 when the firm Keshab Deo Gauri Shankar was started Sham Lal, the plaintiff's grandfather, was alive. The evidence led on behalf of the plaintiff is to the effect that Sham Lal had become very old and was incapable of looking after his business, and there is a suggestion that this shop was started without the consent of Sham Lal. On the other hand the defendants have led positive oral evidence that at the inauguration ceremony of Keshab Deo Gauri Shanker, Sham Lal was himself present and blessed the ceremony and that this shop was started with his advice and consent. The learned Subordinate Judge, after having heard the witnesses for both the parties, has come to the conclusion that it is not established that this firm was started without the knowledge and consent of Sham Lal. On the other hand he believes that Sham Lal was responsible for this new firm. We see no reason to take a contrary view of the oral evidence on this point. We have no reason to suppose that while Sham Lal was alive, a firm styled Keshab Deo Gauri Shankar was started in which Gauri Shankar was made a partner without the knowledge and consent of his natural guardian and grandfather Sham Lal.

The position then is that in 1915 there was liability on the main firm Sham Lal Gokul Chand on account of the outstanding debts of the firm Keshab Deo Radha Ballabh. For those debts the main firm, of which Sham Lal and Keshab Deo were partners, was liable. The main firm could not get rid of this liability by merely dissolving the other shop. Ram Gopal witness has stated that the stranger partner Radha Ballabh became indebted to the extent of Rs. 30,000 or 40,000 and became blind, so as to be incapable of looking after the business ; and as he had no funds, both Sham Lal and Keshab Deo consulted together and decided that the best thing was that Radha Ballabh should be removed and the firm should thereafter be styled Keshab Deo Gauri Shankar. So far as the circumstances under which Radha Ballabh ceased to be a partner are concerned, our attention has not been drawn to any other oral evidence on the point except that of Ram Gopal. If Radha Ballabh had become heavily indebted and was useless as a partner, it was no wonder that the plaintiff firm decided that the business should be run without him. Inasmuch as the family business was liable for the debts of that firm there could be no objection to the transference of the liability to the firm styled Keshab Deo Gauri Shankar.

The firm Keshab Deo Gauri Shankar commenced its business on the very day on which the firm Keshab Deo Radha Ballabh was closed, and it carried on its business on the same premises (Ram Sarup p. 83, line 47). It carried on its business at that place for several years, and when the business became slack it was transferred to a room in the shop of Sham Lal Gokul Chand (Sham Sundar p. 70 line 13). We also find from the evidence of Ram Sarup p. 83 that the nature of the business carried on by Keshab Deo Gauri Shankar was similar to that carried on by Keshab Deo Radha Ballabh as well as the main firm Sham Lal Gokul Chand. We have already noted that even the plaintiffs' witnesses admit that this firm was started out of the funds of the main firm. We have therefore no hesitation in coming to the conclusion that the interest of Sham Lal's family in the firm Keshab Deo Gauri Shankar was similar to the interest of the family in Keshab Deo Radha Ballabh. Thus in 1915 to 1916 while Sham Lal was alive he was liable for the debts of the firm Keshab Deo Gauri Shankar, inasmuch as the family business was interested in it in the same way as before. It is impossible to hold that the firm Keshab Deo Gauri Shankar was a new business, started independently of the family by Keshab Deo, to which Gauri Shankar a minor had been for the first time admitted as a partner. On the other hand we accept the view of the Court below that the firm Keshab Deo Gauri Shankar was the firm in which the plaintiff's family was interested. The learned Subordinate Judge has recorded his finding on p. 118 on this point in the following words :

" The plaintiff's own evidence therefore goes to prove that the firm Keshab Deo Gauri Shankar is an ancestral firm in which originally his father was a partner and had started the business under the name of Keshab Deo Radha Ballabh which itself was a branch of the ancestral firm Sham Lal Gokul Chand and that the plaintiff is a partner in the firm Keshab Deo Gauri Shankar. "

It has been strongly contended on behalf of the plaintiff that, although Sham Lal was interested in the business Sham Lal Gokul Chand, he was interested in

his individual capacity as a mere partner, and his family consisting of his son and grandson was not at all interested. It is impossible to accept this position. There are many circumstances indicating that it was Sham Lal's family that was interested in the firm and not Sham Lal in his individual capacity. We may for instance mention the fact that several shops and branches were opened in the name of the descendants of Sham Lal, viz., Kishen Lal and Gauri Shankar. We may also point out that the expenses of Kishen Lal and Gauri Shankar were incurred out of the funds of the main family firm. Indeed separate khatas exist in their names. The plaintiff in para. 4 of the plaint did not suggest that this business was the exclusive business of Sham Lal which he inherited for the first time on his death in 1916. Had that been so the partnership would have been dissolved on the death of Sham Lal, but the plaintiff admits that the shops at Hathras and Patna are still going on, and he is liable for its outstanding debts. It is therefore impossible to accept the position that the present plaintiff became interested in the main firm for the first time on the death of his grandfather, and that although so far as the main firm is concerned he admits his liability, the partnership in Keshab Deo Radha Ballabh, even if Sham Lal was interested in it, must be deemed to have been dissolved in 1916 when he died, and that the plaintiff being a minor could only be admitted to the benefits of it and not its liabilities. The view of the learned Subordinate Judge is that even the firm Keshab Deo Gauri Shankar is a mere offshoot of the family business Sham Lal Gokul Chand with no stranger partner in it at all, and it is therefore on the same footing as the joint family ancestral business Sham Lal Gokul Chand. We accept that finding.

It follows that as a joint family does not die on the death of its managing member there could be no dissolution of the partnership, even if it was a mere partnership, when Sham Lal died. That a joint family can be a partner is well established in this Court. *Mewa Ram* v. *Ram Gopal* (1).

In order to determine the extent of the liability of the plaintiff to the debts of this firm it is also necessary to consider whether the interest of Sham Lal in the main firm was that of a member of a joint Hindu family with Gokul Chand and Keshab Deo or was that of a mere partner. As already pointed out the plaintiff's case is that there was a complete separation and after that Sham Lal Gokul Chand carried on this business jointly as mere partners and not as members of a joint Hindu family. On the other hand the defendants' case is that they continued to be members of a joint Hindu family.

There is of course the initial presumption against the plaintiff that the two brothers Sham Lal and Gokul Chand were members of a joint Hindu family. The fact that Makund Lal went out of the family owing to his adoption did not have the effect of any disruption. The circumstance that Salig Ram separated would undoubtedly have considerable bearing on the question, but his going out of the family might be the result of a complete partition between all the members or his individual separation. The oral evidence on both sides is not independent and reliable so that implicit faith could be placed on it. The learned Subordinate Judge has not based his conclusion on the oral evidence. He is of opinion that the evidence produced by the plaintiff as the actual partition having taken place is not convincing. He heard the witnesses and has disbelieved them, and we are not prepared to say that he was wrong in not being satisfied with the plaintiff's case of an actual partition among all the members of the family. The position then is that the evidence is nil on either side. We have the fact that Salig Ram did separate. If there had been a general partition, then the burden would lie on the defendants to establish that there was a subsequent reunion. The defendants might then have to show that there was some agreement between Sham Lal and Gokul Chand to reunite, though that agreement may be inferred from their subsequent conduct, *Bhima Rout* v. *Dasarathi Das* (2). On the other hand, if Salig Ram alone separated then there would be no presumption that the remaining members remained united, but the fact of their having continued to remain united might, without proving any special agreement, have been

(1) A. I. R. 1926 All. 337=48 All. 395.

(2) [1913] 40 Cal. 323=16 I. C. 908=17 C. L. J. 183.

inferred from the subsequent course of conduct. We may quote in this connexion the observations of their Lordships in the case of *Palani Ammal* v. *Muthuvenkatachala Moniagar* (3).

"It is also beyond doubt that a member of such a joint family can separate himself from the other members . . . . . and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to join as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them."

Thus, even if we assume that Salig Ram separated, the defendants can show from the subsequent conduct of Sham Lal and Gokul Chand that they continued to remain united. (Here the judgment discussed evidence and proceeded.) Having considered the entire oral and documentary evidence we have come to the conclusion that the finding of the learned Subordinate Judge that the plaintiff has failed to prove that his family was separate from that of Keshab Deo's must be accepted, and that it must be held that the plaintiff and Keshab Deo formed members of a joint Hindu family which had been carrying on the business styled as Sham Lal Gokul Chand, and which later on had an offshoot called Keshab Deo Gauri Shankar.

In this view of the matter the plaintiff's liability for the debts of both these firms is on the same footing as the liability of a minor member of a joint Hindu family for the obligations of an ancestral family business. For debts contracted for the purpose of such business, not only the property of the firm but the joint family property of the firm would be liable: *Mahabir Prasad Misir* v. *Amla Prasad Rai* (4) and *Raghunathji Tarachand* v. *The Bank of Bombay* (5). Gauri Shankar, minor, however, cannot be liable personally for these debts, nor can any self-acquired property of his be liable.

Had the plaintiff brought separate suits against each set of defendants in respect of the various alienations, the questions of fact which arose in each case would have been considered separately and threshed out in detail. The plaintiff, however, has chosen to bring one multifarious suit, and the allegations in the plaint, even after they were supplemented by his application dated 9th July 1923, were by no means specific or exhaustive. He has alleged generally that the alienations made by his uncle Keshab Deo were not for legal necessity or on account of any business in which the plaintiff was interested, and he has further alleged vaguely and generally that he had not been properly represented. One would have expected the plaintiff to allege specific irregularities in respect of each decree which he wanted to challenge. A mere general and sweeping allegation that he was not properly represented was by no means sufficient. In order that the defendants should meet the plaintiff's case it was necessary to allege what particular irregularities were committed which vitiated those decrees. In the absence of such irregularities the judgments operate as res judicata and the plaintiff cannot be allowed to go behind them, The learned Subordinate Judge in his findings on issues 10 and 11 has remarked that the only ground on which the plaintiff alleged that he was not liable for the decretal amounts was that he was not a member of the firm Kashab Deo Gauri Shankar, and has noted that "the decrees were not questioned on any other ground." If that he the true position then the plaintiff's case in respect of these decrees breaks down a finding that he was liable for the debts of the firm Keshab Deo Gauri Shankar.

We are further of opinion that it is impossible in the absence of sufficient materials to come to the conclusion that the plaintiff had not been properly represented in any of the previous suits. In order to show why the Court appointed a particular party in one case, one must see the application which was filed by the then plaintiff, the affidavit which supported it and the reasons which influenced the Judge in appointing a particular guardian to represent the present plaintiff. The plaintiff has not taken the trouble to produce copies of applications, affidavits or orders of the Court, and in the absence of such documents we are unable to hold that the appointment of his guardians in various cases was irregular and unauthorized by law.

(3) A. I. R. 1925 P. C. 49=48 Mad. 254 (258) =52 I. A. 83 (P.C.).
(4) A. I. R. 1924 All. 379=46 All. 364.
(5) [1910] 34 Bom. 72=2 I. C. 173=11 Bom. L. R. 255.

We may, however, refer to two particular decrees on which special stress is laid on behalf of the plaintiff. In one case it is said that he was impleaded as a major, whereas he was a minor and a proper guardian ought to have been appointed. This decree is printed on p. 283. The learned Subordinate Judge has pointed out that this objection was neither taken in the plaint nor in the supplementary application, and that the plaintiff did not allege this as a ground of his attack. Apart from that the decree on p. 283 shows that the defendants were being sued as partners of a firm carrying on business in the name of Keshab Deo Gauri Shankar. Keshab Deo was the elder member of the firm who was managing the business, and the firm itself could be sued in its own name under O. 30 of the Code. We therefore think that this circumstance does not vitiate this decree.

In another case it was alleged on behalf of the plaintiff that his mother, whose real name is Mt. Jai Dei, was wrongly described as Mt. Barfi Dei, and that no summons was actually served on her. The only witness on behalf of the plaintiff, besides his mother, who has deposed that the plaintiff's mother's name is Mt. Jai Dei and not Mt. Barfi Dei, is Balu Mal, but he is not definite as to whether she is called by some other name or not. On the other hand there are witnesses on behalf of the defendants who say that her name is Mt. Barfi Dei also. The learned Subordinate Judge considered that the oral evidence adduced by the defendants was more reliable and the plaintiff had failed to prove that Mt. Barfi Dei was not the name of his mother. As the question is one of fact we accept the finding of the Court below on the point, and, therefore, hold that no irregularity on this account has been made out. This disposes of all the decrees which are impugned in this appeal.

Four auction sales also have been challenged, but the learned counsel for the plaintiff has not pressed the plaintiff's case as regards them. Indeed, as the sales have taken place in execution of decrees against the firm Sham Lal Gokul Chand, for which the plaintiff admits liability, the sales must stand and cannot be disputed in this case.

Now remain 19 simple mortgage-deeds. The plaintiff attacked these transactions on the ground that he was not a partner of the firm Keshab Deo Gauri Shankar and was not liable for the debts of that firm. Neither in the plaint, nor in the supplementary application was there any express mention that these debts had not been contracted for the purposes of this firm or that they were bad for want of legal necessity. The main ground of attack was that they were not binding on the plaintiff because he was not a partner of that firm, nor was joint with Keshab Deo. The effect of our findings is that this ground of attack fails entirely. We may mention that no specific issue was framed by the Court below as to the existence or absence of any legal necessity for any of these transactions, or as to whether they were incurred for the purposes of the firm Keshab Deo Gauri Shankar. The learned Subordinate Judge also has not dealt with these transactions individually, but has lumped them together and dismissed the plaintiff's suit on the common ground that he was a member of a joint family and was bound by the debts of the firm of that family.

The learned advocate for the plaintiff has urged before us that these transfers by Keshab Deo cannot stand unless it is established either that they were supported by legal necessity or that the money had been required for the purposes of the firm or that at any rate representation to that effect had been made and acted upon. This line of attack was not adopted in the Court below, and it seems to us that it would be unfair to the defendants if we were to accept this new ground and decree the plaintiff's suit against those defendants, who have omitted to lead evidence to show that the money advanced by them had been required for the purposes of the business. On the other hand, there are some documents which show on the face of them that the money advanced was probably not advanced for the purposes of the firm but was advanced to Keshab Deo himself. If we simply dismiss the plaintiff's suit in respect of this class of transactions we would be doing so although there is nothing to show that they were or that they were not required for the business. Having considered this point carefully we have come to the conclusion that it would be inequitable and unjust to allow the plaintiff to raise this point in this appeal against those defendants who were absent

in the Court below and the recitals in whose documents show that at least a representation had been made that the money was required for the purposes of the business. As regards those defendants whose deeds contain no such recitals and who were absent in the Court below, we think that the best course would be to leave this point open, so that the plaintiff, if he is so advised, may raise the question over again and call upon them to justify the transfers in their favour. But as against those defendants who were either present in the Court below and contested the claim and have succeeded, or those who were absent but the recitals in whose documents do contain some evidence of a representation having been made, it would not be fair that the decrees which they have been able to secure should be modified and the question allowed to be reopened in future. We are therefore of opinion that we should not allow the plaintiff to raise the question of absence of legal necessity or the objection that the money taken by Keshab Deo had not been required for the purposes of the business. Those cases where the defendants were represented in the Court below or are represented here, as well as where the mortgagee plaintiffs are suing are cases where the recitals in the deed impugned show that the money was acquired for the purposes of the business. The plaintiff's suit fails against them. In particular we may mention that the deeds in favour of defendants in first appeal No. 440 of 1925 who were absent in the Court below do contain recitals of the nature indicated above, and the suit must be deemed to have been finally decided with regard to the validity of the transfers in their favour. We might also mention that with regard to the mortgage-deed dated 8th November 1917 (p. 177) the mortgaged property has already been attached in execution of a money-decree against the parent firm Sham Lal Gokul Chand, and has been sold at auction and purchased by a stranger. As the plaintiff does not deny his liability for the debt of that firm, the auction sale stands and, therefore, he has no longer any right to challenge the validity of the mortgage deed. Subject to the observations made above all the appeals must fail and are dismissed with costs.

S.N./R.K. *Appeals dismissed.*

A. I. R. 1929 Allahabad 155

NIAMATULLAH, J.

Mohammad Ishaq—Defendant—Appellant.

v.

Jafri Begam—Plaintiff—Respondent.

Second Appeal No. 1207 of 1926, Decided on 10th December 1928, from decree of Dist. Judge, Aligarh, D/- 30th March 1926.

(a) Agra Tenancy Act (2 of 1901), S. 201 (3) — Entries in revenue register are conclusive in suit for profits—Judgment prior to years of profits does not operate as res judicata and should be ignored.

Entries in the revenue register must be given effect to in a suit for profits, in so far as they record the plaintiff's proprietary rights, however clear and incontrovertible the proof to the contrary may be. A judgment or decree previously obtained, declaring rights which are inconsistent with the entries for subsequent years cannot operate as res judicata : 33 *All.* 799 (*F.B.*) *Rel. on.* ; *A. I. R.* 1921 *All.* and 124 *A. I. R.* 1922 *All.* 356, *Cons.* [P 156 C 1]

(b) Cosharer — Lambardar is entitled to reasonable remuneration for collecting revenue if actual charges are unascertainable.

Lambardari dues have no reference to costs incurred by a lambardar in course of village management. He is entitled to recover those costs as his out of pocket expenses in making collections. In cases where the exact amount which he spends in that connexion may not be easily ascertainable, he is entitled to a reasonable remuneration ; a reasonable percentage ought to be allowed as costs of collection : *A. I. R.* 1923 *All.* 335 and 1 *O. L. J.* 156, *Rel. on.* [P 157 C 1, 2]

M. A. Aziz—for Appellant.

Uma Shankar Bajpai and *Majid Ali*—for Respondent.

Judgment.—Plaintiff-respondent brought the two suits out of which these consolidated appeals Nos. 1207 and 1208 of 1926 have arisen for recovery of profits from the defendant-appellant for the years 1329-1332 F. She claimed to be a recorded cosharer of khatas 1 to 4, mahals Umri and Ghair Khwastgaran in village Pikhlauni, district Aligarh. The defendant-appellant who is the lambardar admittedly collected the rent of these mahals during the years in suit.

The defendant contested the claim on the ground that the plaintiff has no proprietary right left in the aforesaid mahals as by a civil Court decree passed in a suit for partition between her and other cosharers including the defendant a share in village Basti Kazi (not in dispute) was allotted to her in lieu of her share in the mahals in dispute and other properties.

That suit related to revenue paying properties and other immovable properties.

The Courts below have decreed the suits awarding Rs. 131-11-0 as the plaintiff's share of profits. Except as regards village expenses to be hereafter noticed, no question has been raised before me concerning the amount of profits decreed.

The principal contention in second appeal is that the plaintiff's rights having been determined by a decree of a competent Court the entries in the revenue records should not be allowed to prevail so as to override the terms of that decree. I may mention at the outset that the parties are not agreed as regards the effect of the decree and as to whether it can prove to demonstration that the existing entries in the revenue record are erroneous. Unless the Court is precluded from going behind such entries it should examine and construe the decree to ascertain if the plaintiff lost her right to recover the profits claimed by her, as contended by the defendant.

I think the Courts below have rightly held that the entries in the revenue registers for the years in suit are decisive of the plaintiff's claim for profits. There was at one time a great divergence of judicial opinion in this Court as to whether the presumption enjoined by S. 201 (3), Agra Tenancy Act 2 of 1901, is conclusive and absolute, so as to exclude all evidence to the contrary, or, is only rebuttable, in which case the correctness of entries can be the subject of investigation in a suit for profits. The Full Bench case *Durga Prasad* v. *Hazari Singh* (1), heard by all the Judges of the Court, as then constituted, has finally set the controversy at rest and it must be held, as ruled in that case, that entries in the revenue register must be given effect to in a suit for profits, in so far as they record the plaintiff's proprietary rights, however clear and incontrovertible the proof to the contrary may be. Unless it operates as res judicata a judgment or decree, previously obtained, declaring rights which are inconsistant with the entries, is no more than a piece of evidence rebutting the entries subsequently called in question and as such should be ignored like any other evidence offered to prove the incorrectness of those entries. The decree relied on by the defendant bears the date 25th October 1920 (1327F) and was passed in a suit instituted on 10th July 1920. The profits claimed are for 1329-1332 F (1922-1925) for which years the entries record the plaintiff as a cosharer. The decree cannot operate as res judicata inasmuch as the question directly and substantially in issue now is whether the plaintiff-appellant had certain proprietary rights in the years 1329-1332 F., which was not, and could not, be in issue in the suit in which the decree was passed two years previously by a civil Court which is not competent to try the present suit. It is conceivable, (I do not suggest that such is the case) that some events happened in the interval which altered the rights determined by the decree and which justify the entries. If, therefore, the decree be allowed to contradict the entries, evidence relating to what happened since cannot be excluded. Such a course will make the rule contained in S. 201 (3) as interpreted in the Full Bench ruling, above referred to, quite nugatory and if once the inquiry is opened the mischief sought to be avoided by the rule will be let in. The learned counsel for the appellant has referred me to a number of cases bearing on the point. I do not consider it necessary to discuss those decided before the Full Bench case already mentioned. In *Mubarak Fatima* v. *Muhammad Quli Khan* (2) the entries existing at the date of suit were accepted as correct and the amendment during the pendency of the suit, which was found to be manifestly erroneous was rejected. Reference was also made to a civil Court decree passed before the institution of the suit for profits but as it did not go the whole length of the controversy in the profits case it was not considered to be of any assistance. It is not an authority for the proposition that the presumption arising from S. 201 (3), Tenancy Act, should yield to the force of a decree passed before the suit for profits in so far as the entries were inconsistant with it.

In *Surjan Singh* v. *Chatura Kunwar* (3) a civil suit was instituted and a decree obtained in the interval between the decision of the Court of first instance (which awarded profits to the plaintiff, a recorded cosharer, on the strength of the entries in the revenue registers) and the hearing of the appeal when the decree o

(1) [1911] 33 All. 799=11 I. C. 116=8 A. L. J. 1025 (F.B.).

(2) A. I. R. 1921 All. 124=43 All. 697.

(3) A. I. R. 1922 All. 356=44 All. 250.

the civil Court was produced and acted upon. The civil suit was directed against the entries themselves and was one contemplated by the proviso to S. 201, Tenancy Act.

In the case before me we have only the decree of the civil Court of which mention has already been made. Without being supplemented by other documents, and possibly some oral evidence, it cannot be affirmed with precision that it covers all the khatas in question. There is some reason to believe that it does relate to two at least of the khatas lying in one of the two mahals in question but it is impossible to give effect to it without instituting an inquiry as to what the claim was, how adjustment was made and what was allotted on partition to each. The entries relied on by the plaintiff were not, and could not, be directly and specifically in question in the civil suit. It may hereafter turn out that the plaintiff is taking unfair advantage of the appellant's omission to obtain correction of entries in the revenue registers in due time, but if such is the case the appellant has no one but himself to thank for his negligence.

Another question raised in the appeal is that the Courts below did not allow any village expenses, including collection charges. In dealing with this matter the lower appellate Court remarked that

"there was only vague evidence that a mukhtaram and a ziladar were maintained by the defendant-appellant and their salary was not proved. Lambardari dues were allowed to the defendant."

I think this view is not equitable or correct. Lambardari dues have no reference to costs incurred by a lambardar in course of village management. It is a statutory right of a lambardar to recover from his cosharers, 5 % on the Government revenue, wholly apart from what he is entitled to recover as his out-of-pocket expenses in making collections. In many cases the exact amount which he spends in that connexion may not be easily ascertainable, as for instance where a common staff is employed to manage a number of properties of heterogeneous character of which only one is in dispute in a suit for profits or where a lambardar engages no karinda or mukhtar and personally works as such, in which case he is entitled to a reasonable remuneration. Such was the case in *Mt. Hira* v. *Ram Adhin Singh* (4) decided by a learned Judge of this Court. In such cases a reasonable percentage ought to be allowed as costs of collection. In *Pt. Iqbal Narain* v. *Pt. Suraj Narain* (5). Sir Benjamin (then Mr.) Lindsay considered 10 % as a reasonable basis of allowing collection charges in ths absence of evidence to prove actual costs incurred by the lambardar. There is no hard and fast rule and circumstances of each case have to be considered in fixing the amount. In the case before me the lower Courts have awarded profits on gross rental, that is, on the assumption that the lambardar has managed to collect to the last pie. It is not, therefore, unreasonable to allow him Rs. 11-11-0 so as to reduce the decretal amount to the round figure of Rs. 120-0-0. The cost of collection works out roughly at 10% on the amount collected. I would, therefore, modify the decrees of the lower Courts as indicated above and dismiss the appeal in other respects. The respondent will get nine-tenths of her costs in all Courts from the appellant.

R.K. *Decree modified.*

(4) A. I. R. 1923 All. 335.
(5) [1914] 1 O. L. J. 156=24 I. C. 673.

A. I. R. 1929 Allahabad 157

DALAL, J.

Ram Chand—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 95 of 1928, Decided on 27th April 1928, from order of Dist-Magistrate, Muttra, D/- 6th January 1928.

U. P. Prevention of Adulteration Act (6 of 1912) S. 15—Person accused under S. 4—Summons not issued within one month from consent obtained but accused appearing—S. 15 does not deprive Court of jurisdiction.

If a person accused under S. 4 appears and stands his trial in spite of the fact that the summons was not issued to him within one month from consent obtained under S. 12, S. 15 does not deprive Court of jurisdiction to try him. [P 158 C 1]

N. C. Vaish—for Applicant.

M. Waliullah—for the Crown.

Judgment. — The applicant Ram Chand has been convicted under S. 4, United Provinces Prevention of Adulteration Act (6 of 1912), for selling adulterated ghee. His prosecution was duly sanctioned as required by S. 12 of the Act, but a complaint was not lodged till

more than thirty days after the sanction by the Health Officer. The argument here was that the trial Court had no jurisdiction to proceed with the prosecution. S. 15 lays down that no summons shall issue for the attendance of any person accused of an offence under S. 4, unless the same is applied for within thirty days from the date upon which the order of consent referred to in S. 12 shall have been made or given. In my opinion this section does not deal with the jurisdiction of the Court. Jurisdiction arises under S. 12 on the order or consent in writing of the Health Officer. If the applicant had disobeyed the summons, he could not have been prosecuted under S. 174, I. P. C. When, however, he appeared and stood his trial, S. 15 is not so worded as to deprive the Court of jurisdiction. It only prohibits the issue of summons, but not the taking place of a trial.

It was further argued that the fine of Rs. 100 was excessive. I do not think so, having regard to the frequency of this kind of offence. I dismiss this application.

S.N./R.K. *Revision dismissed.*

A. I. R. 1929 Allahabad 158

SULAIMAN AND KENDALL, JJ.

Mt. Sarwari Begam—Defendant—Appellant.

v.

Mt. Razia Khatun and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 136 of 1928, Decided on 16th November 1928, from order of Dist. Judge, Budaun, D/- 5th April 1928.

Mahomedan Law—Pre-emption—Preliminary demands as to all items—Pre-emptor can sue for some of them only—Evidence Act. S. 115.

Where several items of properties are sold under a sale-deed, and the preliminary demands have been made by the pre-emptor in respect of all the items, the plaintiff is not bound to sue for pre-emption of all these items but is entitled to confine his claim to a portion only. [P 158 C 2]

Baleshwari Prasad—for Appellant.

Judgment.—This is a defendant's appeal arising out of a suit for pre-emption under the Mahomedan law. Four items of properties were sold under the sale-deed. The plaintiff's evidence was that she made the two preliminary demands in respect of the properties sold but the vendee refused to give the properties to her. At the time of the institution of the suit she left out one item and half of another item on the allegation that she herself was their owner and she asked for a declaration to that effect. The first Court dismissed her claim for pre-emption on the ground that it was not proved that the demands necessary under the Mahomedan law were made. He granted her a decree as regards the portion claimed by her as her own property. The lower appellate Court has upheld the finding that she was the owner of that portion of the properties which had been excluded from the suit and has further held that she made the two necessary demands. So far as the finding that the demands were actually made is concerned, that is a finding of fact and must be accepted.

The learned advocate for the appellant, however, urges that inasmuch as the preliminary demands had been made in respect of all the four items the plaintiff was bound to sue for pre-emption to all these items and was not entitled to confine her claim to a portion only. The learned District Judge has pointed out that when the plaintiff came to know of the sale she could not wait indefinitely to ascertain which houses belonged to her before making the immediate demand. She also made the second demand at an early date. It was before the institution of the suit that she came into full possession of the facts and was therefore justified in confining her claim for pre-emption to two of the items only, and asking for a declaration as regards the remainder. It is contended before us that such a course is not permissible. No authority is cited in support of this contention. We are unable to accede to this argument. If such a contention were to prevail the result would be that a pre-emptor who subsequently becomes aware of the fact that her own property has been fraudulently included in the sale-deed cannot claim it as her own before instituting a suit and must offer to pay its price unnecessarily. We do not think that there is anything to prevent the plaintiff from not including in the plaint the properties which really belonged to her. Even if she had made demands in respect of a larger number of properties and later on came to know that she had no right to pre-empt some

of them she could undoubtedly exclude them from her suit.

The result therefore is that this appeal is dismissed under O. 41, R. 11, Civil P. C.

R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 159

MUKERJI, J.

Brij Narain Man Tewari—Defendant—Appellant.

v.

Mt. Motirani and *others*—Plaintiffs—Respondents.

Second Appeal No. 234 of 1927, Decided on 14th December 1928, from a decree of Addl. Sub-Judge, Gorakhpur, D/- 19th May 1926.

Agra Tenancy Act (3 of 1926), S. 79—Tenant ejected—During ejectment proceedings property attached and purchased in execution of money decree against tenant—Purchaser cannot in a subsequent suit by landlord raise the plea that the tenant being grove-holder could not be ejected for arrears of rent.

The landlord obtained a decree for arrears of rent against an occupancy tenant in respect of a holding which comprised the plot in suit. The arrears of rent not having been paid, an application was made for ejectment of the tenant from his holding. Opportunities were granted from time to time to pay up, but ultimately on 21st October 1918 the tenant was formally ejected from his holding. The plot in suit had been attached in execution of a simple money decree obtained by a stranger against tenant, who on 24th July 1918 purchased it himself. He obtained possession through the execution Court on 4th May 1919, i. e., long after the landlord had been put in possession of the land. In a suit by the landlord for a declaration of title and recovery of damages against stranger.

Held: that the question that the tenant was a grove-holder and he could not be ejected in execution of the decree for arrears of rent, could not be raised in these proceedings. The ejectment proceedings being binding on the tenant, the title, if any that could accrue to the purchaser could accrue only subject to the result of the ejectment proceedings.

[P 160 C 1]

N. Upadhiya—for Appellant.

K. Verma—for Respondents.

Judgment.—The defendant is the appellant before this Court. The history of the case briefly is this:

One Jaisri was an occupancy tenant of the plaintiff-respondents. The latter obtained a decree for arrears of rent against Jaisri in respect of a holding which comprised the plot 1710. The arrears of rent not having been paid, an application was made for ejectment of Jaisri from his holding. Opportunities were granted from time to time to Jaisri to pay up, but ultimately he failed to pay and on 21st October 1918 Jaisri was formally ejected from his holding. On plot 1710 there stood 9 trees. This plot had been attached in execution of a simple money-decree obtained by the defendant against Jaisri. The defendant brought this plot to sale on 24th July 1918 and purchased it himself. He obtained possession through the execution Court on 4th May 1919, i. e., much after the plaintiffs had been put in possession of the land.

The plaintiffs came to Court on the allegation that the defendant had unlawfully appropriated the fruits of the trees standing on plot 1710 and they accordingly sued for a declaration of title and recovery of damages, namely the value of the fruits.

The suit has been decreed by both the Courts; hence the defendant's appeal. The defendant contends in this Court that Jaisri was a grove-holder of plot 1710 and not a mere occupancy tenant and that Jaisri's title could pass in execution of the decree held by the defendant.

There are two answers to this contention. The first of these is that this is entirely a new case set up by the defendant for the first time in this Court. The grove-holder's rights are clearly understood. In the plaint, para 2, the plaintiffs very clearly stated that the seven plots which comprised the holding of Jaisri were held as one holding for a consolidated rent of Rs. 20. The defendant did not meet this statement fairly. He contended himself with saying that he admitted only so much of the statement in para. 2 of the plaint as described plot 1710 as the property of Jaisri Singh and that so many trees stood on the land. The plaintiffs had stated that Jaisri was an occupancy tenant of the land. As to that the defendant said nothing. In the additional statement in the written statement the defendant said that plot 1710 was covered with trees and was not fit for cultivation. In the next paragraph, namely in para. 10 he said that the trees of the grove were liable to be sold. A grove-holder is entitled not only to the trees but to hold the land on which the trees stand and to maintain the trees so

long as they exist. The fact that in para. 10 of the written statement the defendant mentioned the trees alone as saleable and did not state that the grove as such was liable to be sold shows that this defence of Jaisri having been a grove-holder, was not present in his mind.

In the Court of first instance no issue was raised as to whether Jaisri was a grove-holder or a mere occupancy tenant. In deciding issue 1, the learned Munsif no doubt stated that he was not satisfied that the trees were not transferable, but his remarks were only by the way. There having been no issue, there was no clear finding. In his grounds of appeal to the lower appellate Court, in ground 4 the appellant did state that proceedings under S. 59, (ejectment proceedings under the Tenancy Act) were not applicable to a grove, but from the judgment of the lower appellate Court it appears that no question of grove was discussed before it. It seems to me that it is now too late in the day to raise the question, namely whether Jaisri was an occupancy tenant of the grove or was a grove-holder.

The second reply to the appollant's contention is this. The defendant is a purchaser pendente lite. As the learned Judges of the Courts below have pointed out, the ejectment proceedinge were pending before a Court of competent jurisdiction and during the pendency of those proceedings, the defendant made his purchase. The question that Jaisri was a grove-holder and he could not be ejected in execution of the decree for arrears of rent, was a question which could be raised in those proceedings, on behalf of Jaisri and also on behalf of the defendant himself, after he had made the purchase. But no such question was ever raised. The ejectment proceedings being binding on Jaisri, the title if any that could accrue to the defendant could accrue only subject to the result of the ejectment proceedings. In this view the appellant has no case. The principle of S. 52, T. P. Act ,would apply if that section did not in terms apply.

The appeal fails and is hereby dismissed with costs.

R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 160

BOYS AND BANERJI, JJ.

Parshadi and *others*— Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 752 of 1928, Decided on 30th November 1928, from an order of Sess. Judge, Shahjahanpur, D/- 13th August 1928.

(a) Penal Code, S. 302—Person using lathi with fatal result in expected fight—Knowledge that the result would follow may be presumed.

When men who expected a lathi fight use their lathis with the result that a man is killed, it must be taken, in the absence of special circumstances, that they knew that they were doing an act so eminently dangerous that it must in all probability cause such bodily injury as is likely to cause death. [P 161 C 1]

(b) Criminal trial — Particular guilty person not ascertained — Capital sentence may be given.

It should not be a practice to assume that where the particular person cannot be found to be guilty of the fatal blow the capital sentence should not be inflicted. [P 161 C 2]

K. O. Carleton—for Appellants.

M. Waliullah—for the Crown.

Judgment.—The facts of this case are set out in the judgment of Mr. Ardagh, the Sessions Judge of Shahjahanpur, very clearly and there is only one comment in regard to the views expressed by him that we shall have to make.

The facts are very clear, and if there is any point apparently established by the evidence for the prosecution which does not in fact represent the truth the accused have only themselves to blame for it. They have set up foolish defences of alibi, in one case supported by evidence that is most probably fabricated. We have therefore no assistance from them to enable us to determine exactly what happened. It is clearly established by the evidence for the prosecution that certain residents of village Gour went to fish in a tank within the limits of village Sherapur. While they were fishing they were deliberately attacked by certain of the villagers of Sherapur. who pretended to think that they had a grievance against the Gaur villagers for fishing in the tank and who were determined to take away from the Gaur villagers the fish which they had caught.

In the course of the assault committed on the Gaur villagers Jamal and Chandan who stood their ground, were injured, Chandan fatally. All the six appellants have been sentenced to transportation for life under S. 302 read with S. 149.

We have already described the grievance of the Sherapur villagers as an alleged grievance and we have so described it because all the evidence indicates that the Gaur villagers had at least a joint right, if not the sole right, to fish in the Sherapur tank. In any event there could be no possible question in these circumstances of a right of the Sherapur villagers to defend their property for it was clearly a case in which they had plenty of time to have recourse to the public authority, the police station was only three miles away. The people who had taken the fish were very well-known to the Sherapur villagers and the case was wholly different from one where a person finds an unknown thief stealing his property in the middle of the night. It has only been possible to criticize the case for the prosecution in respect of two points. It is suggested that there was a delay in making a report. That delay might possibly be accounted for in many ways. No attempt was made on behalf of the defence to elicit the reasons for the delay by cross-examination—no questions were asked on the point.

Next it is suggested that this was not a case under S. 302. We think it is clearly established by the evidence that when the party set out from Sherapur each one of them set out with the intention of depriving by violence the Gaur villagers of the fish that they had caught. They must obviously have expected resistance, and that must have meant a lathi fight. When men use their lathis with the result that a man's skull is fractured, it must be taken in the absence of special circumstances, that they know that they were doing an act so eminently dangerous that it must in all probability cause such bodily injury as is likely to cause death. It is clear to us then that the offence of murder was committed, and under S. 149 all of them were equally guilty. It is manifest that the exact amount of guilt attaching to the accused in different cases and in different circumstances may vary, but we have no discretion to inflict less than the sentence of transportation for life if we are satisfied that it was a case in law of murder. This is one of the cases which we can only leave to the Local Government to consider.

Lastly, we have noted above that there was only one point in which we considered that exception might be taken to the judgment of the learned Sessions Judge and that is a point which it was not likely would be taken by the counsel for the defence, for it was not in the interests of his clients to take it. The learned Judge has said :

"It is not, I believe, the common practice to sentence to death those who are implicated in a riot in which death is caused and in which the definite assailants are not ascertained."

We do not think that the learned Judge is right in stating the proposition so broadly and possibly he did not mean to. It is clear that there may be cases in which the guilt of any particular assailant of actually striking the fatal blow cannot be established but in which all the persons concerned would be indubitably guilty of murder and equally deserve a capital sentence. Such a case may clearly be where six men go out with the deliberate intention of killing a person and in pursuance of the common object one or other kills him. It may not be possible to establish which struck the fatal blow, but it is manifest that all would be equally guilty and all should receive a capital sentence. That again is a proposition stated broadly and in particular cases might require qualification ; but it is sufficient to say that there should not be, if in fact it does exist a practice, to assume that where the particular person cannot be found to be guilty of the fatal blow the capital sentence should not be inflicted. The appeals are dismissed.

M.N./R.K. *Appeals dismissed.*

** A. I. R. 1929 Allahabad 161

SULAIMAN AND KENDALL, JJ.

Bank of Upper India Ltd. (in liquidation)—Plaintiff—Appellant.

v.

Fanny Skinner and *others* — Defendants—Respondents.

First Appeal No. 278 of 1926, Decided on 3rd December 1928, from decree of Sub-Judge, Meerut.

**** Registration Act, S. 17—Sale of mortgagee's interest must be registered—Transfer**

of Property Act, S. 54—General Clauses Act (10 of 1897), S. 3 (25).

A sale of a mortgagee's interest can only be effected by means of a registered deed of transfer: 10 *A. L. J.* 167; 29 *Cal.* 1; 37 *Mad.* 51, *Foll.* 13 *All.* 89; 15 *All.* 134 and *A. I. R.* 1924 *All.* 796, *Expl.* and *not Foll.* [P 164 C 1]

B. E. O'Conor and *Ram Nama Prasad* —for Appellant.

K. N. Katju and *S. N. Gupta* — for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for sale on the basis of a mortgage-deed dated 8th December 1911, executed by defendant 1 in favour of the Bank of Upper India. In the original written statement which was filed by the principal contesting defendant on 17th July 1924, she raised various pleas including a denial of proper execution, receipt of consideration as well as some other pleas. But there was no plea that the plaintiff Bank had no locus standi to sue through its liquidator. On 10th November 1925, she filed an application stating that she had just come to know that the Bank of Upper India had sold all its assets and liens to the Trust of India and that accordingly the plaintiff had no right left to sue the defendant. In spite of objections the Court considered that this was a legal plea and framed an additional issue 8. All the other issues have been found in favour of the plaintiff, but the suit has failed on the ground that the assets of the Upper India Bank had been transferred to the Trust of India Limited and the plaintiff Bank cannot maintain the suit. The finding on the last mentioned issue is the only point which has been discussed before us by the learned counsel for the parties.

The principal facts of this case cannot be disputed. The Bank of Upper India suspended payment sometime about October 1914. In 1915 an application was presented under S. 153, Companies Act, putting forward a compromise before the High Court for approval. On 2nd June 1915, Tudball, J., sanctioned a scheme under which the shareholders were to surrender their shares and receive in exchange debentures in the Trust of India Limited on certain conditions. Later on 28th February 1917, that scheme was slightly modified and the learned Judge accepted the modification. The true banking business of the Bank of Upper India was to be absorbed and taken over by the Alliance Bank of Simla and that portion of the Bank's business which was not true banking was to be taken over by a company called the Trust of India Limited. In lieu of their shares the shareholders were to be offered debentures in the Alliance Bank and preference shares in the Trust of India Limited on certain terms. It is not necessary to specify the scheme in any detail.

On 30th June 1917, the shareholders of the Upper India Bank at their meeting resolved that the company should be wound up voluntarily, and Messrs. Hunter and Stuart be appointed liquidators for its winding up with joint and several powers. It was further resolved that a draft agreement with the Trust of India Limited, should be approved, and the liquidators be authorized pursuant to S. 213, Companies Act of 1913, to enter into the said agreement with the Trust of India Limited, in terms of the said draft, and to carry the same into effect with such if any modifications as they may think expedient. Subsequently the Alliance Bank of Simla and the Trust of India Limited also went into liquidation. Presumably with a view to evade the payment of stamp duty to Government, the liquidators of the Upper India Bank and those of the Alliance Bank and the Trust arrived at some mutual and private understanding that the debentures and the preference shares should be offered to the shareholders of the Upper India Bank and that the assets of the latter Bank be taken over by the liquidators of the Alliance Bank and the Trust. As to documents which were outstanding the understanding was that the liquidators of the Upper India Bank should realize the same and pay over the amount realized to the other liquidators. The oral evidence in this case leaves no doubt that this mutual arrangement has been carried out to a very great extent, and that as between these two sets of liquidators there has been absolutely no breach of contract so far. But it is also an admitted fact that the liquidators of the Upper India Bank have not executed any proper registered document transferring their interests in the immovable properties in favour of the other liquidators. At any rate it is admitted in this case that no registered document transferring the rights under the mortgage in suit has been executed by the

liquidators of the plaintiff Bank. The learned Subordinate Judge relying principally on a judgment of the High Court in a previous proceeding has come to the conclusion that the assets of the Bank have all been legally transferred to the Trust of India. In that case the question arising in the present appeal did not directly arise. The learned Subordinate Judge has quoted expressions used by Walsh, J., as to the taking over of the assets of the Bank of Upper India, the transactions having been carried through, the shareholders of the Bank of Upper India having surrendered their shares in exchange for debentures and preference shares and the due execution and performance of the agreement for sale. There is a further remark in his judgment to the effect that

"the exchanges have been made, the matters have passed into history and the legal rights of the parties have been settled without the necessity of a formal document".

Ryves, J., however, confined his judgment exclusively to the question of estoppel and remarked :

"It may be that the parties inter se are estopped from disputing the transfer although in law no valid transfer has taken place so far as immovable properties or securities on such immovable properties of over Rs. 100 in value are concerned".

The defendant not being a party to that proceeding, it is not suggested that that judgment operates as res judicata. As the question at that time was principally one of estoppel, we do not think that it was at all decided in that case that a valid transfer of all the immovable properties had been legally effected.

If no registered document is required for the transfer of the mortgagee's interest under a simple mortgage deed, and an oral assignment is effective, then there would be no doubt that the plaintiff Bank has parted with its interest in this mortgage by virtue of the arrangement with the liquidators of the other company. On the other hand, if no valid transfer can take effect without a registered document, it is clear that although the parties to the arrangement may themselves be estopped from going behind it that arrangement cannot be used as transferring legal title to the Trust when a stranger, who is not a party to that agreement, wishes to take advantage of it.

Section 17, sub-Cl. (b), Registration Act makes

"all non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish whether present or in future, any right, title or interest, whether vested or contingent of the value of Rs. 100 and upwards, to or in immovable property"

compulsorily registrable. It is obvious that if a sale deed of the mortgagee's interest had been executed it would have required registration inasmuch as it would have affected an interest in immovable property. But strictly speaking S. 17 requires registration only when a transaction has been reduced to writing. It does not in terms lay down that no transfer can take effect in the absence of such document. We have to fall back upon the provisions of the Transfer of Property Act to see whether to effect a valid transfer a registered instrument is necessary. S. 58, Cl. (a) makes it quite clear that a mortgage is a transfer of an interest in immovable property. Then S. 54 provides that a transfer of tangible immovable property of the value of Rs. 100 and over or other intangible thing can be made only by a registered instrument. The question remains whether the mortgagee's interest is itself immovable property within the meaning of S. 3. That section, however, does not give a complete definition of immovable property. For that we have to refer to its definition in the General Clauses Act (Act 10 of 1897), S. 3, Cl. (25), where it is laid down that immovable property shall include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. Even that definition on its own language is not exhaustive. A subtle distinction has sometimes been drawn between an interest in the immovable property and the immovable property itself. And on the basis of such a distinction the learned advocate for the respondent has urged that although a mortgagee's interest is an interest in immovable property it is not immovable property itself, and therefore a transfer of it does not require a registered deed. We are unable to accede to this contention.

In the first place a mortgagee's interest may come in within the meaning of the expression 'benefits to arise out of land' in the General Clauses Act. In the second place, the Indian legislature appears to have intended that all rights to immovable property should fall within the category of immovable property. Mort-

gages of immovable property have priority over all subsequent transfers and subsequent transferees are presumed to have notice of the previous charge. Such presumption cannot be made unless there is a registered document. It seems to be against the general policy of the Transfer of Property Act that subsequent transferees should be bound by a mortgage although that mortgage need not be made by a registered instrument. The mortgagee's interest is not a mere right to recover the debt due but to have a charge on the property and to follow it wherever it goes. His claim is excluded from the definition of actionable claim in S. 3, T. P. Act. We have therefore no hesitation in coming to the conclusion that a sale of a mortgagee's interest can only be effected by means of a registered deed of transfer.

Chamier, J., in the case of *Mutsaddi Lal* v. *Muhammad Hanif* (1) expressed the opinion that the interest of a simple mortgagee was an intangible thing within the meaning of S. 54 and the transfer of it can be made only by a registered instrument. The Calcutta view also is that the mortgagee's interest is immovable property even within the meaning of the provisions of the Civil Procedure Code: *Paresh Nath Singha* v. *Nabo Gopal Chattopadhya* (2). The same view has been expressed in Madras: *Nataraja Iyer* v. *South Indian Bank of Tinnevelly* (3).

No doubt in numerous cases of this Court for instance: *Abdul Majid* v. *Muhammad Faizulla* (4), *Karim-un-nissa* v. *Phul Chand* (5) and *Umrao Singh* v. *Lal Singh* (6), it has been held that a simple mortgagee's interest is not immovable property within the meaning of that word as used in the Civil Procedure Code. As the latter Code does not define immovable property, the learned advocate for the respondent has urged that these cases must have proceeded on the definition of that word in the General Clauses Act, which definition applies to the case before us. But there are various provisions in the Civil Procedure Code which make it impracticable to hold that the interest of the mortgagee can be attached and sold as immovable property according to the procedure laid down for its sale. Those considerations influenced the learned Judges of this Court considerably. We do not therefore think that those cases are any guide to us in the present case. The view expressed by us as above maintains a consistency between the policies of the Registration Act and the Transfer of Property Act, and we think is the correct view.

No matter what the equities may be between the Bank of Upper India and the Trust of India Limited, inter se, we must hold that no valid and legal transfer of the mortgagee's interest had taken place so as to deprive the present plaintiff of all rights to maintain the suit. We accordingly allow this appeal and setting aside the decree of the Court below, decree the plaintiff's claim with costs in both Courts. The usual six months are allowed for payment.

M.N./R.K. *Appeal allowed.*

(1) [1912] 10 A. L. J. 167=15 I. C. 853.
(2) [1902] 29 Cal. 1=5 C. W. N. 821 (F.B.).
(3) [1911] 37 Mad. 51=22 M. L. J. 105=13 I. C. 91=(1911) 2 M. W. N. 590.
(4) [1890] 13 All. 89=(1890) A. W. N. 186.
(5) [1893] 15 All. 134=(1893) A. W. N. 51.
(6) A. I. R. 1924 All. 796=46 All. 917.

A. I. R. 1929 Allahabad 164

DALAL, J.

Sheo Prasad—Plaintiff—Appellant.

v.

Dodi and *another*—Defendants — Respondents.

Second Appeal No. 1746 of 1926, Decided on 3rd January 1929, from decree of Dist. Judge, Bareilly, D/- 18th June 1926.

Agra Tenancy Act (2 of 1901), S. 199—Option exercised cannot be revoked.

Once a Court has selected between the options given to it in S. 199, the jurisdiction is exhausted and it cannot change its mind subsequently and proceed to adopt the other course which was open to it at the beginning.

[P 165 C 1]

M. L. Agarwala—for Appellant.

Hazari Lal Kapoor—for Respondents.

Judgment. — The two subordinate Courts have sought to legislate in the present litigation instead of following the clear dictates of law. They are of opinion that the provisions of S. 199 (2) are hard and unjust and have therefore assumed the illegal attitude contrary to law of refusing to administer Statute Law. In the present case the plaintiff, a zamindar, sued the defendants for ejectment as a non-occupancy tenant and the defence was that the defendants a major and a minor under the guardianship of that

major, had a proprietary right in the land, The Assistant Collector by order in writing required the defendants to institute within three months a suit in the civil Court for the determination of the question of title. This order was made on 18th October 1924. No suit, however, was brought, and the consequence of such neglect would be as enacted in Cl. (2) of the section. The words are :

" when an order has been passed under Cl. (a), sub-S. 1, if the defendant fails to comply with it, the Court shall decide such question of title against him."

The Assistant Collector had no option but to decide that the defendants had no proprietary right in the land in suit. Instead of doing so the successor of the Assistant Collector, who had passed the order under Cl. (a), proceeded to try the question of proprietary title himself and arrived at a finding that the defendants had such title. Once a Court has selected between the options given to it in S. 199, its jurisdiction is exhausted and it could not change its mind subsequently and proceed to adopt the other course which was open to it at the beginning. The subordinate Courts were bound to hold and I now hold that the defendants have no proprietary right in the land in suit,

It was argued on behalf of the defendants that the order of 18th October 1924 did not bind and was not directed against the minor Badri. This argument is not correct. At that time Badri was represented by his guardian Dodi and there was no defect in the representation. The order of 18th October 1924 was binding on both the defendants.

It is argued on behalf of the plaintiff here that the subordinate Courts have held that the defendants are non-occupancy tenants and not occupancy tenants. In my opinion that question has not been properly tried and decided. I set aside the decrees of the two subordinate Courts and holding that the defendants have no proprietary rights in the land in suit, remit the suit to the Court of the Assistant Collector for a trial on the merits after accepting the decision recorded by this Court. Costs here and hitherto shall abide the result.

M.N./R.K. *Suit remitted.*

A. I. R. 1929 Allahabad 165

BOYS, J.

Kashi Pershad—Plaintiff—Appellant.

v.

Ambika Prasad and *others*—Defendants—Respondents.

Second Appeal No. 370 of 1927, Decided on 2nd January 1929, from decree of Sub-Judge, Allahabad, D/- 24th November 1926.

United Provinces Land Revenue Act, S. 42 —Decision in proceedings amounting to decision in suit under S. 95, Agra Tenancy Act (2 of 1901) is final.

The decision in any enquiry in the revenue Court conducted in accordance with the provisions of S. 42, which in fact amounted to a suit under S. 95, Tenancy Act of 1901, is final, and the civil Court has no jurisdiction. [P 166 C 2]

M. L. Agarwala and *Haribans Sahai* —for Appellant.

Narain Prasad Asthana, Uma Shanker Sinha and *Baijnath Sahai*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for a declaration of title to certain plots of land of which he claimed to be his occupancy tenant joint with his brother, and for possession. The defendants rested their answer on a plea that there had been a revenue Court decision in an enquiry held in accordance with the terms of S. 42, Land Revenue Act, and that the decision in that case operated as res judicata, and that the civil Court had no jurisdiction to reopen the matter. The trial Court held that by virtue of the provision in S. 40, Cl. (3), Land Revenue Act the plaintiff had a right to bring a suit in the civil Court, but found against him that he had not succeeded in proving any interest in the property in suit. The lower appellate Court held in the defendant's favour that the enquiry in the revenue Court had been conducted in accordance with the provisions of S. 42, Land Revenue Act, and that it had in fact amounted to suit under S. 95, Tenancy Act of 1901, and that the decision in that was final, and that the civil Court had no jurisdiction. The facts are not complicated. The name of one Mahesh was entered as the occupancy tenant. During his lifetime the present defendants 1 to 3, who are sons of the sister of Mahesh, claimed to be in joint occupancy with Mahesh and entitled to have their names

entered along with Mahesh. Before this proceeding could be concluded Mahesh died and the proceeding was thereupon avowedly converted into a proceeding under S. 42, Land Revenue Act, and the zamindar was made a .party. Mahesh Prasad had a brother Madho who had two sons, Kashi, the present plaintiff, and Bindeshri, the present defendant 4. Bindeshri resisted the claim of the present defendants 1 to 3 to be entitled to inherit the occupancy tenancy of Mahesh on the ground that it was really the occupancy tenancy of Madho Prasad, the father of Kashi and Bindeshri. It does not appear that Kashi was specifically an objector in those proceedings, but it has been found that he was in fact assisting Bindeshri in the course of those proceedings and was responsible for the drafting of some of the documents filed, and further it is to be noted that Bindeshri's objection was not one based on his own right alone, but was based on the plea that the occupancy holding belonged to Madho Prasad, the father both of himself and of Kashi. It has therefore not been seriously contended before me that those proceedings were not between the same parties as the present proceedings.

In this proceeding under S. 42, Land Revenue Act, the revenue Court must have had to enquire and did enquire which of the contesting parties, the sons of Madho Prasad or the nephews of Mahesh were entitled to the interest in the occupancy holding, and for the purposes of determining the devolution of that interest it had in this case to determine not only which of the contestants if either were sharing in the cultivation at the time of Mahesh's death. but also which of them came within the classes of connexions of the deceased specified in S. 22. It did determine that the occupancy holding could not as an occupancy holding devolve on the sons of Madho, the present plaintiff Kashi and the present defendant 4, Bindeshri, because they were not sharing in the cultivation, though they were among the connexions of the deceased mentioned in S. 22, and it decided that the present defendants 1 to 3, the sister's sons of Mahesh, could not be entitled to the occupancy holding as such because though they had been sharing in the joint cultivation they did not come within the classes of connexions of the deceased specified in S. 22. It, therefore, decided that neither of the contestants was entitled to succeed to the interest in the occupancy holding as such. Finding, however, that the sister's sons of Mahesh, the present defendants 1 to 3, were in possession, it recorded them as non-occupancy tenants.

The trial Court held that this finding did not bar the right of Kashi to sue in the civil Court, and it arrived at that finding on a consideration of S. 40, sub-S. (3), and 44, Land Revenue Act. The trial Court as the lower appellate Court says, brushed aside S 42, Land Revenue Act. The lower appellate Court held that the proceeding conducted by the revenue Court was, as the revenue Court itself described it to be, a proceeding under S. 42, Land Revenue Act, and in view of the fact that the zamindar as well as the claimants to the tenancy were parties to the proceeding it held that it had been converted into a suit under S. 95, Tenancy Act, and that the civil Court had no jurisdiction. I am in agreement with the view of the lower appellate Court. I would, however, add one observation. The lower appellate Court was troubled by its view that there was some conflict between S. 42, Land Revenue Act and S. 44 which imports a reference to S. 40, Cl. (3). I do not appreciate myself the suggested difficulty. It appears to me that S. 40 avowedly refers to matters which are decided and have to be decided solely on the basis of possession. The matter before the revenue Court could not be decided solely on the basis of possession. It is, of course, obvious that the final decision at which it arrived to enter the name of the present defendants 1 to 3 as non-occupancy tenants was a decision to which it was led by its finding that defendants 1 to 3 were in actual possession. But the matter which it had to decide and which it did decide first was concerned not merely with the question of who was in possession, but with the question on whom did the interest in the occupancy holding devolve by right of succession as that right of title to succession is declared by S. 22, Tenancy Act, I see, therefore, no reason to interfere with the decree of the lower appellate Court, and the appeal is dismissed with costs.

M.N./R.K. *Appeal dismissed.*

* A. I. R. 1929 Allahabad 167

BOYS AND KING, JJ.

Ram Raj Singh and *others*—Plaintiffs —Appellants.

v.

Lachmi Singh and *others*—Defendants —Respondents.

Second Appeal No. 168 of 1926, Decided on 10th December 1928, from decree of Dist. Judge, Ghazipur, D/- 9th September 1925.

*** Cosharer—Mutual relation—Cosharer zemindar, who mortgages his share to another cosharer, continues to be cosharer and can obtain peaceful possession of holding unless shown to have lost this particular right by virtue of mortgage.**

A cosharer zamindar, who mortgages his share in the zamindari, does not lose the sum total of his zamindari rights by virtue of the mortgage. He still continues to be a cosharer, and possesses all the rights except those which definitely pass by virtue of the mortgage. Such a mortgagor cosharer, therefore, has the right to obtain and keep peaceful possession of a holding which has fallen vacant, and the mortgagee who seeks to oust him from such a holding, must show that the mortgagor had lost this right also on account of the mortgage. [P 167 C 2]

P. L. Banerji for *Ambica Prasad Dube*—for Appellants.

Uma Shankar Bajpai for *G. S Pathak*—for Respondents.

Judgment.—This is a plaintiff's appeal in a suit for possession of a holding of an occupancy tenant, one Raghunandan, who had died. In this case it was at first in dispute as to whether the plaintiffs or the defendants had taken possession of the holding, but this issue has been found as a fact in favour of the defendants. The history of the circumstances in which the parties find themselves is very simple. Plaintiffs and defendants are both cosharers in the mahal. Prior to Raghunandan's death the defendants had mortgaged their zamindari share to the plaintiffs and they had also—it is not clear whether before or after their mortgage to the plaintiffs—obtained a mortgage of his occupancy rights from Raghunandan. With the legality of this latter transaction we are not concerned but only with the fact that it has been found that prior to Raghunandan's death the defendants were in possession of the holding as mortgagees from Raghunandan. On Raghunandan's death they remained in possession of the holding. The plaintiffs got a decree for their title to the holding from the trial Court; they have also got a decree for possession. The trial Court was of opinion that the defendants, after the death of Raghunandan, were mere trespassers. The lower appellate Court was of opinion that they were cosharers in peaceful possession and therefore entitled in the ordinary way to remain in possession, presumably as their khudkasht. The sole question, therefore, for decision in this appeal is, in what capacity were the defendants in possession subsequent to the death of Raghunandan. We have heard learned counsels on both sides and they have both asserted their respective propositions which they wish us to accept but neither of them has been able to refer us to any authority in support of his particular proposition. The contention of the appellants that the defendants are mere trespassers rest upon the suggestion that the cosharer defendants when they mortgaged their zamindari rights with possession ceased to be anything but the merest shadows of cosharers. They no longer really were cosharers at all. All their rights, of every sort and description, had passed to the plaintiffs. This is a proposition that we are not prepared to accept, and even at the outset when we put the question to the counsel for the appellants

"Were the defendants after their mortgage still entitled to be regarded as cosharers or not?"

he had to admit that they must be regarded still as cosharers. It is manifest that the sum total of their rights as cosharers cannot be said to have belonged to the plaintiffs merely by virtue of the mortgage.

It has to be admitted on behalf of the appellants that all the rights of a cosharer remained in the defendants except those which definitely passed to the plaintiffs by virtue of their mortgage. For instance, they would still have remaining in them their pre-emption rights and would be necessary parties in a suit for partition.

We are unable to see on what principle it can be held that they must have lost any right to take peaceful possession such as they obtained in this case. In fact, the correctness of the propositions had to be, and was, admitted at the outset, firstly that the defendants were still cosharers, and secondly, that a cosharer is

entitled to obtain and keep peaceful possession ; but then this second proposition had to be further qualified, by limiting it to :

"a cosharer who has not mortgaged all his zamindari rights"

It is suggested that in this case the plaintiffs were entitled to take possession and to oust the defendants by virtue of the fact that they were in possession of the whole zamindari rights at the time Raghunandan died. How inequitably the proposition for which the defendants contend might work may be illustrated by what is an extreme example but is still a fair example indicative of the effects of the principle which the defendants assert. Let us suppose that the plaintiffs and defendants have each an eight annas share and on 1st January the defendants mortgage their eight annas to the plaintiffs for one year. Let us next suppose that during the 12 months 100 occupancy holdings fall vacant, in other words, escheat to the zemindars. The defendant has to claim that the mortgagee for the time being in possession of the full 16 annas zemindari rights can take peaceful possession of all and the whole of those 100 holdings and the mortgagor has no right to touch one of them. At the end of the year on 31st December the mortgagor redeems the mortgage but according to the defendant the one-time mortgagee can hold on to the whole of those 100 holdings, for he can say :

"I acquired these by virtue of being a cosharer, not necessarily in whole or in part by virtue of being a mortgagee of your share. You the one-time mortgagor cannot say which of these holdings I took peaceful possession of by virtue of being a cosharer myself and which yon say I took possession of as being a mortgagee of your share."

He would thus be able to hold on to the whole of the 100 holdings of which he had so acquired possession. This is merely an instance of the inequitable result of the principle for which the defendants contend. We prefer the broad principle that it having to be admitted and being admitted that the plaintiff as a cosharer had not lost all the rights of a cosharer it is for the defendant-appellants to show us that he had lost this particular right. We see no reason to interfere with the decree of the lower appellate Court and dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 168

BOYS, J.

Bhajan Singh—Plaintiff—Appellant.

v.

Nokhe—Defendant—Respondent.

Second Appeal No. 345 of 1927, Decided on 13th December 1928, from a decree of Dist. Judge, Bareilly, D/- 25th August 1926.

*** U. P. Land Revenue Act, S. 233 (k)—By compromise made after preliminary decree, *S* becoming entitled to whole suit land—Compromise not incorporated in final decree—*S* trying to get decree amended—Partition proceedings beginning—*S* applying for postponement until decree was amended—Partition officer passing partition decree — *S* then getting decree in his favour amended—S. 233 (k) should not be applied.**

The rule embodied in S. 233 (k) should not be blindly applied, and where a new fact crops up, which shifts the title, the bar in S. 233 (k) is not effective. [P 169 C 1]

After preliminary decree a mortgage suit was compromised, but the compromise was not incorporated in the final decree. Before *S* who became entitled to the whole land by compromise, could get the decree amended, partition proceedings began, and a partition decree was passed although *S* had applied to the partition officer to postpone proceedings until he got decree amended. Subsequently the decree was amended.

Held : that the rule in S. 233 (k) should not be made operative in this case : *A. I. R.* 1925 *All.* 590, *Dist.* [P 170 C 1]

S. D. Sinha—for Appellant.

S. C. Das and *Dwarka Prasad* — for Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit for possession of three quarters of a share in a zamindari. The plaintiff mortgaged the whole of the share to the present defendant's predecessor-in-title. The defendant by purchase at an auction-sale in pursuance of the decree of another person became the owner of three quarters of the share. He subsequently brought a suit for the sale of the remaining quarter for a proportionate amount of the mortgage-debt.

In 1917 there was a preliminary decree for sale of the quarter which was followed by negotiations between the plaintiff and the defendant for a settlement. These negotiations resulted in an agreement, according to the terms of which the mortgagor was to pay to the mortgagee the whole amount of the mortgage money plus the price which the mortgagee had paid at his auction purchase of three quarters of the share, and in re-

turn the plaintiff-mortgagor was to get back the whole of the share as soon as he had paid the first instalment. For some unexplained reason but apparently by some body's inadvertence the compromise was not embodied in the final decree which was simply for the sale of a quarter. The present plaintiff, the mortgagor, took objections ; but before his objections were finally disposed of in his favour partition proceedings had been instituted in 1922.

During this period of these partition proceedings it must be noted that the present plaintiff was endeavouring to get the decree amended so as to embody his compromise. He would naturally, therefore, make some application to the partition officer in this respect. He could have applied to the partition officer, whether successfully or otherwise, to give effect to the compromise. He did not do so but applied to the partition officer to postpone proceedings pending the result of the efforts he was making in the civil Court. It would appear (but it may be that we have not all the facts) that this was a very reasonable application, but it was refused and a final partition decree was reached under which in the beginning of 1924 the three quarters share in dispute went to the present defendant, the quondam mortgagee.

On 2nd August 1924, that is about six months after the partition decree, the plaintiff was finally successful in getting the decree in the mortgage suit amended so as to embody the compromise and he now sues to get back the three quarters. Both Courts have thrown out the plaintiff's suit on the ground that S. 233 (k) debars them from interfering or altering in any way the results embodied in a partition decree.

The plaintiff appeals. The rule in S. 233 (k) obviously does not require support from judicial authority. It is manifest that there must be number of cases that can be quoted in which that section has been applied. But it is equally clear that the rule cannot be applied in the sense that a distribution made by a partition decree can never at any time be disturbed whatever may have happened since the partition decree or, however, much new facts may have come into existence. It appears to me, therefore, that one should not blindly apply S. 233 (k). If I were satisfied in this case that no new fact had come into being since the partition decree I should of course unhesitatingly hold that the suit was barred by S. 233 (k), but the facts of this case require careful examination. At the date when the partition proceedings were going on the plaintiff had at his back a certain compromise, and it is argued for the defendant that that compromise was the basis of his title and that he could have and should have put that compromise to the partition officer, that if he did not do so it was his own fault and he must stand the consequences. The case as it may be stated for the plaintiff-appellant is :

> "Had I put the compromise to the partition officer he would quite rightly have said 'I am not prepared to act on this compromise for it is the subject of legal proceedings now proceeding and it may well be that the civil Court will refuse to recognisze that compromise'. In other words, the plaintiff would undoubtedly have been told 'your alleged title is under a cloud at present' and the partition officer would have refused to assume that the final decree which did not embody the compromise was a wrong decree."

The very fact that there was in existence a final decree subsequent to the compromise which did not embody the compromise but decreed the relief as originally claimed would have justified any reasonable man in declining to pay any heed to the compromise in the situation in which it then was. The plaintiff could do no more than ask for a postponement to enable his title to be declared ; and this he did. Subsequently to the partition decree which had ignored the compromise, the civil Court declared that the plaintiff was entitled to an amended decree on the basis of the compromise. A new right of the plaintiff was thereby declared by the Court. His title became clear. I may illustrate my view as follows : If after this partition decree the defendant had sold the three quarters share which had been allotted to him back to the plaintiff and having received the consideration money had refused to carry out the transfer, and the plaintiff had been compelled to sue, could the defendant have said :

> "I had this three quarters share allotted to me in the partition, you cannot disturb a partition decree, the most you can do is to sue me for the return of the money ?"

Manifestly not, and manifestly because a new fact affecting the title of the

parties had come into being subsequent to the partition proceedings.

Here as it seems to me a new fact very materially affecting the title of the parties had come into being since the partition decree, namely, the declaration of a title in the plaintiff, while the facts existing prior to the partition decree would have suggested to any reasonable cautious person that in the existing state of facts the title was with the present defendant, the mortgagee. For the above reasons I think that S. 233 (k) is no bar to the suit.

I was invited to consider the decisions referred by the lower Courts, and I in return invited counsel for the respondent to put the strongest of his cases. He referred me to *Zorawar Singh* v. *Bhagwan Singh* (1). But admittedly in that case there was no suggestion of any new fact having come into existence subsequent to the partition decree. I would utter a word of caution in reference to the view I have expressed. It is manifestly not any new fact coming into existence that will remove the bar contained in S. 233 (k): I am concerned only with the present case; and where the new fact shifts the title, as in my view it does in this case, the alleged bar is not effective.

The result is that I allow this appeal and setting aside the decrees of the lower Courts, grant the plaintiff a decree in terms of his reliefs (a) and (c). He will have his costs throughout. None of the other reliefs is pressed.

S.N./R.K. *Decree set aside.*

(1) A. I. R. 1925 All. 590.

** A. I. R. 1929 Allahabad 170

MEARS, C. J., AND MUKERJI, J.

Bankey Behari Lal—Plaintiff—Appellant.

v.

Brij Behari Lal and *others*—Defendants—Respondents.

First Appeal No. 131 of 1925, Decided on 17th December 1928, from decree of Sub-Judge, Pilibhit, D/- 28th January 1925.

(a) Practice—Duty of Court—Findings of facts should be arrived at before law is applied.

The proper method of trying a case is by arriving at findings of fact first and applying the law to them afterwards. [P 172 C 1]

(b) Evidence Act, S. 34—Account books to be admissible must be regularly kept.

It is only the account books that are properly kept that are admissible in evidence as relevant. [P 172 C 2]

**** (c) Hindu Law—Partition—Declaration of intention by notice does not effect separation when parties agree to withdraw it.**

Even where an unequivocal wish to separate is once declared by a notice, a separation will not be effected in law, if it be found, as a fact, that the intention was given up as the result of a subsequent agreement of all the parties including the member demanding a separation, by which the notice was expressly or impliedly withdrawn: *A.I.R.* 1928 *All.* 422, *Expl.*; 32 *All.* 415 and *A.I.R.* 1925 *P.C.* 49, *Rel. on*; *A. I. R.* 1928 *All* 419, *Ref.* [P 173 C 1]

U. S. Bajpai and *K. N. Katju*—for Appellant.

Iqbal Ahmad and *Mukhtar Ahmad*—for Respondents.

Judgment.—This appeal arises out of a suit for partition of joint family property in which the appellant was the plaintiff. The relationship of the parties is shown by the following pedigree:

(For pedigree see p. 171)

The plaintiff's case was that, on the death of Bhagwan Das the family estate belonged by right of survivorship, to the rest of the family consisting of the parties to the suit and that in the case of partition the plaintiff's share was one-half. The plaintiff accordingly claimed separation by metes and bounds of his one-half share. The defence was that the plaintiff had separated himself from the rest of the family during the lifetime of Bhagwan Das and that he was allotted a quarter share only to which alone he was entitled.

The learned Subordinate Judge has held that the defendant's case was partially true that although no partition by metes and bounds took place, as alleged by the defendants, there was nevertheless enough evidence to show that the status of the family had been split up and that the plaintiff had come to be regarded as the owner of a quarter share. The learned Judge accordingly decreed the suit by directing a partition of a quarter share to the plaintiff. The main question for determination in this appeal is whether or not there was an actual disruption of the family by the separation of the plaintiff before the death of Bhagwan Das or whether at the date of the suit the family still continued to be joint in which event the plaintiff's share would be one-half.

In order to enable the Court to weigh the evidence at its proper worth it is necessary to examine closely the pleadings of the parties. The defendants, who pleaded separation and on whom therefore the burden of proof lay, disclose their case in the written statement of Ram Bilas. It appears that originally Ram Bilas was the sole defendant in the case. Later on, his son and grandsons were impleaded. These, however, contented themselves with filing a short written statement and with the adoption of Ram Bilas's written statement. Ram Bilas's case, in his long written statement, put briefly was this : About July 1920 the plaintiff insisted on partition and it was arranged that he should make collections in three villages, viz., Gularia, Nawa Bagla and Mirpur Hirpur (out of 22 villages owned by the family), that these three villages yielded Rs. 1,500 a year as the net profit, that as the total amount of yearly profits to which the plaintiff was entitled for his one quarter share was Rs. 2,000, it was arranged that at the close of the agricultural year which commenced in July 1920 (1328 F) an adjustment of account would take place and the deficiency in the plaintiff's profits would be made good by Bhagwan Das and Ram Bilas, that all moveable properties were actually divided, that the servants of the family were divided and they thereafter, managed for their respective masters and that as regards money lending and sugar business, it was agreed that after the payment of a possible debt, the balance would be divided. It appears that on 2nd February 1922, the plaintiff sent a registered notice to Bhagwan Das and Ram Bilas demanding partition. The defendants did not rely on it as a document creating, as a matter of law, a separation in the status of the family. The reason was that according to their case the partition had already taken place in July 1920. The defendants accordingly stated in para. 5 of the written statement (p. 9) that by means of this notice the plaintiff declared the separateness of his status and, the defendants added that it was agreed, as the result of the notice, that a deed of partition would be registered as soon as Bhagwan Das recovered from his illness. It was the defendants' case that on 2nd February 1922 Bhagwan Das was really ill, but we may state at once that there is no reliable evidence to prove this and the Court below has not found that such was the case.

In view of the pleadings stated above, the only question for decision was whether the plaintiff had separated in July 1920. No question arose as to whether if the family was joint, even at the date of the registered notice namely, 2nd February 1922, the delivery of the notice created a disruption in the family. The case, however, has been considered from both the aspects and the following issue was framed by the Court below :

" Whether the plaintiff separated from the joint family about July 1920. If the answer to the above be in the negative, is the plaintiff to be looked upon as separated in interest after his notice or registered letter of 2nd February 1922."

The learned Subordinate Judge recorded the following finding as to the first part of the issue :

" Therefore if I were asked on the strength of oral evidence . . . . . to hold that there was a regular partition by metes and bounds of all the joint family property in or about July 1920, I would unhesitatingly decline to do so . . . . . In fact, I may go the length of saying that even the entire circumstantial evidence, to which I shall presently refer, read in conjunction with oral evidence referred to above, fails to my mind to establish that any regular partition of all the family property by metes and bounds was really made." (p. 115 of the printed record).

The learned Judge then proceeded to remark that the above finding did not preclude the Court from finding that the

NIHAL CHAND

- Nand Lal
  - Bhagwan Das (died 1st May 1922)
- Tula Ram
  - Ram Bilas, Defendant (died pending the suit)
    - Brij Behari Lal, Defendant
      - Shyam Behari Lal, Defendant
      - Raj Behari Lal, Defendant
      - Taj Behari Lal, Defendant (died pending the suit)
  - Thakur Pd.
    - Bankey Behari, Plaintiff

plaintiff had, as a matter of fact, severed his rights or interest in the joint family property. The learned judge ultimately held, as already stated, that the plaintiff had severed his interest during the lifetime of La'a Bhagwan Das, but did not say when the disruption took place. As we have already stated, the learned Judge was not satisfied that a partition took place in July 1920.

Before examining the evidence the learned Judge adopted a method of trying the case of which we do not approve. Instead of arriving at findings of fact first and applying the law then, he proceeded to find out what the law was and then to find his facts. This procedure is calculated to mislead a Judge and to tempt him to arrive at findings which are likely to fit in with his view of the law. In our opinion this is what has actually happened, in this particular case. The learned Judge found as a matter of law that a definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation (p. 116 of the record). It is not the case that the learned Judge applied this rule of law to the notice dated 2nd February 1922 specifically, but he applied it to the entire case.

The first thing that we have to see is whether the learned Judge erred in his finding of fact, namely, that the plaintiff had separated his status from the joint family and had become a separated member. The learned Judge, as already stated, has discarded the oral evidence adduced on behalf of the defendants. He based his opinion on the account books said to belong to the family and the account book of a certain legal practitioner Lala Tribhuban Lal. He relied also on certain minor pieces of evidence which will all be noticed, in due course.

It appears that, as very often happens in the case of a suit for partition of large properties belonging to a joint family, the filing of the plaint was followed by an application to the Court to send down a man, styled 'a commissioner' to take possession of the account books and moveables in the possession of the defendant. The object of this procedure is to prevent the defendants from manipulating the accouut books and removing the moveable properties and the cash, if any. A similar application was made in this case and certain account books were brought into Court by a certain pleader who was appointed the commissioner. When the account books were received in Court the plaintiff was asked to state if those books were or not the books belonging to the joint family. He replied in the affirmative. The learned Judge pinned the plaintiff down to this statement and did not permit him to say later on, that some of the account books had been tampered with at the instance of the defendants. Before us the learned counsel for the plaintiff contented himself with pointing out that some of the account books were entirely unreliable, although they may have been kept and maintained by servants of the joint family. For reasons to be presently stated, we are satisfied that some of the account books cannot possibly be accurate. It is only the account books that are properly kept that are admissible in evidence as relevant: vide S. 34, Evidence Act. (Then the Judgment proceeded to consider the oral and documentary evidence of both parties and coming to the conclusion that at the date of the death of Bhagwan Das the parties were living jointly and there was no separation at all proceeded.) Now we come to a consideration of the effect of the registered notice which was given, evidently, in a fit of petulance, by the plaintiff to Bhagwan Das and Ram Bilas. This will be found printed at p. 147 of the record. As we have already said, it is not a part of the defendants' case, as put forward in the written statement of Ram Bilas that from the date of the delivery of this notice to the addressess of it, the families became separate, to all intents and purposes. The defendants' case on the other hand was that there already existed a separation which had taken place some 20 months previously, and the result of this notice, dated 2nd February 1922, was only a declaration of the factum of separation. Before we consider the legal effect of this notice, we may at once point out that the very fact that such a notice was given tends to destroy the defendants' case that there had already existed a separation between the parties. By this notice, Bankey Behari asked for a partition. The reference to 'settlement of account' has no reference to any previous partition alleged by the defendants in the written statement and for two reasons. The notice does not

imply any previous partition. Further, the Court below has found that there was no partition by metes and bounds and we have found that there was no partition at all.

There can be no doubt that a member of a joint Hindu family, if he chooses, may separate himself and to effect a separation in status it is not necessary that the other members should be a consenting party. But even where an unequivocal wish to separate is once declared any separation will not be effected, in law, if it be found, as a fact, that the intention was given up as the result of a subsequent agreement of the parties by which the notice was expressly or impliedly withdrawn. Before we proceed to consider the case-law, let us examine the facts of the case. The plaintiff's case is that after he had given this notice, he was called upon to explain his conduct towards an elder member of the family, like Bhagwan Das. One Lal Bahadur, undoubtedly a relation of the parties, and whose brother comes as a witness for the defendants, swears that he was present at the interview. The result of the interview was that the plaintiff was promised some money for his expenses and he admitted his error in asking for partition. There can be no doubt that the plaintiff himself and his witness, Lal Bahadur, have in occasional passages of the evidence made statements which cannot be accepted. But it is perfectly clear to us that the notice was not followed by anything serious in the nature of a disruption of the family. The defendants' case is that when the notice was received, the plaintiff was told, evidently by Ram Bilas, that Bhagwan Das was ill and the plaintiff must not hurry, and when Bhagwan Das got well, an account would be taken of what further profits were due to the plaintiffs and a deed of partition would be registered. We can take it, therefore, that it is common ground that no actual partition followed the giving of the notice (p. 147). Again, it is common ground that, as the result of the notice, a meeting among the member of the family took place, in which distant relations may or may not have been present, and nothing came out of the storm which the notice aroused. We may, therefore, safely take it, in view of the subsequent conduct and statements of the parties, enumerated above, and as the evidence adduced by the plaintiff shows that the plaintiff dropped his idea of separation, at the instance of the other members of the family and possibly of relations like Lal Bahadur. The plaintiff, having no son and only a daughter his separation meant the loss of a quarter share to the family. This very inducement was likely to have been put forward to make the plaintiff abandon his idea of separation. Our finding of fact, therefore, is that the plaintiff did conceive an idea of separation, but gave up that idea a day or two later as the result of a family meeting.

Now we come to the question of law, which is involved in the second part of the issue framed by the Court below and is reproduced here :

"Has the plaintiff to be looked upon as separate in interest after his notice or registered letter of 2nd February 1922 ?"

On behalf of the respondents reliance has been placed on a statement of law contained in the case of *Ram Kali* v. *Khamman Lal* (1) by two learned Judges of this Court, the judgment being delivered by Sen, J. The learned Judges professed to lay down the result of certain decisions of Hindu Law relating to joint families and partition. The proposition relied on by the respondents in support of their case is Cl. (e) at p. 879 of the report. To understand this Cl. (e) we have to read it with the preceding Cl. (d). They are as follows :

(d) It is not necessary that there should be a concensus or agreement among the coparceners for the severance of status of the joint family.

(e) Where severance is effected by explicit declaration, the result is decisive and the legal result cannot be affected or controlled by subsequent conduct of the parties.

With the proposition in Cl. (d) we have no quarrel. As regards Cl. (e) too, we should have no quarrel with it, if the third word "is" may be read as "has been."

We have not the least doubt that the learned Judges did use the word "is" in the sense of "has been." The proposition that is laid down in Cl. (e) is really a proposition that was laid down by this very Bench of the Court, in *Jai Narain* v. *Baijnath Rai* (2) quoted by the learned Judges themselves with approval at p. 878. This proposition lays down that where there has been a completed separa-

(1) A. I. R. 1928 All. 422=26 A. L. J. 857.
(2) A. I. R. 1928 All. 419=50 All. 615.

tion, there can be no joint family afterwards except by way of reunion.

The case before us is whether the evidence before us points to a completed separation or only to an attempted separation. We have found as a fact that there was no completed separation, that a separation was demanded but the demand was given up at the instance of the other members of the family. The question therefore is whether an unequivocal demand which has not been persisted in and has no doubt, been given up with the consent of the other members of the family must nevertheless be treated as affecting a separation? The answer to this question is not furnished by the case of *Ram Kali* v. *Khamman Lal* (1) relied on by the respondents. Indeed their Lordships do concede at p. 876 (*of* 26 *A. L. J.*) of the report that on the authority of the Privy Council,

"it must be held to be settled law that the intention to separate can very well be abandoned."

The cases quoted by their Lordships, viz., *Kedar Nath* v. *Rattan Singh* (3) and *Palani Ammal* v. *Muthuvenkatachala Moniagar* (4), afford illustrations of a demand for separation, subsequently abandoned with the result that the jointness of the family remained undisturbed. In the case of *Kedar Nath* v. *Rattan Singh* (3), there were three brothers; one separated outright, the second brought a suit for partition but withdrew his claim and remained joint with the third brother against whom he had brought the suit. Their Lordships held that as between the second and third brothers there was no disruption of jointness. Similarly, in the *Madras* case there was a demand for separation. A partition suit was filed, but ultimately, the matter was compromised. It was held that the family did continue to be joint. In all these cases, the demand was abandoned with the consent of the other members of the family. It is not necessary for us to say, definitely, in this case, whether the person making the demand for partition may abandon it without the consent of the other members of the family, so as to enable him to continue to be a member of the joint family. But it is clear to us that, where all the parties are agreed, including the member demanding a separation, that the demand should be withdrawn, there is no disruption in the status of the family. Such being our view of the law we hold that the mere notice of 2nd February 1922, which was never persisted in and which was ultimately given up did not create a disruption of the joint family.

The result is that the family was joint when Bhagwan Das died on 1st May 1922. It follows that the plaintiff is entitled to a half-share in the entire joint family property. We allow the appeal, modify the decree of the Court below and decree the plaintiff's suit for partition, in its entirety. This will be the preliminary decree in the suit and the partition will be carried out in accordance with law. The plaintiff will have his costs of the suit and of the appeal.

M.N./R.K. *Appeal allowed.*

(3) [1910] 32 All. 415=7 I. C. 648=37 I. A. 161 (P.C.).

(4) A. I. R. 1925 P. C. 49=48 Mad. 254=52 I. A. 83 (P.C.).

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* A. I. R. 1929 Allahabad 174

BOYS, J.

Mt. Mumtaz Begam — Plaintiff—Appellant.

v.

Mt. Lachhmi and *others*—Defendants—Respondents.

Second Appeal No. 86 of 1927, Decided on 18th December 1928, from decree of Sub-Judge, Muttra, D/- 11th September 1926.

(a) Interpretation of Statutes — Express words—Words especially important must be given appropriate meaning.

Words must be given their appropriate meaning and most empatically so, words of such tremendous import as "the mortgagor" etc., in S. 58 (c), T. P. Act. [P 176 C 1]

*** (b) Transfer of Property Act, S. 58 (c)—Definition is not self-sufficient—Reference to Cl. (a) is necessary for determining if a transaction is mortgage.**

Section 58 (c) bears internal evidence that it cannot possibly be a self-sufficing definition of a mortgage by conditional sale and that reference to S. 58 (a) cannot possibly be avoided because S. 58 (c) does not by itself (nor do the Cls. (b), (d) or (e) by themselves) declare any transaction whatever to be a mortgage. It is S. 58 (a) which declares what transactions are mortgages and it is necessary to determine whether there is a mortgage at all before Cls. (b), (c), (d) or (e) are referred to.

[P 176 C 1 & 2]

(c) Transfer of Property Act, S. 58 (c)—Scope—Mortgages taking form of ostensible

sales on certain conditions are alone mortgages by conditional sale.

Section 58 (c) does not say that any transaction where there is an apparent sale (whether real or only ostensible) on certain conditions is necessarily a mortgage by conditional sale, but merely that of those transactions which are mortgages those which take the form of an ostensible sale on certain conditions are to be called mortgages by conditional sale. [P 177 C 1]

*** (d) Transfer of Property Act, S. 58 (c)—Meaning of "ostensible" explained.**

The word "ostensible" does not mean (a) merely that the object bears a certain form or appearance without suggesting that it is or is not that of which it has the superficial appearance, but means (b) that the object bears a certain appearance but is not really that of which it bears the appearance. [P 178 C 1]

(e) Transfer of Property Act, S. 58 (c)—Test.

Intention of parties is material for deciding whether transaction is sale or mortgage: *A. I. R.* 1924 *P. C.* 226, *Foll.*; *A. I. R.* 1926 *All.* 670, *held not Appl.*; *A. I. R.* 1927 *All.* 137, *Ref.* [P 178 C 2]

*** (f) Transfer of Property Act, S. 58 (c)—Tests to determine whether transaction is sale or mortgage.**

It can be contended that transaction was not intended to be a mortgage, when it is found that there was nothing to show that the relation of debtor and creditor continued to exist, there was nothing about interest or its equivalent, that the price was a very fair one for a sale, and that a very long period, (five times as great as the period contemplated in the deed) had been allowed to elapse before the party took action. It is immaterial that prior to the transaction the relation of debtor and creditor had existed between the parties; 49 *All.* 405 *Rel. on.* [P 179 C 2; P 180 C 1]

(g) Transfer of Property Act, S. 58 (c)—Document one—Transaction is not necessarily mortgage.

That a transaction was all contained in one document, is by itself certaintly not conclusive that the transaction was a mortgage: 38 *All.* 570 (*P.C.*), *Rel. on.* [P 180 C 1]

N. P. Asthana—for Appellant.

G. N. Kunzru and *S. C. Das*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for redemption of what is alleged by the plaintiff to be a mortgage by conditional sale dated 14th February 1910, that is long after the Transfer of Property Act came into force. The defendant's contention is that the transaction was an out-and-out sale. Both Courts have agreed with the defendant and have dismissed the suit.

The transaction is all evidenced by only one document. I have not had the document itself placed before me. Nor has the Court been supplied with a translation or transliteration of the document as required by the rules of the Court. From the judgment of the trial Court it is manifest that in addition to the sale there was also a clause empowering the transferrer to repurchase the house that had been sold at any time within three years from the date of the sale. The trial Court has held that there was nothing to show that the relation of debtor and creditor continued to exist, that the documents of title were all handed over to the purchaser; that immediate possession of the house was given, that there was nothing about interest; that the price was a very fair one; and that the period for the purchase was a fair indication that the document was intended to be a sale and not a mortgage-deed. The lower appellate Court referred to the fact that the present suit had been brought 15 years after the execution of the deed, i, e, about 12 years after the date fixed for the purchase; that all the incidents of an absolute sale had come into effect including immediate possession and the passing of the title; that the price was found more than a fair price; and that there was nothing to show that there was a relation of debtor and creditor continuing to exist between the parties. Both Courts held without hesitation that the document consituted an out-and-out sale with a covenant that the vendee would resell the property if he was asked to do so within three years. The only material section of the Transfer of property Act is S. 58.

The case stated by counsel for the appellant, if I have put it together correctly from his argument and the cases referred to by him, is as follows:

"The only portion of S. 58 requiring consideration is Cl. (c). It is not necessary before applying Cl. (c) first to determine whether there is a mortgage at all. The words "the mortgagor," "mortgaged property" and "mortgage-money" must be read as "the transferrer," "the property" and "the price or consideration" respectively. Where there is a transfer which is on the face of it a sale coupled with one or other of the conditions set out in Cl. (c) that transfer is a mortgage by conditional sale, and the question of intention is immaterial.

The whole argument then, of the appellant involves reading S. 58, Cl. (c) as if it read

"(c) where the transferrer purports to sell the property on condition that on default of payment of the price on a certain date the sale shall become absolute or on condition that on such payment being made the sale shall become void or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale."

How far this argument was prompted by anxiety lest the findings of the lower Courts might be held to be findings of fact on the question of intention and so to debar the appellant from any right of second appeal I am unable to say, but it has to be examined. Counsel was able to find some support in the language used in certain reported cases, but I am of opinion that the contention is unsound. To these authorities I shall return; at the moment I desire only to make clear the issue on which the decision turns.

Firstly, the argument gives no effect to the words "the mortgagor," "mortgaged property" and mortgage-money" and assumes that in place of those phrases the words "transferrer," "the property" and "the price" may be read. There is no justification for this. Words must be given their appropriate meaning and most emphatically so, words of such tremendous import as "the mortgagor" etc. It involves rewriting the whole clause.

Secondly, it fails to appreciate that the word "ostensibly" has two meanings only one of which can possibly be attributed to it as used in S. 58 (c) and the inevitable consequence of attributing to it its correct meaning. To this I shall return.

Thirdly, it omits to notice the significance of the change from the use of the word "is" in para. 1, S. 58 (a) which defines a mortgage to the words "is called" in all the rest of S. 58 which gives the appropriate names to the parties and particular categories of mortgages.

Fourthly, S. 58 (c) bears internal evidence that it cannot possibly be a self-sufficing definition of a mortgage by conditional sale, and that reference to S. 58 (a) cannot possibly be avoided. It is only necessary to read the clause, "where the mortgagor ostensibly sells "the mortgaged property . . . ." What property? If it is suggested that anybody can be a transferrer, that any form of consideration may be regarded as the price and that it was only bad drafting when drawing up a definition of mortgage by conditional sale, to anticipate by calling the transferrer "the mortgagor" and the consideration "the mortgage-money", it is at least beyond doubt that it is impossible to regard it as essentially immaterial whether the term "the mortgaged property" is used or the term "the property". The use of the term "the mortgaged property" is compelled, for otherwise the definition would cover a case of ostensible sale even of moveable property. Use of the term "the mortgaged property" in its turn compels reference to S. 58 (a). From another aspect, if, as has been precisely suggested, all that is necessary to a mortgage by conditional sale is a transfer which is in form a sale on certain conditions it could cover any property, which is obviously not the case.

I will proceed to state the view which I hold of the proper scope and interpretation of this Cl. (c), S. 58. S. 58 (c) does not by itself (nor do the Cls. (b), (d) or (e) by themselves) declare any transaction whatever to be a mortgage. It is S. 58 (a) which declares what transactions are mortgages. Before Cls. (b), (c), (d) and (e) are looked at all it is necessary to determine whether there is a mortgage at all. It appears to me manifest that if reference is first made to Cl. (c) before considering Cl. (a) pause must instantly be made before being able to apply Cl. (c) at all at the words "the mortgagor." Is there "a mortgagor?" The question must first be determined and can only be determined by reference to S. 58 (a).

When it has been determined whether the transaction satisfies the conditions of S. 58 (a) and it has been found that it does, then there is a mortgage, and certain general consequences will follow. When and if this has been found, it may, and in most cases will, be necessary to determine what are the incidents of the mortgage which has been found to exist, i. e., what consequences will ensue. Certain incidents are declared by other sections of the Transfer of the Property Act and by other Acts (e. g. the Limitation Act) to attach to all mortgages and certain further incidents according to the particular category in which the particular mortgage falls. To determine into which category the mortgage, which has already been found to exist, falls we then have to look at S. 58 (b), (c), (d) and (e) and S. 58 which tell us by what name the particular mortgage is to be "called".

In determining whether it was a mortgage some of its characteristics will have been determined (e. g. whether, where there was apparently a sale, the sale was real or only ostensible and actually for the purpose of securing a loan, etc.). If the characteristics already so found proved or obviously apparent are not sufficient to determine into which category it falls, further inquiry will have to be directed to the existence or non-existence of the additional requisite characteristics. Having determined into which category it falls then it is possible to apply the other sections and Acts which declare the incidents attaching to the particular form of mortgage. To put this in other words, S. 58 (c) does not say that any transaction where there is an apparent sale (whether real or only ostensible) on certain conditions is necessarily a mortgage by conditional sale, but merely that of those transactions which are mortgages those which take the form of an ostensible sale on certain conditions are to be called mortgages by conditional sale. The general provisions relating to mortgages will apply to such by virtue of the previous finding under S. 58 (a) that they are mortgages and the special provisions relating to mortgages by conditional sale will apply to them by virtue of their being "called" or classified as "mortgages by conditional sale" in accordance with S. 58 (c).

The above is in accordance with what might have been expected when the framers of the Act proceeded to their work. Before the Transfer of Property Act there were various kinds of transactions which were held to be mortgages with varying incidents attaching to them. The obvious thing to do was to lay down first what essential conditions must be satisfied before a transaction could be called a mortgage at all. This preliminary step was taken in para. 1, S. 58 (a). Having determined what was essential to the transaction amounting to a mortgage (note the word "a mortgage is") the draftsmen then proceeded to give names to the parties the consideration, and the document by declaring that they should be "called" the "mortgagor" "the mortgagee" "the mortgage-money" and "the mortgage-deed" respectively. In other sections of the Act certain general provisions were laid down to be applicable to all transactions found to be mortgages. It was then necessary to determine to which class a particular form of mortgage belonged in order to determine what special incidents should attach to a particular mortgage in question. For this purpose in S. 58 (b) to (e), further characteristics were detailed according to which if they were found to exist the particular mortgage would be classified or "called" "simple" by "conditional sale," "usufructuary," or "English" respectively, and in other sections of the Act certain special provisions are laid down to apply particularly to each class. Where the further specified sets of characteristics were not found to exist in their simple form or a combination of certain simple forms provision was made by S. 98, such being described as "anomalous mortgages."

Parenthetically, in reference to the discussion that sometimes arises as to whether the legislature meant by the enactment of S. 58 (c) to amend or merely to state the then existing law I may note that if the view expressed above by me is correct the only change made by S. 58 (c) in the existing law, if it can be called a change, is that while before the passing of the Act it was open to argument that any particular transaction entered into before the Act which had been found to be a mortgage was of the class of mortgages by conditional sale and had the incidents attaching to that form of mortgage, three kinds of mortgage entered into after the Act are specifically declared to be of the class of mortgages by conditional sale, and it may well be that by implication the legislature intended that no other mortgages not coming within the terms of S. 58 (c) were to be considered mortgages by conditional sale, and if they do not come within the descriptions in S. 58 (b), (d) or (e) they would have to be considered as anomalous mortgages.

To turn now to the authorities which were quoted to me in support of the appellant's contention, and a consideration of these will involve consideration also of the true meaning of the word "ostensible" as used in S. 58 (c). These decisions are reported in *Jagannath* v. *Gauri* (1) and the judgment of Ashworth, J., in *Lalta* v. *Jagdish* (2). There are also to be found some remarks, in the judgment of

(1) A. I. R. 1926 All. 670.
(2) A. I. R. 1927 All. 137=48 All. 787.

Sulaiman, J., who was a party also to the decision in *Jagannath* v. *Gauri* (1), *Mathura* v. *Jagdeo* (3) which seem to support the appellant, but he clearly held at the bottom of p. 421 that the intention was the primary question.

On the other hand the contention of the appellant finds no support at all in the judgment of Kanhaiya Lal, J., who with Ashworth, J., decided the case *Lalta* v. *Jagdish* (2) nor in the judgment of Lindsay, J., who with Sulaiman, J., decided the case *Mathura* v. *Jagdeo* (3). For the respondent I was also referred to *Jhanda* v. *Wahiduddin* (4). To all these cases, besides others, I have given the most careful consideration. I note that the remarks in *Jagannath* v. *Gauri* (1) were avowedly obiter while the views of Ashworth, J., avowedly differed from those of Kanhaiya Lal, J.

I will discuss here the meaning of the word "ostensible" as used in S. 58 (c). The word has two meanings and it is essential to be clear as to the sense in which the word is used. The word "ostensible" may mean either (a) merely that the object bears a certain form or appearance without suggesting that it is or is not that of which it has the superficial appearance or (b) that the object bears a certain appearance but is not really that of which it bears the appearance. I may be pardoned for emphasizing this by reference to the second meaning as stated in the Oxford Dictionary

"often implicitly or explicitly opposed to 'actual' 'real' and so equals 'merely' 'professed' 'pretended'."

It seems manifest that the second is the only meaning possible here. If it meant in S. 58 (c) only "having the appearance of a sale" without importing also that it was not really a sale, it would involve holding that the legislature, as of course it had power to do, had declared that, regardless of the intention of the parties, if the transaction bore the appearance of a sale on one of certain conditions, it was in law a mortgage even though the parties may have intended a sale.

Apart from the fact that there is no reason for crediting the legislature with so drastic an action (and I have shown that in my view the object intended and effected was quite different), the Privy Council has continued to apply the test of intention to make a sale or to make a mortgage to transactions entered into after the Act: *Narasingerji* v. *Parthasaradhi Rayanim Garu* (5). For the contrary view I can only find the remarks in *Jagannath* v. *Gauri* (1) which were avowedly only made obiter as suggesting an idea and the view of Ashworth, J., in *Lalta* v. *Jagdish* (2) who held (p. 1064 *of* 24 *A. L. J.*) that it was not necessary first to establish a mortgage; but even he, as I understand, agreed that the intention of the parties was the decisive factor, he would apparently limit the evidence of that intention by a test restricted to one point: see p. 1065 *of* 24 *A. L. J.*:

The question then of intention having to be decided, the thought suggested itself to me that, provided that the question of intention was determined, it was perhaps immaterial whether it was determined when deciding whether under S. 58 (a) there was a mortgage or when deciding under S. 58 (c) whether the transaction was really a sale or only ostensibly a sale. But it is not in fact an academic question whether the decision as to there being a mortgage at all is approached first by a consideration of S. 58 (a) or by a direct and primary consideration of S 58 (c). Of course the circumstances may be such that a mere statement of them suggests that if the transaction is going to prove to be a mortgage at all it will prove to be one of the kind named in S. 58 (b), (c), (d) or (e), as the case may be, and it may be this fact that tempts to a consideration of the terms of those clauses at the outset; but, as it appears to me, to consider the terms of those clauses before it has been determined whether the transaction is a mortgage at all is not only an error of procedure but an error which is also likely to confuse and mislead. The danger is manifold. If the first consideration of the question begins with Cl. (c) the mere fact that there is an apparent sale with one of the conditions specified, the mere similarity of some of the characteristics, is likely to pre-dispose the inquirer to a finding in a particular direction. Again, the fact that one or other of the characteristics is not to be found in S. 58 (c) may similarly prompt the idea that it is

(3) A. I. R. 1927 All. 321=49 All. 405.
(4) A. I. R. 1916 P. C. 49=38 All. 570=43 I. A. 284 (P.C.).
(5) A. I. R. 1924 P. C. 226=47 Mad. 729=51 I. A. 305 (P.C.).

not a mortgage at all, whereas, though not a mortgage by conditional sale, it may yet satisfy the requirements of S. 58 (a) and be an anomalous mortgage. The transaction may be quite unlike that in S. 58 (b) (d) or (e) and though very nearly like, yet not quite similar to that in S. 58 (c), but it may nevertheless be a mortgage within the definition in S. 58 (a), and of the class provided for in S. 98. On the other hand there is no room for these dangerous impulses if attention is first concentrated, as I have suggested it should be, on the terms of S. 58 (a). If concentration of the first attention be on the words in S. 58 (a) "for the purpose of securing etc." the appropriateness of the various tests which have been approved by their Lordships of the Privy Council of "purpose" or "intention" (e. g., is there anything to indicate that the relation of debtor and creditor subsisted as a result of the transaction) will be immediately apparent.

Whether or not the sale was only ostensible (i. e., ostensible in the sense in which I have held that the word is used) will be one of the facts which has to be determined when determining whether it was a mortgage at all. If it has been determined to be a mortgage that will involve a finding that the sale was only ostensible, and the first two requirements of S. 58 (c) will have been found, that there is a mortgagor and a sale which was only ostensible.

Finally, the view that I have suggested appears to have this recommendation also that it allows to every word as we proceed throughout its natural meaning and it gives rise to no difficulty whatever as to the steps by which a decision is to be reached. Opinions may differ as to the exact weight to be attached to any particular item of the evidence, but that is inevitable in all cases.

The suit in this case was brought 12 years after the period of three years named in the deed had elapsed, but it was contended by counsel for the appellant that if he had succeeded in showing that this was a mortgage by conditional sale he would have the full period of 60 years within which to redeem and the limitation to three years in the deed must be regarded as a clog upon the equity of redemption. It may be noted that the contention involves drawing a pen through the words "on a certain date" in S. 58 (c), T. P. Act. The two ideas that "a certain date" is one of the necessary characteristics before a mortgage can be classed as a mortgage by conditional sale. S. 58 (c) and the idea that the period within which the payment or the repurchase is to be made cannot by the stated rule forbidding a so-called clog on the right of redemption be limited to a certain date seem difficult to reconcile, and might have required further examination but for the view at which I have arrived as to the nature of this deed and which I shall now state.

Turning to the facts of this particular case, the first question is, was there by the deed a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced by way of loan? If there was, there was a mortgage and the next question to be determined according to the characteristics found existing, would be in which category of mortgages would the transfer fall? In answering the first question by a consideration of S. 58 (a) the only doubt that could arise in the circumstances of this case is as to the "purpose" or "intention" of the transaction. On the face of it it is a sale with an agreement for reconveyance. Was it really as well as in form a sale or only ostensibly a sale and really a mortgage?

Lest counsel for the appellant might have thought from any remarks that fell from me that I was in agreement with his contention that "intention" was immaterial I gave him a further opportunity of dealing with the findings of the lower Courts as to the intention. Assuming that the finding of both Courts that the intention of the parties was that the document should constitute an out-and-out sale and not a mortgage is open to challenge in second appeal, I find that the Courts have both applied their minds to this question and have agreed that the proper conclusion to be drawn is that the parties did not intend it to be a mortgage; and it is for the appellant to satisfy me that that was a wrong conclusion.

The Courts below in arriving at the conclusion that the transaction was not intended to be a mortgage have relied upon among others, the points that there was nothing to show that the relation of debtor and creditor continued to exist; that there was nothing about interest

or its equivalent; that the price was a very fair one for a sale; and that a very long period, five times as great as the period contemplated in the deed, had been allowed to elapse before the plaintiff took action. For reliance on all these points there is ample authority. For the appellant it was mentioned that prior to the transaction the relation of debtor and creditor had existed between the parties. That fact manifestly as pointed out also by Lindsay, J., in *Mathura* v. *Jagdeo* (3), is no indication either way. Again, it was urged that the transaction was all contained in one document, but that by itself certainly not conclusive for it has been held by their Lordships of the Privy Council: *Jhanda* v. *Wahiduddin* (4), that the mere fact that, where there were two deeds, they were executed on one day, while it is appropriate for consideration, is not necessarily indicative of a mortgage; and ordinarily there is no material difference between a transaction embodied in one document and the same transaction embodied in two documents executed on the same day. The appellant has failed to show any adequate ground for holding that the finding of the lower Courts as to the intention was wrong. I see no reason to interfere and the appeal is dismissed with costs.

M.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 180

SEN AND NIAMATULLAH, JJ.

Irfan Ali and *others*—Plaintiffs—Appellants.

v.

Bhagwant Kishore and *others*—Defendants—Respondents.

First Appeal No. 247 of 1925, Decided on 12th June 1928, from decision of Sub-Judge, Agra, D/- 7th May 1925.

(a) Mussalman Wakf Validating Act (6 of 1913)—Act does not contemplate concurrent gift to charity — If ultimate gift is for charity, paltriness of the income set apart for such purpose is immaterial.

Per Sen, J.—The Wakf Validating Act does not provide that there should be a substantial concurrent gift to meritorious objects or that there should be a concurrent gift to such objects at all. The policy of the Act is amply vindicated, if there is an ultimate gift in favour of such objects as are considered pious, religious, charitable or meritorious under the Mahomedan law or religion, and the paltriness of the income set apart for charity etc. is immaterial. [P 183 C 2]

(b) Mahomedan law— Wakf—Non-appointment of trustee from public does not invalidate.

Per Sen, J.—The mere fact that no member of the public is appointed a trustee will not invalidate a trust for charitable purposes. [P 184 C 1]

(c) Mahomedan law — Wakf— Permanent dedication explained.

Per Sen, J.—The words "permanent dedication" imply that the subject and the object should be unfailing. [P 184 C 1]

*** (d) Mahomedan law— Wakf— (*Per Sen, J.*)—Mere use of word "wakf" does not indicate ultimate dedication to poor.** (*Niamatullah, J. contra*).

The mere use of the word "wakf" or the making of a wakf in favour of one's descendants does not necessarily predicate an ultimate dedication in favour of the poor or some other meritorious object. (*Case law discussed*). [P 186 C 2]

*** (e) Mahomedan law—Wakf—(*Per Sen, J.*) —Intention to benefit exclusively the family —Public having no right to control —Ultimate benefit to poor cannot be implied** (*Naimatullah, J., contra*).

Where the wakf indicatse the objects of the endowment and limits them to the members of his family and states in explicit language that the wakf is intended exclusively for the benefit of his family and the members of the public have no right of administration or control, an ultimate benefit to the poor cannot be implied from such a transaction. (*Case law discussed*). [P 187 C 2]

(f) Mahomedan law—Wakf—Validity.

Per Niamatullah, J.—If the deed of wakf is otherwise valid, the intention to defeat the creditors of his heirs cannot affect the validity. [P 188 C 2]

H. Iqbal Ahmad, *Mukhtar Ahmad* and *S. K. Dar*—for Appellants.

N. P. Asthana—for Respondents.

Sen, J.—This is an appeal from the judgment and decree of the Subordinate Judge of Agra, dated 7th May 1925, dismissing the plaintiffs' suit for a declaration that the property specified in Sch. A of the plaint was endowed property and as such was not liable to attachment and sale in execution of the decrees held by Kedarnath, defendant 2 and by Shankar Lal, defendant 3 against Hakim Saiyed Ali Ahmad, defendant 4.

Hakim Saiyed Mubarak Ali was a Mahomedan of the Hanif sect. His estate consisted of a residential house, 6 small houses which used to be rented out for shops and zamindari shares in two villages, namely, Nagla Patam and Phulpur.

His family consisted of his wife, Mt. Sitara Begam, two sons, Hakim Saiyed

Nisar Ahmad and Hakim Ali Ahmad (who figures in the suit as defendant 4) two daughters, Mt. Mustafa Begam and Mt. Murtaza Begam and a grandson named Saiyad Wahajuddin.

On 22nd June 1909, he executed a will which sets out in detail the properties owned by him. This will which appears to have been attested by his wife, his sons and daughters and duly registered by the Sub-Registrar of Agra provided that one-third of the income of his property after paying the Government revenue, the rates and taxes and the salaries of servants should be utilized for necessary repairs and for expenses relating to marriage and deaths (presumably of the members of the family) and for the Fateha ceremeny of his ancestors. The rest of the income of the property was to be divided amongst his wife, sons and daughters in certain fixed shares. This arrangement was to remain in force for a period of 25 years, after which the executors under the will were directed to divide the property among the heirs according to their Quranic shares under the Mahomedan law.

On 11th May 1911, Hakim Mubarak Ali executed a document which he describes as a codicil to the will dated 22nd June 1909. The scheme of the original will is not departed from. The legacies are confined to the members of the family but the original legacy in favour of the two sons is modified to this extent that in place of the legacies to the sons personally they are legacies to the sons, their wives, and children.

This document is also attested by his wife and children like the document first mentioned.

On 7th March 1913, the Musalman Waqf Validating Act (Act 6 of 1913) was placed upon the Indian Statute Book.

Saiyed Mubarak Ali did not contract any debts during his lifetime and his estate was not burdened with any liabilities.

The even peaceful tenor of his life appears to have been disturbed by his elder son, Saiyed Ali Ahmad who entered upon a course of extravagance, contracted debts and disgraced himself by ultimately seeking the shelter of the Court of bankruptcy. He was adjudicated an insolvent about the year 1910.

Matters stood thus, when on 23rd October 1913, Saiyed Mubarak Ali revoked the two wills already referred to and executed a fresh document, which purports to be an instrument of a testamentary character, under which a waqf was created relating to his entire property.

The governing idea of the testator as can be gathered from the first two wills, is that his estate should remain intact after his death. Although the consent of the heirs in the lifetime of the testator does not validate a will under the Hanifi law, he got these two documents attested by his heirs with a view to bind their conscience with a moral obligation to give effect to his wishes.

When the third document came to be executed, Hakim Mubarak Ali thought that he could create a perpetuity in favour of his descendants, by force of the Wakf Validating Act, and the assent of his heirs was no longer necessary. The third document dated 23rd October 1913, is not attested by his wife, his sons and daughters.

It opens with the following words :

"I, the executant, am a Saiyad Musalman of Hanifi sect. Previously, I executed a will and codicil in respect of my property and had them registered. I now revoke all of them and make a wakf by will of all my property, a list of which is attached to, and forms part of, this document, and declare it to be wakf by will."

As a matter of fact no list of property is appended to this document. The omission does not invalidate the deed because the property was ascertainable and has been ascertained by the evidence produced in this case.

In paras. 2 and 3 of this instrument, trustees are nominated, two of whom are the plaintiffs, of this suit. The third trustee died and in his place was appointed his son who is plaintiff 2.

Directions have also been given as to how the vacancies were to be filled up, if the trustees died or refused to assume the office.

The scheme of the endowment will be apparent from the following paragraphs:

Paragraph 4.

"It will be incumbent on the trustees to pay the Government revenue and cesses and other Government demands, etc. whatever they may be as well as to defray the expenses of repairs and other expenses relating to the property and to pay the wages of employees out of 1/3rd of the income of the wakf property and then to spend the remaining income on good acts, recognized as such by the Mahomedan law (as for instance fatiha offerings for elders, education and marriage of children etc. etc.) and

out of the other 2/3rd of the income of the wakf property:

(a) To continue to pay Rs. 20 a month to Mt. Sitara Begam, my wife, for inheritance. This sum she (will get) till the term of her life; and after her (death), the legal heirs will be entitled to get the same for their maintenance.

(b) Similarly out of the aforesaid 2/3rd of the income my daughter's son, Saiyed Wahajuddin will be entitled to get Rs. 5 a month for maintenance, generation after generation.

(c) Similarly out of the said income Hakim Saiyid Ali Ahmad, the eldest son, and his wife and children will be entitled to get Rs. 30 a month for maintenance jointly generation after generation.

(d) Likewise, Hakim Saiyid Nisar Ahmad, my second son and his wife and legitimate children will be entitled to get Rs. 30 a month for their maintenance jointly generation after generation.

(e) In the same way my danghter, Mt. Mustafa Begam will be entitled to get Rs. 15 a month for her maintenance generation after generation.

(f) In the same way, my second daughter, Mt. Murtaza Begam will be entitled to get Rs. 20 a month for her maintenance, generation after generation."

Paragraph 5:

"It will be binding on the trustees to pay the fixed sums to the recipients for the maintenance. But the recipients will in no way, be competent to transfer these stipends, nor can the stipends be liable to attachment and sale in any decree."

Paragraph 6:

"The dwelling house, together with its appurtenances, is also included in the wakf and it too can by no means be transferred or encumbered; of course, the persons for whom monthly stipends have been fixed by means of this wakf, will be competent to live in it."

Paragraph 7:

"After the payment of the aforesaid stipends out of the 2/3 of the income. the balance, be whatever it may. will be reserved and applied in multiplying the property. It will be lawful for the trustees to make an addition to the monthly stipends out of the balance in their hand according as it may be advisable when the number of the children of the stipendiaries grows larger."

Paragraph 8:

"The trustees or other persons will not be competent to transfer or encumber the wakf property in any way."

Paragraph 11:

"In case of violation of the above conditions or any other kind of misconduct relating to the wakf, it will be lawful to avert it by the provisions of the law. But it should be borne in mind that this is a wakf for the family and not for the public, so the public have nothing to do with it. The trustees will be the directors and managers of this wakf and only the persons declared entitled to stipend and maintenance under this wakf will be entitled to prevent, if necessary, violation (of the conditions) and misconduct.

"I have, therefore, executed this (deed of) wakf by will in order that it may stand as authority."

This document is registered by Maulvi Abdus Samad, Sub-Registrar of Agra on 23rd October 1913.

Saiyed Mubarak Ali died on 2nd December 1914. Upon his death, the will was assented to by all his heirs. The trustees entered upon their office immediately and remained in possession of the property till troubles began in the year 1923.

Kedarnath, defendant 2 obtained a simple money decree against Saiyid Ali Ahmad for Rs. 655. Shankar Lal defendant 3 also obtained a similar decree against him for Rs. 371-8-6. These decree-holders caused the property in dispute to be attached by the Official Liquidator, defendant 1 on 28th February 1923 The date fixed for sale was 23rd May 1923. The plaintiffs as mutwallis of the endowment applied for and obtained the permission of the insolvency Court to institute the present suit which was filed on 29th October 1923.

The Official Liquidator did not contest the suit. Negotiations for a compromise were in progress in the Court below for some length of time but ultimately the compromise fell through. The suit was contested by defendants 2 and 3 upon various grounds, most of which were frivolous and which were properly rejected by the learned Subordinate Judge. Those pleas have not been urged before this Court and require no further notice.

The plea which prevailed in the Court below was that the instrument dated 23rd October 1913 did not create a valid wakf under Act 6 of 1913. The claim was accordingly dismissed.

The sole question for determination in appeal before this Court is whether the instrument conforms to the provisions of the Wakf Validating Act, 1913.

The judgment of the Subordinate Judge appears to have been influenced by the following considerations:

(a) A negligible sum has been provided for in the instrument of trust for charitable objects. (b) Under the terms of the Validating Act no wakf in perpetuity for the support of one's family, children or descendants generally was valid, without an ultimate provision being made either expressly or by necessary implication for the benefit of the poor and the needy or for a religious, pious or charitable pur-

pose of a permanent character, recognized by the Mahomedan law. There was no provision in the document in controversy for the ultimate destination of the income of the 2/3rds of the property in case the family became extinct as a whole or where any of the several branches, for whom provisions had been made in the will, ceased to exist. (c). The members of the public had no hand in the control or administration of the trust.

In considering the circumstances which immediately preceded the execution of this document, the material fact which must have influenced the judgment of the testator was the pecuniary embarrassment of his first son which culminated in his being adjudicated an insolvent in the year 1910. The extent of his liabilities is not exactly known; but these must have been large enough and in any case embarrassing enough to force on Ali Ahmad the necessity of seeking the protection of the insolvency Court. It was about this time that the first will of Saiyid Mubarak Ali was executed. The date of the will is 22nd June 1909. The testator was about 70 years old at the time of the execution of this document. He appears to have felt considerably apprehensive as to the future of his family after his death. The provision and the underlying scheme of this document prove to a demonstration that Mubarak Ali was anxious that after his death the property left by him "may remain safe and be not wasted." The ruling idea was the preservation of the property. Restrictions were imposed against partition or transfer of the property for a period of 25 years certain. He expected that a quarter of a century was long enough to allow the storm which had gathered over the head of his first son to be allayed.

The Court below has taken into consideration the smallness of the sum provided for the benefit of the needy and the poor or for other meritorious purposes out of the residue of the income of 1/3 of the wakf property. The income of the wakf property cannot be ascertained from the materials before this Court either exactly or approximately. Rs. 120 per month are charged upon the income of 2/3rds of the entire property. This may be whole of the net income or a substantial residue may be left after paying the maintenance allowances. The Subordinate Judge proceeded upon the data that Rs 120 a month either is or may well be taken to be net income of 2/3rds of the wakf property and concluded that the income of the remaining 1/3 could be no more than Rs. 60 a month. This is pure speculation and the conclusion arrived at by the learned Subordinate Judge was unwarranted.

The learned Subordinate Judge has evidently failed to see that under the Wakf Validating Act where the dedication is made in favour of one's descendants, generation after generation, it is not necessary that there should be an immediate or concurrent gift in favour of religious or charitable objects under the Mahomedan law. The Act does not provide that there should be a substantial concurrent gift to meritorious objects or that there should be a concurrent gift to such objects at all. The policy of the Act is amply vindicated, if there is an ultimate gift in favour of such objects as are considered pious, religious, charitable or meritorious under the Mahomedan law or religion. The learned Subordinate Judge has, therefore, gone off the rails in taking into account the paltriness of the income set part for charity etc.

It is not unlikely that the provision in para. 4 relating to the residue of the income of the 1/3rd being spent upon pious and charitable objects was purely illusory and no more than a cloak with a view to circumvent the law against perpetuities. It was open to a Hanifi Muhomadan to get round the law against perpetuities by strictly adhering to the precepts contained in Act 6 of 1913. The document in controversy was executed very soon after the Act, and the testator or his advisors do not appear to have carefully considered the provisions of the said Act.

The Wakf Validating Act allows the settlement of properties in perpetuity in favour of the family, children or descendants of a person belonging to the Mussalman faith. A settlement of this description from its inception and in view of its scope and character is more domestic than public. The Act does not require that persons outside the family should be appointed mutwallis or trustees or that the members of the public should have a hand in the control of funds or in the general administration of the trust. It is at a remote future that the contingency may arise when the ultimate trust

in favour of the poor has got to be administered either by the State or by the members of the public. But the mere fact of no member of the public having been appointed a trustee will not invalidate the trust. The learned Subordinate Judge has evidently erred in attaching undue importance to the implications flowing from the provisions of para. 11 of the will.

If the instrument creating the wakf does not fulfil the requirements of the Wakf Act, it may lend itself to the criticizm that the provision in favour of certain pious objects was illusory and the imperative directions contained in the instrument that the members of the public can and should in no case have a voice in the administration of the trust may have an important bearing upon the question whether the testator intended an ultimate destination of the usufruct of the property in favour of the needy and the poor or in favour of an object of any recognized merit under the Mahomedan law.

In order to constitute a "wakf" under S. 2 Cl. 1, Mussulman Wakf Validating Act, certain conditions should be fulfilled: (1). The settlement should be of any property; (2) the appropriation should be permanent and not for a limited period only; (3) the object should be such as is recognized by the Mussulman law as religious, pious or charitable. The words permanent dedication imply that the subject and the object should be unfailing. It further recognizes that the wakif should have the purpose of the condition in his mind and that the said purpose should be a meritorious object under the Mahomedan law. A dedication of property in perpetuity to the members of the family may be a pious object under the Mahomedan law but a wakf in favour of one's self and descendants is not valid unless the unfailing object is indicated by express text or necessary implication.

The Act therefore contemplates that the object should be defined and must fall under the category of religious, pious or charitable purpose recognized by the Mussulman law.

Section 3 of the Act legalises a wakf created; (1) for the maintenance and support wholly or partially of one's family, children or descendants and (2) for the maintenance and support of the appropriator during his lifetime or for the payment of his debt

"provided that the ultimate benefit is in such a case expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussulman law as religious, pious or charitable purpose of a permanent character."

It dispels the doubt caused by conflict of authority on the point whether the appropriator could make any reservation for his own maintenance.

The Wakf Validating Act amounts to a statutory recognition of the views of West, J., if not entirely at least very substantially as set forth in *Fatima Bibi* v. *Advocate-General* (1) (at p. 53).

"A wakf must be certain as to the property appropriated, unconditional, and not subject to an option. It must too, have a final object which cannot fail and this object it seems must according to the better opinion be expressly set forth."

Under the Act, the final object need not be explicity declared.

In *Muzhuroolu Huq* v. *Puhraj Ditarey* (2), Kemp, J., observes (at p. 237):

"we are of opinion that the mere charge upon the profits of the estate, of certain items which must in course of time necessarily cease being confined to one family and for particular purposes, and which after they lapse, will leave the whole profit intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law. A person may make an endowment settling lands on himself and enjoying the profits during his lifetime, and after his lifetime devoting the profits to the support of the poor, the main object of the Mahomedan law being that the profits of the land endowed should be endowed for a purpose which always remains in existence. Now, the poor are always with us, and, therefore, a man making an endowment and enjoying the profits during his lifetime, to go to the poor after his death, does not make the endowment for an uncertain or nonexistent object."

Under the Mahomedan law as distinguished from the text of the Wakf Validating Act, an ultimate dedication to the poor was necessary to indicate the perpetual character of the disposition.

To go back for a moment to the decision of West, J., in the case already referred to. The learned Judge observes (at p. 53):

"If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a wakf is not made invalid by an intermediate settlement on the founder's children and their descendants. The benefits, these successively take, may constitute a perpetuity in the sense of the English law, but according to the Mahomedan law that does not vitiate the seltlement provided the ultimate charitable object be clearly designated. (If the words

(1) [1881] 6 Bom. 42.

'clearly designated' in the above text mean expressly declared, to this extent, the law has been modified by statute). And he further observes (at p. 54) should the intermediate purpose of the dedication fail, the rule of Mahomedan law appears to be that the final trust for charity does not fail with them. It is but accelerated, being itself regarded as the principal object in virtue of which effect is given to the accompanying and intervening dispositions."

Farran, J., discusses, this aspect of the case in *Amrutlal* v. *Sheikh Husain* (3), (at p 502). Mr. Bailie's statement of the law is clear. He says :

"Mr. Hamilton has unnecessarily restricted the legal meaning of wakf to appropriations of a pious or charitable nature (Hidaya Vol. II, note p. 334)"

and he has been followed by Sir William Macnaghten, who renders the word by "endowments." But it will be seen hereafter that the term is more comprehensive and includes settlements on a person's self and children, p. 549, note 3 ; see, too, Introduction, p. 36, where he says :

"with regard to its objects, two conditions are required. There must be some connexion between them and appropriator ; and these must be of such a nature that taken together they can never fail. The poor are held to answer both these conditions, because they are supposed to be connected with every body and because 'there will always be poor in the land' . . . . one class of appropriations I have designated by the name of 'settlement' to distinguish them from "endowments" which have hitherto been supposed by English writers to be the only proper objects of appropriation. These are appropriations by a person for the benefit of himself, his children. kindred or neighbours. Thus a man may settle his land 'on himself and after him on such an one and then upon the poor' . . . . so, also if he should say upon my child and child of my child and child of the child of my child, the produce is to be expended on his child for ever so long as there are any descendants."

According to Mr Bailie the wakf is valid though a purpose is mentioned which may fail, for in that case the rent or produce would revert to the poor, which must be supposed to be the appropriator's design though he should fail to mention it (p. 553). Introduction (p. 36, Book 9 on appropriations) is only an amplification of the above quoted introductory passage. It is founded on the work which forms the basis of Mr. Bailie's digest, the Alamgiri. In his view, settlements of almost any description may be created provided there be an ultimate remainder in favour of charity or religion to ensure their perpetuity. The logical deductions from the arguments of Abu Yusuf are responsible for this wide extension of the term "wakf". Muhammad would confine it to its more legitimate purpose.

The Wakf Validating Act appears to have extended the rule of Mahomedan law as formulated by the aforesaid Judges to this extent that the ultimate gift in favour of charity or any other meritorious object under the Mahomedan law need not be expressed but may also be implied.

There is no evidence before this Court that according to its customary meaning the term wakf imparts an ultimate benefit to the poor. According to Abu Hanifa wakf implies giving in charity. Muhammad agrees with him but insists upon a declaration that the appropriation was intended to be perpetual.

Ameer Ali, J. in *Bikani Mia* v. *Sukhlal* (4), (at pp. 132 to 177) has brought under contribution if not all, at least, all the authorities on the subject which were available to that great Judge and scholar. He cites a passage from Zakihratul Fatawa (taken from the Introduction to Morley's Digest). It is laid down in the book Ajnas that

"if a man makes a wakf and lays down in it with respect to himself that he should, during his life time, eat out of it and feed those whom he likes that after him it should go to his child, his child's child and to his posterity for ever, so long as it may continue and that upon its becoming extinct, it should go to the poor, this could be valid according to Aboo Yusuf, may the mercy of God be on him, and it will not be disposition in the nature of a will in favour of his child, the child eating out of a property belonging to God the most High. Do you not see that when a man makes a wakf in favour of his children and their children so long as their posterity may continue and gives it afterwards to the poor it is valid."

Bailie, in his Digest on Mahomedan law (1865 edition p. 557) states the law in the following terms :

"It is a further condition according to Aboo Haneefa and Mahammed that the ultimate destination to which the rent or produce is to be applied is one that can never be cut off or fail, and unless such be mentioned in the wakf it is not valid according to them. But according to Aboo Yusuf the mention of it is not a condition. Nay. the wakf is valid in his opinion though a purpose is mentioned which is actually cut off or fails, for in that case, the rent or produce would revert to the poor, which

(2) 13 W. R. 235.
(3) [1887] 11 Bom. 492.
(4) [1893] 20 Cal. 116 (F.B.).

must be supposed to be the appropriator's design, though he should fail to mention it."

Again at p. 559.

"The word "waqf" alone or in combination with Hoobs establishes a wakf according to the approved opinion which is that of Aboo Yusuf. If one should say "I have made this my land prohibited" or "it is prohibited" that would be the same in the opinion of Abu Yusuf according to Abu Jaffar as if he had said "appropriated." If a person should say.

this my land is apropriated for such an one "or on my son" "or the poor of my kindred being good persons "or orphans" and the appropriation of it is not to be reversed it would be no wakf according to Muhammad, because it is for a purpose that may be cut off or fail and is not perpetual but it would be wakf according to Aboo Yusuf because the making of it perpetual is not a condition with him."

Mr. Amir Ali, in his Tagore Lectures on Mahomedan law (vol. 1, edn. 5. p. 198)

"under the Mahomedan law the ultimate beneficiaries of every wakf for which no other object has been specified are the poor and indigent. No wakf therefore is likely to fail."

His opinion seems to be in accord with that of Aboo Yusuf. It is significant that at pp. 210 and 211 he states that "Sodqa Maukoofa" or "Maukoofa Sodqa" imply benefit to the poor in perpetuity. The case reported in *Fakhuruddin Shah* v. *Kifayat Ullah* (5), illustrates the numerous ways in which wakf may be declared or created. The word "wakf" need not be used at all and, therefore, it could not be said that the customary mode of appropriation is by using the word "wakf" although there can be no doubt that the word is frequently employed. The definition of the word "wakf" as given in the Wakf Validating Act, would suggest that before the Act could be applied the purpose of the wakf had to be indicated in the text, that is, it should be indicated either in the instrument creating the wakf or in the transaction constituting the dedication. S. 3 requires that the ultimate object should be indicated either expressly or by implication.

Babu Shama Charan Sarkar, in his Tagore Lectures on Mahomedan law (1875 edition p. 115) says:

"Thus the appropriation becomes valid, that is absolute, according to the various opinion of the three great lawyers according to Aboo Haneefa in consequence of the appropriator's declaration and a Magistrate's subsequent decree according to Aboo Yoosuf by his simple declaration and according to Muhammad by his declaration and delivery to a procurator."

(5) [1910] 7 A.L.J. 1095=8 I. C. 578.

It ought to be borne in mind that the passage quoted above relates to the formalities necessary for the creation of a wakf and although there is considerable divergence of opinion this passage is not helpful except indirectly, for the determination of the crucial question as to whether the mere use of the word "wakf" or the making of a wakf in favour of ones descendants would necessarily predicate an ultimate dedication in favour of the poor or some other meritorious object. At p. 120 of the lectures the opinion of Aboo Haneefa and Muhammad has been set out in very clear terms. It is further a condition that the ultimate destination to which the rent or produce is to be applied is one that can never be cut off or fail, and unless such be mentioned in the wakf it is not valid.

The foot-note shows that the above passage has been taken from Vol. 2 of Fatawa Alamgiri and has been reproduced in Bailie's Digest at pp. 557 and 558. Immediately after the aforesaid text, Mr. Sarkar adds in small print "According to Aboo Yusuf". The mention of it is not a condition. Nay, the wakf is valid in his opinion though a purpose is mentioned which is actually cut off or fails, for in that case the rent or produce would revert to the poor, which must be supposed to be the appropriator's design, though he should fail to mention it.

The appellant strongly relies upon the opinion of Imam Aboo Yusuf and contends that the mere use of the word "wakf" unaccompanied by anything more, was sufficiently wide in its significance to include within its orbit an ultimate dedication to the poor or to meritorious objects.

It cannot be questioned that the opinion of Aboo Yusuf ranks very high in the Hanafi school. But his opinion is not shared either by the great master or by his co-disciple. The recognized canon of construction is what is stated by Mahmud, J. in *Agha Ali Khan* v. *Altaf Ali Khan* (6) at p. 449):

"It is a general rule in interpretation of the Sunni law that when there is a difference of opinion between Imam Abu Hanifa and his two disciples Kazi Abu Yusuf and Imam

(6) [1892] 14 All. 429=(1892) A. W. N. 187 (F.B.).

Muhamad, the opinion of the majority prevails."

It is also contended that where the great Mahomedan Jurists are divided in opinion, the Qazi is entitled to decide the point on grounds most conformable to justice and equity. It is doubtful if it would be more in accord with equity to impart a final trust in favour of an unfailing object, where the text is silent on the point and the conduct of the wakif proves that he wanted to create a perpetuity in favour of his family and had no great tenderness for charity.

It is next argued that the opinion of Aboo Yusuf is entitled to greater weight than that of the other two. This plea may be disposed of briefly with the remark that the relative weight of the authority of one or the other of the three great jurists is unsettled in Anglo Mahomedan law and there is considerable difference of opinion on the point. As will be apparent from a reference to *Sheikh Abdool Shukkoor* v. *Raheemoon nissa* (7), *Abdul Kadir* v. *Salimanissa* (8), *Muhammad Azizuddin Ahmad Khan* v. *Legal Remembrancer* (9), *Bikani Mia* v. *Suk Lal Podder* (4) and *Ma E. Khin* v. *Maug Sein* (10)

In order to find whether there was an implied dedication in favour of the poor or for any meritorious object the document dated 23rd October 1913, should be construed as a whole, and it may be permissible to look at the surrounding circumstances to gather whether there was an implied intention on the part of the testator. There is no express provision to that effect in the document. There is nothing in the document from which an implied intention may be gathered. On the other hand, Cl. 11 of the will clearly states that this was a wakf for the family and not for the public and so the public had nothing to do with it. This would suggest that there was no implied intention of ultimately dedicating the property to recognized purposes of charity etc. Assuming that the testator could by the mere use of the words "I make a wakf of all my property" create a valid endowment in favour of the poor because the term "wakf" implies an ultimate dedication to the poor this cannot advantage the plaintiff in the present suit He does not make a wakf in such general terms. He indicates the objects of the endowment and limits them to the members of his family. He states in explicit language that this wakf is intended exclusively for the benefit of his family and the members of the public have no right of administration or control. It would be extremely difficult to hold under these circumstances that an ultimate benefit to the poor could be implied from a transaction of this character.

As has already been noticed, the one idea which obsessed the mind of the testator was the preservation of the family and the maintenance of his family members from generation to generation. He did not at all care for charity. There is not a particle of evidence on the record that during the brief period of his life after the execution of his last will he ever applied any portion of the income of the property towards charitable objects. But this need not be pressed too far. As has already been indicated the income of the property cannot be ascertained from the evidence which has been placed before this Court. It may be doubted, if after paying the Government revenue and the taxes and defraying the expenses of the repairs etc, any residue was left at all to be devoted to purposes of charity The instrument read as a whole reminds one of a similar instrument which provoked Farran, J's criticizm that the instrument created "the worst and most pernicious kind of perpetuity." It is not surprising that the Subordinate Judge, under the circumstances came to the conclusion that the instrument in question did not fulfil the requirements of Act 6 of 1913 and consciously or unconsciously, he was influenced by some of the considerations which powerfully weighed with Lord Hobhouse in the case of *Abdul Fata* v. *Rasamaya Dhur Chaudhary* (11) (*at p.* 87 *of* 22 *I. A.*)

"But it would be doing wrong to the great law-giver to suppose that he is thereby commending gifts for which the donor exercises no self-denial in which he takes back with one hand what he appears to put away with the other which are to form the centre of attraction for accumulations of income and further accessions of family property, which carefully protect so-called managers from

(7) 6 N. W. P. 94.
(8) [1886] 8 All. 149=(1886) A. W. N. 53 (F.B.).
(9) [1893] 15 All. 321=(1893) A. W. N. 109.
(10) A. I. R. 1925 Rang. 71=2 Rang. 495.
(11) [1895] 22 Cal. 619=22 I. A. 76=6 Sar. 275 (P.C.).

being called to account; which seeks to give to the donors and their family the enjoyment of their property free from all liability to creditors and which do not seek the benefit of others beyond the use of empty words."

Considering all the circumstances the instrument in controversy does not create a valid wakf in conformity to the provisions of Act 6 of 1913. The document offends against the rule of perpetuity. I would dismiss this appeal with costs.

Niamatullah, J.—(After stating facts the judgment proceeded). There is little doubt that the dispositions contained in the will, the codicil and the deed of testamentary wakf were mostly prompted by a desire to preserve the property for the maintenance of the family of Mubarak Ali and to prevent the same being sold or otherwise made responsible for the debts of his sons the elder of whom Ali Ahmad had been adjudicated an insolvent in 1910. The learned Subordinate Judge is of opinion that:

"The Mahomedan law never recognized any disposition as wakf if it was intended to be used as a cloak to keep the property for the family by depriving the creditors of their right to recover the debts from the property. The criterion under the Mahomedan law was much more strict than under the new Wakf Act."

He seems to think that a person professing the Muslim faith should do nothing with respect to his property which may have the effect directly or indirectly to hamper the creditors of his heirs in the realization of their hope of obtaining satisfaction of their debt advanced to such heirs at a time when they had no property of their own but were expected to succeed to the estate of their father. It is impossible to subscribe to this doctrine. Neither the Mahomedan law nor any other law imposes any obligation on a person to keep his property intact for the benefit of the creditors of his would-be-heirs. In my opinion it is not only permissible but in many cases desirable for a person to place his own property beyond the reach of the creditors of his expectant heirs whose profligacy creates an apprehension lest his property which might have been acquired by his own exertions, by practising economy, and even by making sacrifice should be frittered away after him to the utter impoverishment of his family. The creditors have no equities against him. The case does not partake of the considerations which are present where a person attempts to defeat or delay his own creditors. If the deed is otherwise valid the intention to defeat the creditors of his heirs cannot affect its validity.

The sole question is whether the deed of testamentary wakf quoted above falls short of the requirements of Mahomedan law read with the Wakf Validating Act in any respect. A wakf by will is not valid except to the extent of one third of the property of the testator without the consent of heirs given after his death when the succession opens. All the three deeds were attested by the heirs in token of their consent. If this had been the only act of consent the validity of the deed could not be upheld to the extent at least of two thirds of the property affected thereby. But it is not disputed that after the death of Mubarak Ali the mutwallis nominated in the deed, who seem to be strangers to the family, took possession of the property and have remained in possession thereof since the death of Mubarak Ali which occurred early in 1914. None of the heirs ever impugned the document or asserted their right of inheritance. They have been content to receive their allowances in terms of the deed. Except Ali Ahmad defendant 4 no other heir is a party to this. He has not contested it Under these circumstances the validity of the wakf has not been questioned in this Court and does not seem to have been questioned before the lower Court for want of consent of heirs given after the death of the testator

It has been contended and the contention has found favour with the Court below that though the wakf in question may be otherwise valid under the Mahomedan law it cannot take effect as such for the reason that the ultimate benefit is not

"expressly or impliedly reserved for the poor or for any other purpose recognized by the the Mussulman law as a religious, pious, or charitable purpose of a permanent character."

That there is no express reservation for the poor may be conceded. I am, however, unable to accept the contention that the ultimate benefit to the poor in the remote contingency of total extinction of the family of the testator is not implied. Nor can I accede to the view that no benefit is

"expressly or impliedly reserved . . , . for any purpose recognized by the Mussulman law as a

religious, pious or charitable purpose of a permanent character."

These contentions ignore the primary and technical meaning of the term "wakf" which has been repeatedly used in the deed and which, on the authorities, carries with it the implication of charitable disposition of a permanent character, including the maintenance of the founder's descendants which is in itself regarded as a charitable object in Mahomedan Law. It ignores likewise the history and the circumstances which led to the enactment of the proviso to S. 3 of the Wakf Act, relied on by the respondents.

"'Wakf" in its primitive sense, means detention. In the language of the law (according to Haneefa) it signifies the appropriation of any particular thing in such a way that the appropriators' right in it shall still continue, and the advantage of it go to some charitable purpose in the manner of a loan . . . . . But since (like a loan) it is not of an absolute nature the appropriator is held to be at liberty to resume it and the sale and gift is consequently lawful. According to the two disciples, waqf signifies the appropriation of a particular article, in such a manner as subjects it to the rules of divine property whence the appropriator's right in it is extinguished and it becomes a property of God by the advantage of it resulting to his creatures. The two disciples, therefore, hold appropriation to be absolute ; and consequently, that it cannot be resumed, or disposed of by gift or sale ; and that inheritance also does not obtain with respect to it . . . . Thus the term wakf in its literal sense comprehends all that is mentioned, both by Haneefa and by the two disciples : Hiday Book 15, Hamilton's Edn. 2. p. 231 quoted by P. C. . in *Jewin Doss* v. *Shah Kubeerooddeen* (2), at p. 421."

The arguments of Abu Haneefa by which he supports his view are fully set forth in Hidaya and concluding from one of them he (Abu Haneefa) states :

"It is therefore, evident that a right of property in it still continues ; and it is also evident that this right of property must rest with the appropriator, and not with any other person, as he alone is entitled to expend the revenue arising from it upon the objects of the appropriation, and to appoint a procurator ; but yet, as the term wakf implies giving in charity. the use of it resembles that of a loan : see Hamilton's Hedaya Edn. 2, p. 232 Col. 1 bottom"

Thus, according to Abu Haneefa charitable disposition is implied in the use of the term wakf.

"The argument of Abu Yusuf is that the design of the appropriator is to perform an act of piety acceptable to God ; and this is fully answered in either case; because piety on some occasions may consist in the appropriation of an article to a terminable object, and it may on other times consist in the appropriation of a thing to an interminable object ;—the appropriation is, therefore, equally valid in both instances. Now some say perpetuity is essential to it. Abu Yusuf, however, does not consider the mention of perpetuity as essential, as the terms appropriation or charity do clearly argue this much, according to what was before advanced, that appropriation like manumission signifies an extinction of a right of property without a transfer of that right. According to Mahomed on the other hand the mention of perpetuity is an essential ; because appropriation is a charitable donation of the use of a thing or of actual product ; and as these are sometimes temporary and sometimes perpetual, the general mention of it cannot be understood as a perpetuation ; it is, therefore, indispensable that perpetuity be expressly mentioned (Hamilton's Hidaya Edn. 2 p. 234 Col. 2).

It should be noted that even acording to Mahomed charity is implied to every wakf.

It appears therefore from these passages quoted from a well-known book on Mahomedan law that the term "wakf" implies a charitable disposition according to all the three doctors. In the view of the two disciples which became the accepted law private ownership is completely extinguished in case of wakf property which becomes vested in God subject to the rules of divine property. Abu Haneefa's conception of wakf, viz., that it remains the property of the wakf (settlor) and only the usufruct is "freed" for charitable purposes has not found favour.

The opinions of Mahomed and Abu Yusuf differ in two important respects. Firstly, according to Mahomed the wakf (settlor) cannot reserve any benefit to himself and in this respect he agrees with Shia doctors while according to Abu Yusuf the settlor can make reservations in his own favour, and, secondly, Mahomed insists on the technical compliance with his rule that express mention of perpetuity or of the ultimate benefit to the poor should be made in the instrument of waqf while according to Abu Yusuf the implication arising from the use of expressions of sufficient amplitude is all that is needed.

"Perpetuity is also among the conditions of wakf according to all opinions ; though, according to Abu Yusuf,the mention of it is not a condition, and this is correct." (Bailie p. 557). It is further a condition, according to Abu Haneefa and Mahomed, that the ultimate destination to which the rent or produce is to

(12) [1840] 2 M. I. A. 390=1 Suther 100=1 Sar. 206 (P.C.).

be applied is one that can never be cut off or fail, and unless such be mentioned in the wakf it is not valid according to them. But according to Abu Yusuf the mention of it is not a condition. Nay, the wakf is valid, in his opinion, though a purpose is mentioned which is actually cut off or fails ; for in that case the rent or produce would revert to the poor, which must be supposed to be the appropriator's design though he should fail to mention it" (Bailie pp. 557-558).

Bailie has noted a number of formulas under the heading "words by which wakf is and is not completed" and among them mentions the following :

"This my land is sudukah, appropriated to" what is "good" or "good purposes," also amounts to a wakf. Though no mention be made of sudukah, yet if wakf is mentioned, as by a person saying this my land is wakf "or I have made this wakf" or appropriated" the land would be a wakf for the poor, according to Abu Yusuf. And Sadurash Shaheed and the Sheikhs of Balakh have said:

"Decrees are given on the opinion of Abu Yusuf and we decree according to it,"

also from "regard to custom." And if he should say "it is appropriated to Almighty God for ever," it would be lawful without the word sudukah and would be a wakf for the poor. The word "wakf" alone or in combination with hoobs establishes a wakf, according to the approved opinion, which is that of Abu Yusuf," the ultimate benefit to the poor is taken to be implied in the word "wakf" not only because Abu Yusuf has so construed it but also because its customary meaning imports such a benefit.

In his Tagore Law Lectures Mr. Shama Charan Sarkar mentions the rule that

"the express term by which wakf can be constituted is "wakf-to" (I have appropriated) and not any other."

and in commenting on it observes that

"the terms "Harm to (I have consecrated)" and "Saddakto (I have bestowed)" do not constitute wakf without accompanying circumstances, as by themselves they are susceptible of another interpretation besides waqf." (Tagore Law Lectures by S. C. Sarkar, Lecture XIX (D CCC XIV).

In the Tagore Law Lectures on Mahomedan law (1884) Mr. Amir Ali has stated the rule in these terms :

"If a person declare simply "this my land is maukoofa" and fix the boundaries and say nothing more, according to Abu Yusuf, it would coustitute a valid wakf and the benefit thereof would go to the poor. If he say this land of mine is sadkah maukoofa or maukoofa sadkah "and say nothing more, it will be a valid wakf (according to Abu Yusuf Mahomed and Hillol) and the benefit will go to the poor in perpetuity, for the poor never become extinct and as the proper objects of a charity are the indigent, neither the express mention of the poor nor of perpetuity is necessary . . ." If he use the expression sadkah maukoofa abadi it is valid according to all jurists (pp 210-211). . . ."

The poor form by necessary implication of law, the ultimate beneficiaries of every trust, even such as private in their nature, like family settlements, where, therefore, the primary object fails, such failure instead of voiding the trust "only accelerates" the ultimate application.

The Sirajul Wahaj, as quoted by Tyabji in his principles of Mohamedan Law Edn. 11, p. 593, states that :

"when a person constitutes a waqf generally without designating the object to which it should be applied it is lawful and this is correct ; there are several words which are express in their meaning and the use of which clearly constitutes a wakf because they convey in themselves the intention to dedicate, e. g.,' wakafto ; "haramto ; hahasto" sahalto etc. . . . Tyabji similarly quotes the authority of 'Wajizul Mohit' for the proposition that' If a man were to say. "This my land is maukufa" or "moharama" or "mahbusa" it would constitute a valid wakf according to Abu Yusuf and this is most correct for he, the wakif has mentioned 'wakf' unrestrictedly and an unrestricted wakf is for the poor by custom and practice and what is customary is as if conditioned (pp. 593-594, 2nd Edn)."

The late Mr. J. Karamat Husain has quoted a very large number of original texts to show not only that the word wakf implies a valid permanent dedication, but that in the absence of a formula verbally repeated a valid wakf cannot be constituted : see his judgment quoted in *Fakhruddin Shah* v. *Kifayat Ullah* (5) at pp. 1108-1117. He quotes 27 formulae which do or do not create a wakf according to Baharur Raik (Book on wakf p. 205 Vol. 5. Egypt Edn). Two of these are :

" '(11) This land of mine is forbidden,' (12) "This land of mine is wakf." It is said both create a valid wakf and both formulae are well known to the inhabitants of Hijaz (at p. 1110 ; 7 A. L. J. p. 1095)."

For a considerable length of time the doctrine of Abu Yusuf was accepted by text writers and acted upon in Islamic countries and also in India.

In Macnaughten's Mahomedan Law p. 341 in reply to Q. 2, the law officers observed as follows :

"It is laid down in the 'Khizanutool Mooftieen' a person made an appropriation of a village on the condition that the profits should be enjoyed by Zyed and his offspring generation after generation : in this case each

branch of lineal descendants will share alike, whether consisting of one individual or of many persons ; and the profits will be enjoyed by the descendants in this manner until the lineage becomes extinct, the nearer descendants continuing to exclude the more distant whose ancestors are alive, and on the death of one ancestor leaving a family, his family succeeding to the portion enjoyed by him. Where one of the sharers dies childless, his portion goes to increase the joint stock and when the whole lineage becomes extinct, the appropriation should be devoted to the benefits of the poor."

It is to be noticed that the ultimate benefit to the poor was not expressly provided for, ex facie Zyed and his descendants were the only beneficiaries but the law officers evidently considered that the ultimate benefit was reserved for the poor by necessary implication.

The case of *Deod Jaun Beehee* v. *Abdollah Barber* (13) is quoted by Amir Ali, J. at p. 151 of the Report of *Bikani Mia* v. *Shuk Lal Poddar* (4). In referring to that case Mr. Amir Ali says :

"the ultimate benefit was not given to the poor in express terms. The lady dedicated the property in general terms as is customary among Mussulmans. In the first paragraph she provided that after paying the revenue and taxes she should appropriate as much of the produce as was required for her own use and the remainder to "hereditable and charitable purposes." She provided further that her several relatives should receive their maintenance as heretofore, that she should have the power of increasing or decreasing the number of incumbents ; and the repairs of the mosque etc. and other expenses connected therewith in Ramzan and Eid should be defrayed from the produce. . . . , it will be seen that the usufruct was, after paying the revenue to be appropriated to the endower's own use and towards the maintenance of the members of her family. The amounts disbursable for the repairs of the mosque and for the performance of the festivals were postponed until after the maintenance of the family. But neither the decision of the Judges nor the opinion of the law officers turns upon this provision, and nobody said that the provision for the maintenance of the family invalidated the wakf."

The question which called for decision before Mr. Amir Ali was somewhat different and he quoted the case reported by Fulton as an authority for the proposition that where benefit for the poor is not expressly reserved the validity of the wakf is in no way affected.

Mr. Amir Ali has quoted in the same case a larger number of decisions collected in various books of authority in which wakfs were upheld though express mention of benefit to the poor was not made : see pp. 140, 141, 142, 143, 151, 152, 160-161.

Subsequent decisions made great inroads on the Mahomedan law pure and simple, at least on the law as propounded by Abu Yusuf whose authority was universally accepted before.

In *Abdul Ganne Kasam* v. *Husen Miya Rahimtulla* (14) it was laid down that :

" To constitute a valid wakf according to Mahomedan law it is not sufficient that the word " wakf " be used in the instrument of endowment. There must be a dedication of the property solely to the worship of God or to religious and charitable purposes. A Mahomedan cannot, therefore, by using the term " wakf ", effect a settlement of property upon himself and his descendants which will keep such property inalienable by himself and his descendants for ever ".

In *Fathima Beebee* v. *Advocate General of Bombay* (1) the law was more correctly stated to the following effect :

" A wakf must be certain as to the property appropriated, unconditional and not subject to an option. It must have a final object which cannot fail and this object must be expressly set forth . . . . . If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a wakf is not rendered invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take may constitute a perpetuity in the sense of English law, but according to the Mahomedan law that does not vitiate the settlement provided the ultimate charitable object be clearly designated. "

The decision in this case refers to a number of cases decided by Calcutta and Bombay High Courts and though it does not refer either to Abu Yusuf or Mahomed's views it is obviously based on the views of the latter.

In *Amrut Lal* v. *Sheikh Husain* (3) at 504 Farran, J.. observed :

" If I were at liberty to draw my own deduction from the sayings of Hanifa and the two disciples and to decide in the light of modern jurisprudence between the conflicting opinions of the latter I should without doubt give the preference to the view of Mahomed and refuse to press the arguments of Abu Yusuf to their legitimate conclusions ".

The conclusion which according to that learned Judge is :

" properly deducable from the above cited cases is . . . . that where the primary and general object of the endowment is for the furtherance of religious or charitable purposes, or for the worship of God, such endowment is valid, although the ' wakfnama ' may also provide for the support of the family and descendants of the fonnder ; but that where the wakfnama has for its real object nothing connected with the worship of God or reli-

(13) Fulton 345.

(14) 10 B. H. C. R. 7.

gious observances and provides only in a very remote contingency for the poor, such remote provision does not validate a perpetuity for the benefit of the dedicator's children and their descendants so long as any such exist."

In *Nizamuddin Gulam* v. *Abdul Gafur* (15) it was laid down that :

"A Mahomedan cannot settle his property in wakf on his own descendants in perpetuity without making an express provision for its ultimate devolution to a charitable or religious object."

The learned Judges refer to the difference of opinion between Abu Yusuf on the one hand and Abu Haneefa and Mohammad on the other and follow the latter. It was therefore that they laid emphasis on an express mention being made of ultimate benefit to the poor.

A year latter it was definitely laid down by their Lordships of the Judicial Committee in *Mohomed Ahsan Ullah Chowdhri* v. *Amarchand Kundu* (16) that unless property is substantially dedicated to religious or chartitable purposes no valid waqf can be created.

In the case *Bikani Mia* v. *Sukh Lal Poddar* (4) Mr. Amir Ali in a dissentient judgment attempted to re-establish the law which was unsettled by the case last quoted and supported his view by numerous references to works of undoubted authority. He also maintained that the law as propounded by Abu Yusuf was the correct and generally accepted one but in cases that followed, their Lordships of the Privy Council confirmed their view and extended it by holding that a wakf by which benefit to the poor is reserved only in the remote contingency of failure of all heirs to the settlor was illusory and void.

Thus before the Wakf Validating Act 6 of 1913 was passed the law relating to wakf as applicable to Hanafi Mohammadans was in a very unsatisfactory state owing to conflicting opinions of Abu Haneefa, Mohammad and Abu Yusuf and to the judicial decisions, some being based on the authority of one of these doctors and some on the other or others and some again on considerations derived from the English rules as to perpetuities and from notion of what should be considered to be charitable objects.

It should not be assumed that if two of the three jurists were in agreement against the third the opinion of the majority must always prevail. On consideration of a large number of cases mentioned in the foot-note Tyabji has stated his conclusion in his book on Mahomedan law as follows :

"11A. When Muslim jurists of authority have expressed dissenting opinions on the same question, the Islamic Courts presided over by the Qazi, have authority to adopt that view which in the opinion of the presiding officer is most in accordance with justice in the particular circumstances" (p. 71, Edn. 2).

Wilson likewise quoting a number of cases states that

"The relative weight of these authorities is unsettled . . . . . But the scale may be turned in favour of any one of them by proof that his opinion was preferred by the compiler of some standard Digest, such as the Hedaya or "Fatawa Alamgiri" (S. 15 p. 98 Edn. 4).

The points of difference on this branch of the Mahomedan law due to causes already indicated and existing before the passing of the Wakf Validating Act 6 of 1913 may be summarized below :

(a) Whether a waqf was revocable before a decree of Court was passed in confirmation thereof and the property continued to be vested in the settlor as maintained by Abu Hanifa or such property became vested in Almighty God subject to rules of divine property as maintained by the two disciples Mohammad and Abu Yusuf ; (b) Whether the property to be made wakf must be divided property and not undivided or mushaa as maintained by Mohammad or whether the validity of the waqf is not affected by the property being undivided as held by Abu Yusuf, Abu Hanifa being silent on the subject ; (c) Whether the settlor can validly make provision for his own maintenance by reserving the whole or part of the income of the wakf property for himself, Mohammad being of opinion that he cannot, Abu Yusuf holding the contrary and Abu Hanifa being apparently silent on the subject. (d) Whether a wakf not being substantially for charitable purposes but for the benefit of the settlor's descendants and family, and on total extinction thereof, for the benefit of the poor, is illusory and void as ruled by some Indian High Courts and by their Lordships of the Privy Council or whether such wakf is valid as maintained by majority of the Mahomedan jurists and text writers ; (e) Whether ultimate benefit to the poor which ensures perpetuity should be expressly mentioned as held in some cases

(15) [1889] 13 Bom. 264.
(16) [1893] 17 Cal. 498=17 I. A. 28=5 Sar. 476 (P. C.),

decided by some Indian High Courts on the authority of Abu Hanifa and Mahomed or whether the use of an appropriate expression such as "wakf," the literal, technical and customary meaning of which implied dedication for charitable purposes and ultimate benefit to the poor.

As to (e) it should be remarked that there is no difference of opinion among the three Muslim Doctors that the word "wakf" "Sudakah" or like expression carries with it the implication above mentioned. In many text books reference to which has been made at an earlier part of this judgment the writers thereof accept such meaning as warranted by the etymological and customary sense. According to Abu Hanifa and Mahomed no implication however clear is sufficient and express mention of perpetuity or of ultimate benefit to the poor is essential. The most typical of cases in which such objects may be implied in words or in the context will not meet their requirement of the law.

The object of the Wakf Validating Act 6 of 1913 was to remove the uncertainty which crept in the law as regards the points summarized by me above. The "doubts" referred to in the preamble are none other than those stated above. Accordingly, the definition of the "wakf" given in S. 2 of the Act makes it clear that wakf property is "dedicated property" and discards the conception of Abu Hanifa that the wakf property continues to belong to the settlor. The definition likewise indicates that "any property," divided or undivided, may be made the subject of the wakf. S. 3 declares that the settlor may make provision for his own maintenance and for that of his family and descendants. S. 4 authoritatively lays down that no wakf shall be deemed to be illusory only because the

"benefit reserved therein for the poor or the religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family children or descendants of the person creating the wakf."

The proviso to S. 3 is obviously intended to set at rest the controversy between Abu Yusuf, the text writers and judicial decisions including that of Amir Ali, J. in *Bikani Mian* v. *Shuku Lal Poddar* (4), on the one hand and Abu Hanifa, Mohammad and judicial decisions like *Abdul Ganne Kasam* v. *Hussein Miya Rahimtula* (14), *Fatma Bibi* v. *Advocate General of Bombay* (1) and *Nizamudin Gulam* v. *Abdul Gafur* (15) on the other, as regards the necessity of making express mention of perpetuity or ultimate benefit to the poor. The statute has now dispensed with the necessity of such express mention being made by providing that the same may be

"expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussulman law as a religious, pious or charitable purpose of a permanent character."

It would have been most surprising if the legislature had failed to take notice of such a thorny question as the necessity or otherwise of express mention being made of the unfailing object. Mr. Tyabji thinks that the Act must be taken to lay down (in accordance with the definition in S. 2) that the support and maintenance of the wakif's family etc. must be considered to be a purpose recognized by the Mahomaden law as religious, pious and charitable. This is the view that was put forward by Amir Ali, J., with great learning in his dissenting judgment in *Bikani Mia* v. *Shuku Lal* (4) where he says :

"When a wakf is created constituting the family or descendants of the wakif the recipients of the charity so long as they exist, the poor are expressly or impliedly brought in not for the purpose of making the wakf charitable (for the support of the family and descendants is a part and parcel of the charitable purpose for which the dedication is made) but simply to impart permanency to the endowment."

'Probably the Act is based on the same view . . .' (Tyabji's Mahomaden law, p. 529, 2nd Edn.).

I am unable to accept the view that the Wakf Act gives effect to the view of West, J., in *Fatma Bibi* v. *Advocate General of Bombay* (1) in which express mention of the unfailing object is insisted upon. The Act on the contrary does not so require. An intention to dedicate for the benefit of the poor or to some charitable or religious object if implied in the words of sufficient import or in the context is enough according to the Act.

Tyabji has enunciated the Mahomaden law applicable to Hanafis coupled with the Wakf Validating Act, in the following paragraphs :

"Section 463-A. In accordance with Hanafi law."

(a) A 'wakf' that does not expressly purport to be limited in point of duration, will, according to Abu Yusuf's exposition of the Hanafi law be presumed

to be perpetual, and effect will be given to it.

(b) According to Abu Hanifa and Inam Mahomed, a 'wakf' purported to be made for objects that will fail, is void. According to Abu Yusuf, such a 'wakf' is not void, and it will be presumed that, on failure of the objects expressly referred to, it is for the benefit of the poor in perpetuity, (c) semble, the ultimate benefit of the 'wakf' property may be reserved for any purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character. Such reservation may be either express or implied (S. 463-A (1), (a), (b), & (c), Edn 2 pp. 550-551. He adds in the foot-note that the Wakf Act has given effect to the opinion of Abu Yusuf. His own opinion on the question is stated in these words :

"It is submitted that in many cases the question would be resolved into one of the construction of the particular 'wakf.' If it appears that the real intention was to dedicate only for a fixed period, then what purports to be a 'wakf' for carrying out such an intention cannot be given effect to. Such an intention may appear (or may be betrayed) in either of two ways : (1) failure to mention that the 'wakf' is to prevail in perpetuity, or (2) failure to mention objects that will continue in perpetuity. The views of Abu Yusuf are expressed with reference to the first contingency and of the other authorities with reference to the second.

But, on the other hand, failure to do either things, is not, it is submitted, in itself necessarily conclusive, from the surrounding circumstances and from the terms of the "wakfnama" it may appear that the 'wakf' was intended to be a perpetuity ; and that such objects as would never fail were also intended to be benefited. (page 533, Edn. 2)."

Reverting to the provision of the testamentary wakf made by Mubarak Ali we find that in the preamable he declares all his property as "wakf" unreservedly. If nothing else had appeared in the deed the property would have been considered dedicated impliedly for the poor in general. In fact the preamable is a substantial reproduction of the well-known formula used in creating wakfs. In the clauses of the deed which follow the gross income of 2/3rd of the property is reserved for the benefit of his descendants generation after generation thus postponing the benefit to the poor implied in the preamable until the extinction of his lineage. But for the express provision for his descendants the entire benefit would have enured to the poor immediately. Some charitable objects are to be fed *in presentæ*. This provision is not without its significance as indicating a charitable and religious purpose concurrent with the maintenance of the family. As public charges such as revenue, and cost of repairs and similar expenses, have to be paid out of 1/3rd of the income which is reserved for expenditure on 'good acts' such as Fatiha etc., the amount thus directed to be spent on these charities alone cannot be ascertained.

Clause 7 has been adversely commented on as betraying a desire to accumulate the income for acquisition of other properties. It must be, however, noticed that the direction to multiply has no reference to a time when his lineage ceases to exist but is confined to the time when it continues to exist. To my mind, when such a remote contingency happens accumulation is not to be made but the entire benefit reserved for the descendants will go to the poor.

Clause 11 has been relied on by the learned Subordinate Judge as excluding the public in general from participation in the affairs of the wakf. I think this is not the correct view of the effect of that clause. It permits recourse to law Court for vindication of the provisions of the deed of wakf in cases of attempted violation thereof but makes it clear that, being a family settlement and so long as it is such, any member of the public cannot meddle with its administration and only the beneficiaries have the right to call in question the acts of the mutwallies. This, again, unmistakably refers to a time when his descendants are in existence and not to the contingency of total extinction of his family. As regards the latter eventuality the deed is silent and the usual rules empowering the public to obtain orders of a competent Court regarding the administration of wakf will apply and their is nothing in the deed which excludes their application.

That the "wakf" which Mubarak Ali professes to make was intended to be of a permanent character does not admit of any doubt. No limit of time is fixed for its operation. Indeed, the learned counsel for the respondent maintains that the possibility of total extinction of his line in any remote future never occurred to him. A wakf otherwise than in per-

petuity is one for which a limit of time is prescribed but not where it is to continue ad infinitum. The validity of the wakf does not seem to have been impugned on the ground of want of perpetuity either in the Court below or in this Court. Stress has been laid on the absence of reservation of ultimate benefit to the poor, but I think the two questions are closely allied and mention of ultimate benefit to the poor is insisted on only to ensure perpetuity.

That the term "wakf" implies ultimate benefit to the poor or to some charitable or religious purpose has been shown above, having regard to its literal and customary meaning as generally accepted. To a Musulman it generally conveys the idea that the property designated "wakf" is not private property but is permanently dedicated to some charitable object. The word is frequently used even in deeds of Hindu endowment not in its technical Muslim sense but as denoting dedication. It is not too much to suppose that Mubarak Ali who is described as "Hakim" and presumably a man of some learning used the word "wakf" in relation to his property which he was anxious to preserve in perpetuity in the customary and generally accepted sense as the property set apart for the benefit of his family and in case of total extinction of it for the benefit of the poor. It was a mere accident that he did not mention the poor expressly. He does not divert the beneficial interest to any other family in case of extinction of his own nor does it appear that he was interested in some other class of persons in that remote contingency. The fact that the Wakf Act was availed of soon after it became law lends support to the belief that he desired to create a wakf such as is contemplated by the Act—a typical wakf Alalaulad. It has been acted upon as such for many years and unless its validity can be successfully impugned for some cogent reason it should be upheld as a dedication in accordance with the provisions of the Wakf Act. The learned Subordinate Judge has set aside the deed in its entirety. As to one-third of the property there can be no question As to whether the burden of public charges due in respect of two-thirds of the property can be thrown on the remaining one-third reserved for charities mentioned in the deed it is not necessary to consider. If the disposition be upheld as a whole the complication arising out of that circumstance will not exist.

On the view of the case taken by me this appeal must succeed. I would, therefore, set aside the decree of the Court below and grant the relief of declaration prayed for by the plaintiffs. As the litigation is in a great measure due to careless drafting of the instrument of wakf for which the testator is responsible I make no order as to costs.

By the Court.—This appeal is dismissed with costs.

R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 195

SULAIMAN AND ASHWORTH, JJ.

Bankey Lal and *another*—Defendants—Appellants.

v.

Natha Ram and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 63 of 1924, Decided on 18th October 1927, against decision of Dist. Judge, Agra, D/- 30th October 1922.

*** (a) Civil P. C., O. 41, R. 22—Cross-objections cannot be filed against pro forma co-respondent not interested in appeal.**

Where the person against whom cross-objections are filed is not interested in the appeal and is a mere pro forma respondent, no cross-objections can be validly filed against him: 23 *All.* 93 : 28 *All.* 95, *Foll.* [P 196 C 1]

The plaintiffs impleaded one *J* alleging him to be a partner of the defendants' firm and claimed relief against him jointly with the others. *J* was not proved to have been a partner and the suit against him was dismissed. The plaintiffs filed no appeal against *J* but the other defendants filed an appeal against the plaintiffs, and impleaded *J* as a pro forma respondent.

Held: that the plaintiffs cannot take advantage of *J* having been impleaded by the other defendants, and file cross-objections against him praying that the suit should be decreed against him also. [P 196 C 1]

(b) Civil P.C., O. 41, R. 22 (3)—Substitution of words "the party who may be affected" for "appellant" in R. 22 (3) does not give absolute right of filing cross-objections against any co-respondent even not interested in appeal—Discretion under O. 41, R. 33 should not be exercised to allow such cross-objections—Civil P. C., O. 41, R. 33.

Ths amendment substituting the words "the party who may be affected" for the word "appellant" does not give a respondent an absolute right of filing cross-objections against a co-respondent, even where such co-respondent is not an interested party at all and no relief has been claimed against him in the appeal. In such cases the discretion given by O. 41

R. 33 to the appellate Court to allow cross-objection should not be exercised. [P 196 C 2]

Iqbal Ahmad and *Mukhtar Ahmad*—for Appellents.

S. N. Sen, N. P. Asthana, S. K. Das and *D. N. Gupta*—for Respondents.

Sulaiman, J.—This appeal arises out of a suit for damages on the ground that certain copyrights have been infringed. The success of the appeal depended entirely on the success of suit No. 454 of 1922 brought to set aside the sale. That suit has now been dismissed to-day. It is, therefore, conceded that this appeal must fail with costs on the higher scale. The plaintiffs have filed certain cross-objections against Janki Das, defendant. A preliminary objection is taken that no such cross-objections lie. The plaintiffs had impleaded Janki Das alleging him to be a partner of the defendant's firm, and had claimed relief against him jointly with the others. The Court below has held that Janki Das is not proved to have been a partner. The suit against him has been dismissed. The plaintiffs filed no appeal against Janki Das at all within the time allowed by law. The other defendants, viz., Banki Lal and others filed an appeal against the plaintiffs, and in the memorandum of appeal impleaded Janki Das also. It is quite clear that no relief was claimed in the appeal against Janki Das who was merely a pro forma respondent and need not have been impleaded at all. He was in no way interested in the appeal and there was no point common to him and the other parties which was going to be raised. The plaintiffs have tried to take advantage of Janki Das having been impleaded by the other defendants, and have filed cross-objections against him praying that the suit should be decreed against him also. In our opinion such cross-objections cannot be entertained.

Without saying that in cases of partnership or partition of property or other cases of like nature, where rights common to all the parties are in dispute there can be no cross-objections by one respondent against a co-respondent, I am of opinion that ordinarily in cases where the person against whom cross-objections are filed is not interested in the appeal and is a mere pro forma respondent, no cross-objections can be validly filed against him. This has undoubtedly been the practice of this Court for a considerably long time, and I may refer only to the case of *Kallu* v. *Manni* (1) and *Abdul Ghani* v. *Muhammad Fasih* (2). No doubt sub-Cl. 3, O 41, R. 22 has been slightly amended and the words "the party who may be affected" have been substituted for the word "appellant." But that sub-clause deals with the service of notice. The object of the amendment might be to allow cross-objections against a co-respondent in cases of partnership, partition etc. I am not prepared to hold that on account of this amendment a respondent has an absolute right of filing crose-cbjections against a co-respondent, even where such co-respondent, is not an interested party at all and no relief has been claimed against him in the appeal. In my opinion this is not a fit case for the exercise of the discretionary power given to us under O. 41, R. 33.

Ashworth, J.—I concur. In my view a party to a case cannot be regarded as a respondent in an appeal, the success or failure of which wholly or in part, can in no way affect him. It is only a respondent who has a right of preferring a cross-objection under the said rule. A person who is a defendant in the original suit need not necessarily be a respondent in an appeal brought by the unsuccessful plaintiff.

M.N./R.K. *Order accordingly.*

(1) [1900] 23 All. 93=(1900) A. W. N. 212.
(2) [1905] 28 All. 95=2 A. L. J. 667 (1905) A. W. N. 200.

A. I. R. 1929 Allahabad 196

DALAL, J.

Beni Madho and *others*—Appellants.

v.

Shambhu Nath and *another*—Respondents.

Second Appeal No. 1472 of 1925, Decided on 24th February 1928, from decree of 2nd Addl. Sub-Judge, Allahabad.

(a) Agra Tenancy Act (2 of 1901), S. 79—Suit for ejectment by real tenant—Zemindar's acceptance of rent from trespassar is not his recognition as tenant nor it means that the suit is brought through zamindar's agency—Suit can be brought within ordinary limitation.

The mere fact that a zamindar accepted rent from a trespasser does not mean that the zamindar accepted him as a tenant nor that a

suit for his ejectment was brought through his agency when it was brought by the real tenant. Therefore the suit can be brought within the ordinary period of limitation. [P 198 C 1]

(b) Agra Tenancy Act (1926), S. 103—Zemindar can settle surrendered holding with any tenant.

When a Hindu widow, holding for her life under the provisions of S. 22, Tenancy Act, relinquishes a holding the zamindar is at liberty to settle the land with any other tenant [P 198 C 1]

(c) Hindu Law—Reversioner relinquishing his rights for consideration cannot resile—Evidence Act S. 115.

When a next reversioner relinquishes his rights for consideration, he cannot be permitted to go back upon his relinquishment: *A. I. R.* 1917 *P. C.* 95, *Dist.* [P 198 C 2]

N. C. Vaish—for Appellants.

Haribans Sahai—for Respondents.

Judgment.—This appeal is somewhat difficult. The facts which are rather complicated may be stated as below, in accordance with the findings of the lower appellate Court. The occupancy holding in suit belonged to one Ram Narain prior to 1910. A short time before his death he executed a deed of gift in favour of his daughter Mt. Putia and another daughter's son Shambhu Nath. Shambhu Nath is plaintiff in this suit. Ram Narain left him surviving a widow Mt. Parbati and a separated brother Sheo Narain. After his death entries in the record were made according to the deed of gift but Sheo Narain applied to the revenue authorities to have the name of Mt. Parbati entered during her life so that he may succeed his brother on her death. This matter was compromised on 20th December 1910. According to the compromise, to which Sheo Narain, Shambhu and Mt. Putia were parties the holding was given to Mt. Putia and Shambhu Nath reserving out of 34 bighas a small portion of 1 bigha 14 biswas for the maintenance of Mt. Akasi, widow of a predeceased son of Ram Narain, with the condition that on her death the land will be taken into cultivation by Sheo Narain. Before this compromise was entered into a settlement parcha was prepared with respect to this holding in the name of Mt. Parbati. Settlement operations were pending at the time. On 27th September 1913 Mt. Parbati applied for the entry of the names of Shambhu Nath and Mt. Putia urging that they were in possession and not she and that their names had continued in the records from 1910. On the basis of these revenue proceedings the lower appellate Court has held on a finding of fact that Mt. Putia and Shambhu Nath were in possession of the holding except the small portion of 1 bigha 14 biswas subsequent to the compromise. In 1914 trouble arose in the family and Mt. Akasi applied to the revenue Court to have her name recorded on the ground that her husband Gurdin survived his father Ram Narain. Her application was dismissed on 27th February 1914. Soon after Mt. Parbati died and Sheo Narain applied to be entered as occupancy tenant of the holding on the death of Mt. Parbati under S. 22, Tenancy Act of 1901. He was the heir of his brother Ram Narain on the death of Ram Narain's widow without any condition as to joint possession with Ram Narain on the death of Ram Narain. On 24th October 1914, the revenue Court directed his name to be entered in the record. The Court, however, at the time did not consider the previous litigation, the compromise, and Mt. Parbati's application to the Settlement Officer.

I have not been able to discover whether the names of Mt. Putia and Shambhu Nath were or were not recorded in the village papers subsequent to the compromise. There is the finding of fact of the lower appellate Court that subsequent to the compromise they were actually in cultivating possession of the land in suit.

Subsequent to the revenue Court order on 24th October 1914 Sheo Narain has been in possession and presumably has been paying rent to the zamindar as an occupancy tenant. Nine years later, on 6th September 1923, Shambhu Nath sued for the recovery of the holding on the ground that Sheo Narain and after his death his lineal male descendants were trespassers.

If the arguments advanced by Dr. Vaish were accepted the plaintiff would have no case according to the provisions of the Tenancy Act. He argued on behalf of the defendant appellant that in 1914 Sheo Narain become an occupancy tenant and was recognized as such by the zamindar so whatever rights the plaintiff had terminated on that date and as this ejectment was brought by the zamindar, a suit ought to have been brought within six months under S. 79, Tenancy Act of 1901. The zamindar's consent, however, is wanting to make this argument good. It may be granted that Sheo Narain cannot

have been cultivating the land for such a number of years without paying rent to the zamindar but the mere payment of rent does not mean active consent of the zamindar or the ejectment of Shambhu Nath through the agency of the zamindar. The argument is certainly ingenious but I think having regard to the intelligence of an agriculturist, it will be safer to hold that the active consent or a participation of the zamindar to eject a tenant should be required to deprive an ejected tenant of the 12 years limitation in the civil Court and compel him to go to the revenue Court within the short period of six months.

As must have been observed the decision has become complicated by reason of the property in suit not being revenue paying property but an occupancy holding with peculiar rights. Apart from other consideration I am of opinion that Shambhu Nath and Mt. Putia became tenants of the land under the compromise of 20th December 1910, and were unlawfully ejected by a trespasser Sheo Narain in 1914. The compromise was effected with the consent of the zamindar, as is apparent by his general agent giving consent thereto. The lower appellate Court which has written a very careful judgment has rightly pointed out that though Mt. Parbati was not a party to the compromise, her entire attitude would lead one to the conclusion that she desired to relinquish the holding. Such a desire is manifest from the application already referred to of 27th September 1913. When a Hindu widow, holding for her life under the provisions of S. 22, Ten. Act, relinquishes a holding the zamindar is at liberty to settle the land with any other tenant. In the present case the zamindar settled in accordance with the compromise with Shambhu Nath and Mt. Putia. Whether in consequence they become occupancy tenants or tenants from year to year is not a question which arises in the present litigation. It is of course true as pointed out by Dr. Vaish that a civil Court would not countenance a collusive act between a Hindu widow and the zamindar in order to extinguish the contingent interest of the reversioner. In the present case, however, no such difficulty arises. The next reversioner Sheo Narain was himself a party to the compromise and there is no suspicion of a collusion between the widow and the zamindar in order to deprive Sheo Narain of his contingent rights. Considering the question entirely in terms of revenue law I am of opinion that Shambhu Nath and Mt. Putia became tenants of the land in 1910. They were subsequently unlawfully ejected by a stranger Sheo Narain in 1914. Sheo Narain became a trespasser in consequence and Shambhu Nath was entitled to sue in the civil Court for the ejectment of the trespasser within 12 years of the trespass.

Taking a more general view and not one confined to the terms of revenue law in the present case for a consideration the next reversioner relinquished his rights and he cannot be permitted to go back upon his relinquishment. The appellant's learned counsel referred to the case of *Amrit Narain Singh* v. *Gaya Singh* (1), to warn this Court against holding that a reversioner had a right in praesenti in the property which a female owner held for her life and had bargained with it. The facts of that case were different and the decision was coloured by the fact that a guardian was acting on behalf of a minor reversioner. The general principles of law would apply here that when a party takes a benefit under a particular contract he cannot be permitted to resile from that contract. It was argued that Sheo Narain took no benefit as he was to receive only a very small portion of the holding on the death of a young woman, Mt. Akasi while in law he was entitled to succeed to the entire holding on the death of an elderly woman. As I have already pointed out it was within the power of the widow by agreement with the zamindar to deprive Sheo Narain entirely of the holding by relinquishing it and getting it settled with Shambhu Nath and Mt. Putia. From the facts given already there can be no doubt that the zamindar was favourable to such an arrangement. Under the circumstances Sheo Narain did derive a benefit in making sure of a small portion of the holding reverting to his family though in a distant future. In *Kanhai* v. *Birj Lal* (2), their Lordships held a reversioner bound under such a contract. No doubt the many questions arising in this appeal are debatable but my view

(1) A. I. R. 1917 P. C. 95=45 Cal. 590=45 I. A. 35 (P.C.).
(2) A. I. R. 1918 P. C. 70=40 All. 487=45 I.A. 118 (P.C.).

is in favour of the plaintiff. I dismiss the appeal with costs.

M.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 199

SULAIMAN AND ASHWORTH, JJ.

Bankey Lal—Plaintiff—Appellant.

v.

Nattha Ram and *another*—Defendant party 1 and Defendant party 2—Respondents.

First Appeal No. 62 of 1924, Decided on 18th October 1927, against decision of Dist. Judge, Agra, D/- 30th October 1923.

(a) Hindu Law — Joint family — Trade—Manager by reason of having minor son is not bound to continue partnership with a stranger.

The manager of a joint Hindu family who is partner in a business cannot be required to continue the partnership merely because he has a minor son. [P 199 C 2]

(b) Hindu Law — Alienation — Father—(*Per Ashworth, J.*,) Necessity proved — Adequacy of consideration is immaterial unless fraud or collusion is proved—(*Sulaiman, J. contra*)

Per Ashworth, J.—When once it is shown that a sale by a Hindu father and manager is necessary no suit will lie against the vendee in the absence of fraud or collusion being proved against him, on the ground of insuffiiciency of price inasmuch as the father is empowered to make arrangements for the sale and the vendee can scarcely be expected to see that the price is inadequate. (*Sulaiman, J., contra*). [P 200 C 1]

(c) Transfer of Property Act, S. 55 (1)—Sale-deed not containing rate of interest on mortgages sold—Omission is not fraudulent concealment.

When in a sale-deed which is desired to be set aside, various mortgage bonds were included as sold but the rate of interest borne by them was not entered in the sale-deed, the failure to enter the particulars of interest does not amount to any fraudulent concealment. [P 200 C 1]

(d) Hindu Law — Joint family — Trade—Strangers as partners with joint family—Relations are governed by Contract Act.

Per Sulaiman, J.—Relations of strangers with joint Hindu families, when they enter into transactions of partnership, are not governed strictly by the Hindu law but by the Contract Act. [P 200 C 2]

(e) Hindu Law — Alienation — Father's disability to alienate moveables is same as immovables.

Per Sulaiman, J.—The restrictions on the power of a Hindu father to alienate immovable property are equally applicable to transfers of moveables : 31 *All.* 359, *Foll.* [P 201 C 1]

Iqbal Ahmad and *Mukhtar Ahmad*—for Appellant.

S. N. Sen, N. P. Asthana, S. K. Das and *S. N. Gupta*—for Respondents.

Ashworth, J.—This appeal arises out of a suit brought by the plaintiff-appellant against the defendant-respondents for setting aside a deed of sale executed by defendant 2, Shyam Lal, father of the plaintiff, in favour of Nattha Ram, defendant 1. The admitted facts are that Chiranji Lal, grandfather of the plaintiff and father of defendant 2 carried on the business of publisher and bookseller in conjunction with Nattha Ram, defendant 1. On the death of Chiranji Lal the partnership was maintained by Nattha Ram along with Shyam Lal. At the end of that time Shyam Lal having no inclination to continue the partnership arranged with Nattha Ram to terminate the same and divide some of the assets and sell other of the assets to Nattha Ram. The plaintiff's contention is that the disposal of the assets by Shyam Lal was for a price and consideration which was prejudicial to his interest as minor son of Shyam Lal.

The lower Court dismissed the suit. It held that nothing in Hindu law could compel Shyam Lal to continue the partnership merely because he had a minor son who along with himself, was interested in his (Shyam Lal's) share of the assets of the business. This decision of the lower Court has been impugned by counsel for the appellant but, in my opinion, on no valid ground. The manager of a joint Hindu family who is partner in a busines cannot be required to continue the partnership when he no longer desires to do so and especially when, as in this case, he considers that he is incapable of giving assistance as partner. It may be remarked that in the plaint the allegation was made by the plaintiff that Shyam Lal was a man without capacity or ability. This admission in itself furnishes a solid ground for Shyam Lal deciding not to continue the partnership. There were two houses among the assets of the partnership. When the partnership was dissolved between defendant 2 and defendant 1, the more valuable of the houses went to Shyam Lal and the other to Nattha Ram. A value was put on each house and the difference was taken into account in the disposal of the other assets of defendant 2 to defendant 1. It is

said by the plaintiff-appellant's counsel that the sale of the other assets to Nattha Ram was for an insufficient amount. I consider it open to doubt whether when once it is shown that a sale by a Hindu father and manager is necessary, any suit will lie against the vendee on the ground of insufficiency of price inasmuch as the father is empowered to make arrangements for the sale and the vendee can scarcely be expected to see that the price is inadequate. At any rate it is clear to me that no such suit would lie against the vendee in the absence of fraud or collusion being proved against the vendee. No such fraud or collusion has been proved in this case.

The main point made by counsel for the appellant is that in the sale-deed which, it is desired to set aside, various mortgage bonds were included as sold to defendant 1. The rate of interest borne by these bonds is not entered in the sale-deed. The failure to enter the particulars of interest does not amount to any fraudulent concealment. Appellant's counsel suggests that the failure to enter this rate of interest amounted to fraudulent concealment. He says that if this rate of interest were shown it might be obvious that these bonds were handed over by defendant 2 to defendant 1 for an insufficient consideration. It appears to me sufficiently clear that these mortgage bonds must have been registered and it was easy for any person who was interested in the matter to get copies of these bonds and find out the interest. The mere fact that the sale-deed did not go into the particulars of the interest accruing on these mortgage bonds did not amount to any fraudulent concealment. The consideration for these mortgage bonds was, it appears, the amount due as principal on them according to the bonds. Nattha Ram would have to spend money in suing on them. It is conceivable that although they were secured, the security might in some cases be inadequate. It was open to the appellant to produce in Court the mortgage bonds in order to show the interest due. He did not think it desirable to do so. In these circumstances I would hold that no insufficiency of price for these bonds is proved and that certainly no such insufficiency is proved as to justify the conclusion that the sale by defendant 1 to defendant 2 was fraudulent or collusive. We have to look at the state of affairs at the time of the date of the sale. It seems obvious that no outsider would have been likely to give to Shyam Lal for his and his son's share in the assets of the partnership, dissolved or not dissolved, as good a price as was given by defendant 1. Defendant 1 was continuing the business and obviously the stock, the book debts and the good will would be more valuable to him than to an outsider. No attempt has been made to prove that these assets would have fetched a larger sum if offered to any one else and the contrary seems to me to be a certainty. This being so, it cannot be said that the sale was for an insufficient sum, and the suit of the plaintiff was rightly dismissed. I would note that the plaintiff asks for compensation from defendant 1 in respect of moveable property purchased by him from defendant 2 and disposed of to others. In my opinion Hindu law would not afford any such relief. Whether an action in tort would lie is also doubtful, but it is certain that it would only lie on the ground of collusion or fraud by the vendee. None such has been proved.

For the above reasons I think that the lower Court was quite right in dismissing the suit and I would dismiss this appeal with costs on the higher scale.

Sulaiman, J.—I concur in the conclusion arrived at by my learned brother. The contention that there was no legal necessity for the transfer is, in my opinion, without any force. Relations of strangers with joint Hindu families, when they enter into transactions of partnership, are not governed strictly by the Hindu law but by the Contract Act. If a manager of a joint Hindu family has power on behalf of the family to enter into partnership with strangers, he has equally powers to dissolve such partnership. It is, therefore, impossible to accept the contention that the father was not competent to put a stop to this business, particularly when it was admitted in the plaint that he was wholly incompetent to carry it on. When the father decided that the business was not profitable and that he could not carry it on with profit, there was full justification for his dissolving it. There was thus necessity for the transaction.

The next question is whether the son can challenge the sale on the ground that the consideration was grossly inadequate.

I am not prepared to say that once necessity has arisen for the transfer of ancestral property the sale by the father is always binding on the minor members no matter whether the consideration is grossly inadequate or not. In cases of mortgages their Lordships of the Privy Council have frequently laid down that there may be necessity for the transfer at a certain rate of interest but there may not be necessity for the high rate charged. I am, therefore, not prepared to hold that the plaintiffs' suit would fail automatically as soon as it is found that there was necessity for putting a stop to the business.

If the transaction, as is contended on behalf of the respondents, amounted to nothing more than a mere winding up of the business, it would certainly be doubtful whether the minor son can have the whole thing re-opened. Assuming, however, that it was a sale pure and simple I agree with my learned brother that it is not established that the consideration paid for the sale is inadequate.

The property transferred consisted of moveables and immovables. In view of the cases referred to in *Nand Ram* v. *Mangal Sen* (1), I am bound to assume that the restrictions on the power of a Hindu father to alienate immovable property are equally applicable to transfers of moveables.

It has, however, been suggested that inasmuch as the sale took place several years ago and there is no likelihood that the moveable properties now exist, his suit ought to fail because in Hindu Law no equitable relief for compensation can be granted. I choose to reserve my final opinion on this question as no authority either way has been cited before us. I am, however, inclined at first sight to hold that equitable relief of compensation can be granted even where the goods have been disposed of by the defendant-vendee. If this were not so, the position would be anomalous. The result of a suit brought by the minor member to avoid the alienation would depend not on the merits of the case but on the conduct of the defendant, whether he has or has not, by the time the suit is brought, disposed of the moveable properties. In many suits for setting aside alienations by limited owners equitable doctrines have been invoked. and compensations have been awarded by the Courts. I would, therefore, not be prepared to dismiss the suit on the mere ground that moveable properties which were transferred under the deed might have been disposed of by the defendants. As a matter of fact, this question has not been gone into and we cannot be sure that all the moveable properties that were transferred are not now in the possession of the defendant. I however, agree that the appeal must fail.

By the Court.—The appeal is dismissed with costs including in this Court fees on the higher scale.

M.N./R.K. *Appeal dismissed.*

(1) [1903] 31 All. 359 = 1 I. C. 737 = 6 A. L. J. 415.

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* A. I. R. 1929 Allahabad 201

DALAL, J.

Shankar Singh and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 581 of 1928, Decided on 20th November 1928, made by Sess. Judge, Moradabad, D/- 7th July 1928.

*** (a) Police Act (5 of 1861), S. 30 (4)—Prohibition of every kind of music is not covered by the word "regulate."**

The District Superintendent of Police under S. 30 is authorized to regulate the extent to which music may be used in the streets on the occasion of festivals and ceremonies, but a prohibition of every kind of music is not covered by the word "regulate": 30 *All.* 131, *Rel. on.* [P 202, C 1]

(b) Municipal Board—Rules.

The Murdabad Municipal rules of 1877 were duly cancelled with the necessary sanction on 27th May 1927. [P 202, C 2]

Nehal Chand and *S. B. Johri*—for Applicants.

M. Waliullah—for the Crown.

Judgment.—Reference should be made to my order dated 15th October last. At that time I was impressed by the point made by the District Magistrate that the notifications of 1872 and 1877 were not rescinded by the Municipal Board of Moradabad which cancelled all its bye-laws relating to religious processions in 1927. The Superintendent of Police of Moradabad issued an order under S. 30, Act 5 of 1861, during the Holi of this year on 3rd March 1928 that no crowds attended by music shall pass within the inhabited parts of the city. There is a finding of fact that the large number of

applicants whose case is before me in revision did pass through a locality in the Moradabad City known as katghar during the Holi in a procession accompanied with music. The applicants have been convicted and fined under S. 188, I. P. C. for disobeying an order promulgated by a public servant lawfully empowered to promulgate such order. The lawful authority of the Superintendent of Police in Moradabad to issue the notification of 3rd March 1928 is impugned here. There are two questions for decision : (1) Whether the officer was so empowered under S. 30, Police Act, and (2) whether he was so empowered by a notification of Government dated 18th May 1877. The District Magistrate was of opinion that prohibition of music was covered by the authority given to the District Superintendent of Police under S. 30, Police Act, to regulate the extent to which music may be used in the streets on the occasion of festivals and ceremonies. I do not agree with the District Magistrate that a prohibition of every kind of music would be covered by the word "regulate." A power to regulate is given as regards some matter which is in existence, and it would be a misnomer to direct regulation of a thing that does not exist. Regulation of traffic, for instance, assumes the existence of traffic. That would not empower the police to confine every citizen to his house and prohibit all traffic. Under S. 31, Police Act, the police are empowered to keep order on public roads and in the public streets, thoroughfares, ghats and landing places and at all other places of public resort. In Benares in pursuance of this authority an order was issued that a certain class of people, the Jatrawalas, that is, people who take charge of pilgrims to the sacred city, were prohibited from visiting a railway station. In that case a learned Judge of this Court held that it was not competent to the Superintendent of Police to issue a general order forbidding persons of a certain class to frequent certain specified places on the strength of his authority to keep order in a public place. The reasoning was the same as here : *Emperor* v. *Krishna Lal* (1). The keeping of order did not imply the confining of people to their own houses so that no need may arise for the keeping of order.

I have studied the notifications. As already observed, the District Magistrate was of opinion that a notification of 27th May 1927 (U. P. Gazette of 4th June 1927, Part 3. S. 202) did not cancel the Government Notification of 1877. The Government Notification merely sanctioned rules framed by the Municipality, and the Municipality was entitled to cancel those rules with the sanction of the Local Government. The power of sanction has been delegated by the Local Government to the Commissioner, and the Municipal rules of 1877 were duly cancelled with the necessary sanction on 27th May 1927. There is no Government notification independently of the Municipal rules. The District Magistrate refers to a Government order accompanying the notification of 27th November 1872. That Government order gave expression merely to a pious hope that such an arrangement would be perpetually maintained by the Municipality. The Municipality, however, chose to do away with the arrangement, and the authority which issued the Government order sanctioned the cancellation of the arrangement. There is, therefore, no power left with the Superintendent of Police of Moradabad to deal with music in streets during festival and ceremonies independently of the authority given to him under S. 30 (4), Police Act. I accept the reference of the learned Sessions Judge, set aside the conviction and sentence, and order the fine, if any recovered, to be refunded.

S.N./R.K. *Conviction set aside.*

(1) [1917] 39 All. 131=35 I.C. 1003=14 A.L.J. 1072.

** A. I. R. 1929 Allahabad 202

DALAL, J.

Janeshar Das and *another* — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 749 of 1923, Decided on 4th January 1929, from order of Addl. Sess. Judge, Meerut, D/- 3rd September 1928.

**** (a) Criminal P. C., (as amended in 1923), S. 239—Section is exclusive—Joint trial of two persons in three cases of embezzlement or "abetment"—Trial is illegal.**

The provisions of S. 239 stand by themselves and the scope thereof cannot be extended by use of the provisions of sections not referred to in S. 239. The joint trial of two persons in three separate cases when they are charged in

the alternative with embezzlement or abetment thereof is illegal as they have to meet six distinct sets of circumstances: 33 *Bom.* 221, *Expl.* and *Dist.*; *A. I. R.* 1921 *All.* 246 and 32 *All.* 219, *Cons.* [P 203 C 2]

(b) Criminal P. C., Ss. 234, 235 and 236—Scope (*obiter*).

Sections 234, 235 and 236 are mutually exclusive. [P 204 C 2]

Peary Lal Banerji, *Iqbal Ahmad*, *Sailanath Mukerji* and *Kumuda Prasad* —for Appellants.

Sankar Saran—for the Crown.

Judgment.—I passed a preliminary order in this matter on 4th December 1928. The opinions expressed therein were merely tentative and the whole matter shall be examined over again in the present order. Janeshar Das and Khushi Ram, two servants of the treasurer of the Muzaffarnagar treasury, were charged with three offences and each offence was framed in the alternative either of criminal breach of trust or abetment thereof. There was found deficiency on a certain date in stamp labels kept in the doublelock of the treasury and in cash kept in the single-lock. Inquiry was made and the prosecuting agency appears to have been doubtful whether Janeshar Das committed the breach of trust and Khushi Ram abetted him, or whether Khushi Ram committed the breach of trust and Janeshar Das abetted him. Three items of defalcation were chosen, two relating to stamps and one relating to cash, and as regards each item the charge was framed in the alternative. Both Janeshar Das and Khushi Ram were tried jointly. In this Court the argument of Janeshar Das has been that he was born a fool and the blackguard of the piece was Khushi Ram. On his behalf no allegation was made as to the illegality of the trial. This point, however, was stressed with great force by Mr. Banerji on behalf of Khushi Ram as the learned counsel appears to have felt that the cause of Khushi Ram was damaged by joint prosecution with Janeshar Das.

The provisions of S. 239, Criminal P. C., lay down how persons will be charged and tried together. Mr. Banerji argued that Khushi Ram was really charged for more than three offences, in fact six, as in each case he was charged in the alternative for breach of trust and for abetment thereof. This Court has held that the provisions of S. 239 of the Code are to be considered exclusively without the help of the provisions of Ss. 234 to 238. In 1921 in the case of *Ram Prasad* v. *Emperor* (1) Kanhaiya Lal and Wallach, JJ., had before them the trial of more than one person for three offences of dacoity. They observed :

"The four accused could also have been tried jointly in one trial for any one of the three dacoities in which they are alleged to have taken part, but all could not be tried together at one trial for the three dacoities, as these offences were not committed in the same transaction, S. 234 is one of a number of sections which are grouped together under the heading of "joinder of charges." This may, and in fact does, refer to charges both against single and several accused. But the sections under the general heading relating to these respective cases are kept separate. S. 233 lays down a general rule that for every distinct offence there is to be a separate charge and that every such charge is to be tried separately, except in the cases mentioned in Ss. 234, 235, 236 and 239. Ss. 234 to 238 by their terms refer to the case of a single accused. S. 239 deals with the case where more persons than one are accused. The legislature intended to and did by these sections differentiate between the cases of a single and several accused. It cannot be said that all the sections prior to S. 239 apply to both these cases although in terms they refer to one only, viz, that of a single accused. The existence of a S. 239 specifically dealing with the case of several accused, and the arrangement of the sections to which we have referred, constitutes such a repugnance in the context as prevents us from reading "a person" in S. 234 as including several persons."

These observations were made prior to 1923. The provisions of S. 239 at that time were as follows :

"When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing any offence and another of abetment of, or attempt to commit such offence, they may be charged and tried together or separately, as the Court thinks fit; and the provisions contained in the former part of this Chapter shall apply to all such charges."

The section was entirely recast by Act 18 of 1923, and at present a joint trial is permitted of persons accused of more than one offence of the same kind within the meaning of S. 234, committed by them jointly within the period of twelve months. Obviously, therefore, when more persons than one are tried jointly reference cannot be made to provisions of the Code previous to S. 239 indiscriminately. If that had been the intention it would not have been necessary to state definitely that persons accused of more than one offence of the

(1) A. I. R. 1921 All. 246.

same kind within the meaning of S. 234 committed by them jointly within the period of twelve months may be tried together. It is important to remember this because the Government Pleader referred the Court to the words at the end of the section :

" and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges. "

Those words existed when the Bench ruling in the case of *Ram Prasad* was pronounced and the learned Judges refused to read the provisions of S. 234 conjointly with the provisions of S. 239. In my opinion the words at the end of the section are more by way of limitation than extension. The serious question that arises is whether the appellants should be considered to have been prosecuted on six charges, or on three alternative charges, each alternative case forming one charge. Mr. Banerji, in my opinion, rightly pointed out in this connexion that if the legislature considered an offence and an abetment thereof in the alternative to be one charge there was no necessity to preserve Cl. (b), S. 239 when that section was recast in 1923. That clause permits the joint trial of persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence. If an offence and the abetment thereof were considered to be the same offence the case would have been covered by Cl. (a) without any specification in Cl. (b). The argument on behalf of the Crown was that the provisions of S. 236 should be read along with the provisions of S. 239. Under S. 236 if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once, At present I am not called upon to give an opinion whether this provision and the provisions of S. 234 as to trial of accused persons for three offences committed within the space of twelve months are exclusive or not. The question is whether the provisions of S. 236 may be utilized to declare the charge in the alternative of embezzlement and abetment thereof to be one charge. The provisions of S. 236 themselves do not designate these separate charges as one charge, but designate them as different charges in the alternative, and that is why special permision is given under the Act for the trial of such charges The Bombay High Court in *re Bal Gangadhar Talak* (2), was of opinion that Ss. 234, 235, 236, and 239 were not mutually exclusive. It may be respectfully submitted that there was only one person up for trial in that case, and the consideration of the provisions of S. 239 did not arise in that case. We have also seen how a Bench of equal authority of this Court held several years later that the provisions of S. 239 were exclusive. A Single Judge of this Court in 1910 in *Emperor* v. *Sheo Saran Lal* (3) was not prepared to follow the reasoning of the Bombay High Court in the case of *Bal Gangadhar Tilak*. In that case attempt was made to combine the provisions of S, 234 and of S. 235 (1). It was argued there that if an accused person goes through three similar transactions within the period of 12 months, committing in each transaction the same series of offences, he can be tried at one and the same trial on account of all offences committed in the course of the three transactions even if they total more than three. The learned Judge refused to extend the exception mentioned in S. 234 by adding to it the exception mentioned in S. 235(1).

So far as this Court is concerned the opinion has been that the provision of Ss. 234, 235 and 236 are mutually exclusive. There is all the more reason, therefore, to hold that the provisions of S.239 stand by themselves and the scope thereof cannot be extended by use of the provisions of sections not referred to in S. 239. In my opinion there is considerable reason in this view. When a man is charged in the alternative with embezzlement or abetment thereof he has to meet two distinct set of circumstances. When in three separate cases he is charged in the alternative he has to meet six distinct set of circumstances. This would be against the spirit of the provisions of S. 233 and would not be covered by any of the exceptions detailed in the sections that follow S. 233. In my opinion Khushi Ram was really tried for six offences. The trial was illegal, and the question whether Khushi Ram was prejudiced or not does not arise. At the same time it is possible

(2) [1909] 33 Bom. 221=2 I. C. 277=10 Bom. L. R. 973.
(3) [1910] 32 All. 219=5 I. C. 896=7 A. L. J. 225.

that he was prejudiced in so far that Janeshar Das has attempted to throw the entire blame on him. Prejudice must also be presumed from the confusion arising from a man being called upon to face at a single trial six sets of circumstances.

In the result I set aside the convictions and sentences and order a retrial of Janeshar Das and Khushi Ram. It will be for the prosecution to decide whether they should be tried jointly or separately. Possibly a separate trial would be more advisable, and the point should also be kept in view that so far as this Court is concerned the provisions of Ss. 234, 235, and 236 are considered to be mutually exclusive. A request was made on behalf of Khushi Ram that the same learned Judge who convicted him may not hold the fresh trial. This is a reasonable request. The Sessions Judge of Meerut is requested to see that the trial is held by some other Sessions Judge.

Janeshar Das and Khushi Ram are on bail. They shall remain on the same bail until any further order is passed by the Sessions Judge who retries them.

M.N./R.K. *Retrial ordered.*

A. I. R. 1929 Allahabad 205

DALAL, J.

Bhagwat and *others*—Plaintiffs—Appellants.

v.

Salamat Khan and *another*—Defendants—Respondents.

Second Appeal No. 669 of 1927, Decided on 9th January 1929, from decree of Dist. Judge, Gorakhpur, D/- 8th January 1927.

Hindu Law—Joint family—Sale of joint family property—All major members joining—Circumstances raising presumption of existence of valid necessity not existing—Court cannot hold that there was legal necessity—Burden of proving want of legal necessity is not thrown on minor members challenging sale.

A vendee may be excused from making further detailed enquiries, but to start with there must be certain circumstances in front of him to give him the impression of the probability of the existence of a valid necessity. But where there are no such circumstances, the mere fact that all the major members of the joint family joined in the sale, would not entitle a Court to hold that a valid necessity existed. Nor would it throw the burden of proving want of legal necessity on the minor members challenging the sale : 8 *Bom.* 602 ; *A. I. R.* 1924 *Oudh* 300 ; *A. I. R.* 1925 *All.* 28 and *A. I. R.* 1924 *All.* 912, *Dist.* [P 206 C 1.2]

K. N. Katju—for Appellants.

Iqbal Ahmad and *G. K. Shinde*—for Respondents.

Judgment.—The plaintiffs, minor members of a joint Hindu family sued for the setting aside of a sale-deed executed by the major members of the family. The suit was decreed by the learned Subordinate Judge in a very careful judgment. He heard the evidence and was in a position to estimate the value of the oral evidence. The District Judge set aside the decree and decreed the plaintiffs' suit on condition of payment of nearly the entire sale consideration. Hence the plaintiffs have appealed. The learned Judge's procedure has been somewhat hasty. He did not notice that out of the vendees only two had appealed. It is not clear why the payment of the entire sale consideration should be made to two of the vendees only. The other vendees had submitted to the decree of the trial Court and no decree was passed by the lower appellate Court with reference to the defendants who did not appeal. Under these circumstances the plaintiffs have filed the second appeal against two of the defendants only Salamat Khan and Hubdar Khan, who had appealed to the lower appellate Court.

The trial Court has given the detail of the sale consideration. The consideration was practically paid in cash. Rupees 1,600 was paid in cash before the Sub-Registrar. Rs. 200 was left with the vendees for payment to one Babban Lal. Rs. 1,432 was not paid at that time but is alleged to have been paid subsequently from 1915 to 1918. This sum was secured to the vendors by pro-notes executed by every one of the vendees. The balance of the sale consideration left with the vendees has admitttedly not been paid. The District Judge did not notice the strictures made by the trial Court on Babban Lal. Those strictures will be found to be justified if Babban Lal's statement is read. Babban Lal was a witness for the defendants and was the only one who said anything about the sale consideration. I do not believe that any money was due to Babban Lal at the time of the execution of the sale-deed. He seems to have busied himself about the transfer and probably obtained this sum as a reward for his negotiation of the sale. The conflict in his testimony between the examination-in chief and the

cross-examination discloses the sort of unreliable man that he is. As the evidence stands there is no oral testimony whatsoever that all this large amount of cash was required by the vendors for family necessity. What is noticeable is that not a single vendee has come in the witness-box to state on oath that all these sums were apparently necessary for the common interest of the family to be borrowed. The District Judge has decided the matter in a manner which would abrogate all the tenets of the Hindu law framed for the purpose of saving the interest of the minor members of a joint Hindu family. He is of opinion that when all the adult members of a joint Hindu family enter into a transaction, the burden of proving want of legal necessity falls on the minor members who appear subsequently to challenge the action of the major members. It is true that when all the major members join in a transaction an inference favourable to the vendees may be drawn, if further circumstances in support of valid necessity exist to entitle a Court to hold that valid necessity did exist. It is a piece of evidence but nothing more. I have examined the cases quoted by the learned counsel on behalf of the respondents : *Balvant Rav Sanatoram* v. *Babaji* (1), *Shamsher Datt Singh* v. *Lalla Singh* (2), *B. Bhagwan Das* v. *Allan Khan* (3) and *Dhanraj Rai* v. *Ram Naresh Rai* (4).

The coincidence appears to be curious that the last three judgments in two different Courts were delivered by the same learned Judge. In all those cases there was reason for the vendees on the face of the transaction to believe that the debt was contracted for the common interest of the family, for instance debts had to be paid off or there was a ruined building or the vendors' shop required reconstruction. In all those cases there was evidence which would lead a transferee reasonably to suppose that the transaction entered into by the transferrers was really necessary for the common interest of the entire family. In the present case as mentioned above not one of the vendees has come forward to state what the circumstances were which gave him an apparent assurance of the existence of a necessity when all the major members of a joint Hindu family joined in the transfer. A vendee may be excused from making further detailed enquiries but to start with there must be certain circumstances in front of him to give him the impression of the probability of the existence of a valid necessity. In the present case no vendee has come forward to state what the circumstances were. The oral testimony of the solitary witness Babban is worthless. All that can be said in favour of the vendees is that there was a recital in the sale-deed that money was wanted for the payment of a decree of 29th July 1914, and for further litigation connected therewith, for the marriage of a daughter and for the building of a house. A copy of the alleged decree is not on the file. There is nothing to show that the marriage of a daughter was pending nor has any of the vendees come forward to swear that he saw ruined house which required building or a building in preparation. A large portion of the sale consideration was not promptly paid and that ought to have raised a suspicion in the mind of the vendees that all these alleged necessities were not urgent. There cannot be the slightest doubt that all the necessities mentioned in the sale-deed were false.

There is another suspicious matter. A non-existing tree was included in the sale-deed in order to change the place of registration. In this connexion the testimony of Faujdar Shah, defence witness, is very puzzling. He speaks of his selling the tree to one of the vendees. If so, it is not understood how the vendors could sell the tree and what the defence meant by producing the witness Faujdar Shah. I consider the finding of the lower appellate Court to be arrived at on a wrong understanding of law. I accept the arguments and finding of the trial Court and hold that the transfer was made without any legal necessity. In the result the decree of the lower appellate Court is set aside, the decree of the trial Court is restored and the suit of the plaintiffs decreed against all the defendants with costs of all the Courts.

S.N./R.K. *Decree set aside.*

(1) [1884] 8 Bom. 602.
(2) A. I. R. 1924 Oudh 300.
(3) A. 1. R. 1925 All. 23.
(4) A. I. R. 1924 All. 912.

* A. I. R. 1929 Allahabad 207

SULAIMAN AND KENDALL, JJ.

Kunj Behari Singh and *others*—Plaintiffs—Appellants.

v.

Bindeshri Prasad Singh and *others*—Defendants—Respondents.

First Appeal No. 398 of 1925, Decided on 20th December 1928, from decree of Sub-Judge, Jaunpur, D/- 20th May 1925.

*** Civil P. C., O. 21, R. 1 — Compromise decree—Option to pay direct or deposit in Court—Advantage cannot be taken of Courts being closed on date of payment.**

Under a compromise decree the amount due was to be paid in instalments on fixed dates and in default to pay one instalment the whole amount was to become due. On the date of the payment of first instalment the Court was closed and a tender was filed when the Court reopened.

Held : that there was a default in the payment of the first instalment as the defendants who had the option to make the payment direct to the decree-holder or to deposit the amount in Court, could not take advantage of the circumstances that the Court was closed on the date of payment : *A. I. R.* 1924 *All.* 218 (*F.B.*), *Dist.* [P 207 C 2]

B. Malik—for Appellants.

Piari Lal Banerji and *Iqbal Ahmad*—for Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit on the basis of two mortgage-deeds for recovery of the principal and interest due on them. Previous to this litigation there was a suit instituted by the plaintiffs which was compromised, and the compromise decree is printed on p. 63 of the paper-book. Under that decree it was agreed that the amount due on the two bonds would be Rs. 18,750-2-0 and that simple interest on that sum would be paid at the rate of eight-annas % per mensem from the date of the execution of the "document" up to the date of realization. Five instalments were fixed, the first one was of Rs. 3,750-0-4 payable with interest on 15th June 1924. There was an express provision that in default of payment of any instalment it was to be paid in a lump sum. There were further provisions in the decree which showed that the effect of the regular payment would be to prevent the mortgagees from bringing any suit to recover the amount due on the decree. The plaintiffs claimed that inasmuch as the defendants did not pay the first instalment on 15th June 1924, they were entitled to recover the full amount borrowed on the two documents. The principal defence was that on 15th June 1924, the civil Court was closed, and that a tender was actually filed on 3rd July 1924, when the Court reopened. The tender was signed by the judicial officer on 4th July 1924, and the cash was actually deposited in the Government Treasury on the 5th July. The plea has found favour with the Court below which has held that inasmuch as the civil Court was closed on the 15th June the defendants were entitled to make the tender on the reopening date and that accordingly there was no default. For this view the learned Judge has relied on the recent Full Bench case of *Mohammad Jan* v. *Sham Lal* (1). The learned advocate for the respondents has strongly urged before us that under the terms of the decree the amount had to be deposited in Court in the execution department. In the next place it is argued that, even if that was not so, under O. 21, R. 1, his clients had the option of either paying the amount direct to the decree-holders or depositing it in Court, and inasmuch as they had the right to deposit it in Court they could wait till the civil Court reopened.

In our opinion the payment of the instalments and the right of the decree-holders to recover the amount due was not intended to be exercised through the execution Court. There is an express mention in the decree of the mortgagee's power to bring a suit and recover the amount. In that view it may be difficult to apply O. 21, R. 1.

But assuming that the defendants had the power to make the payment direct to the mortgagees or to deposit the amount in Court, they cannot take advantage of the circumstance that the civil Court was closed on 15th June 1924. If the only course open to them had been to deposit it in Court and the Court was closed on the last date on which they could have made the deposit, then the ruling in the Full Bench case would have been applicable. That was a case of a deposit under a pre-emption decree, and in view of the provisions of O. 20, R. 14 that deposit had to be made into Court. The judgment-debtors in that case had no option but to deposit the amount in Court, and accordingly it was held by the Full Bench

(1) A. I. R. 1924 All. 218=46 All. 323 (F.B.).

that if the Court by its own act prevented the judgment-debtors from making the deposit within the time they should not be deprived of their right to do so, provided they came into Court at the first opportunity available, namely the re-opening day of the Court. In the present case the defendants on their own showing had the option of making the payment to the mortgagees direct. From this they were in no way prevented on account of the Court being closed. They were not compelled to wait till the Court reopened. They had an opportunity available to them of which they did not take advantage. We do not therefore think that they were entitled to say that the time fixed in the compromise decree for the payment of the first instalment should be extended. Accordingly there was a default on 15th June 1924 which entitled the plaintiffs to claim the whole amount. As matters stand now all the dates fixed for the payment of all the instalments have expired and the whole amount has undoubtedly become due under the terms of the compromise decree. We accordingly allow the appeal with costs and setting aside the decree of the Court below decree the plaintiffs' claim for the whole amount of Rs. 18,750-2-0 due on the two bonds as principal together with interest at eight-annas % per mensem from the dates of the execution of the hypothecation bonds. The amount lying in deposit in Court will of course be taken by the plaintiffs in satisfaction of part of their claim, but inasmuch as it was deposited too late and the mortgagees were not bound to accept it, interest will not cease to run on account of this deposit. The usual decree under O. 34 will be prepared and six months' time from this date should be fixed for payment.

M.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 208

DALAL, J.

Raghubar Saran and *others*—Defendants—Applicants.

v.

Jumna Prasad—Plaintiff—Opposite Party.

Civil Revn. No. 316 of 1928, Decided on 17th January 1929, from an order of the Munsif, Bulandshahar, D/- 14th August 1928.

Provincial Small Cause Courts Act, Sch.2, Arts. 35 and 43-A—No allegation of criminal charge—Application of Limitation Act. Art. 48 cannot raise presumption of criminal charge—Arts. 35 and 43-A were not applicable.

A suit was brought in the Small Cause Court for the recovery of certain ornaments or their value from the defendants who were the sons of a person who kept the ornaments promising to return them. There was no allegation of a criminal charge. The suit was dismissed as barred by Art. 48, Limitation Act.

Held, that criminal charge could not be presumed from the application of Art. 48, Lim. Act. and the suit was not barred under Art: S. 35 and 43-A. from cognizance of a Small Cause Court. [P 208 C 2]

Panna Lal—for Applicants.

S. B. L. Gaur—for Opposite Party.

Judgment.—This was a suit brought for the recovery of certain ornaments from the defendants, or their value. The defendants are the sons of a person who kept the ornaments promising to return them. It is said that the case is one of misappropriation, and the jurisdiction of the Small Cause Court would be barred under Arts. 35 and 43A, Sch. 2, Provincial Small Cause Court Act. There is no allegation of misappropriation in the plaint. The ornaments may have been lost, or the defendants sons may have no knowledge of the ornaments. There is no allegation of a criminal charge against the defendants, and on the facts of the case no criminal offence could be made out against them.

The second argument was that the suit was barred by time. In my opinion Art. 48, Limitation Act, was rightly applied by the trial Court. In this connexion it was pointed out that by the application of that article a criminal charge was assumed. Such is not the case, because the first word deals with loss, and the article applies to suits for specific moveable property lost, or for compensation. It is true that if the defendants' father had contested the suit and denied receipt of ornaments, it would have been assumed that by such denial he exposed a dishonest intention, and there would be a presumption of his having misappropriated the property. In the present case as the suit is brought against the man's sons no such presumption can be drawn. I dismiss this application with costs.

M.N./R.K. *Application dismissed.*

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* A. I. R. 1929 Allahabad 209

NIAMATULLAH, J.

Mihi Lal—Plaintiff—Appellant.

v.

Soni Ram and *others*—Defendants—Respondents.

Second Appeal No. 406 of 1927, Decided on 18th December 1928, from decree of Addl. Sub-Judge, Muttra, D/- 28th October 1926.

(a) Evidence Act, S. 106—Date of oral mortgage not being particularly known to mortgagee—No burden lies on him to prove date.

The burden of proving the exact date of a mortgage transaction entered into orally being not peculiarly within his knowledge, does not lie on the mortgagee: 17 *A. L. J.* 330, *Dist.* [P 209 C 2]

***(b) Limitation Act, S. 19—Acknowledgment containing admission of right to redeem—Mortgage held to be executed within period of redemption before acknowledgment.**

Where an acknowledgment by mortgagee contains an admission in unequivocal terms that the mortgagor's right of redemption subsisted till the date of the acknowledgment, the mortgagor should be deemed to have established that the mortgage had been made some time within the period of limitation for redemption (60 years) before the date of such admission: 1 *All.* 117 (*F.B.*), *Rel. on.* [P 210 C 1]

Ambica Prasad—for Appellant.

S. C. Das—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit brought by him for redemption of a mortgage alleged to have been executed some time before the year 1258 Fasli, corresponding to 1850 A. D. The plaintiff is the representative-in-interest of the alleged mortgagor and the defendants are those of the mortgagee, one Mt. Jal Kunwar, wife of Umrao. The mortgaged property consists of four bighas nine biswas land situate in village Parsoli, District Muttra. The principal sum secured by the mortgage is said to be Rs. 16 only.

The defendants denied the plaintiff's right to redeem. Both the Courts below have found that the fact of mortgage and all the terms thereof as alleged by the plaintiff-appellant have been established by evidence. That finding has not been and cannot be questioned on second appeal before me. The only question, on which the plaintiff's right to redeem depends, is one of limitation. The Court of first instance held that the suit is within time having regard to two acknowledgments made by the predecessor-in-interest of the defendants, one in the year 1258 Fasli and the other in 1285 Fasli. The lower appellate Court so far agreed with the Court of first instance that if the mortgage was effected within sixty years before the first acknowledgment of 1258 Fasli, the suit is within time. It also agreed with the Court of first instance that certain attestations of entries in the khewat made by the mortgagee in the year 1258 Fasli and 1285 Fasli constitute valid acknowledgments. But it held differing from the Court of first instance that the plaintiff failed to establish that the mortgage was effected at any time within sixty years before the first acknowledgment, It, therefore, dismissed the suit. The plaintiff has preferred the present second appeal. It has been contended by the learned counsel for the appellant on the authority of *Kamla Devi* v. *Gur Dayal* (1) that the burden of proving the exact date of mortgage, being peculiarly within his knowledge lies on the mortgagee, who has failed to establish it by evidence and that the suit should have been deemed to be within time. I am unable to accept this contention. The case quoted by him proceeds on the ground that the mortgagee in that case was in possession of the land in dispute under a written mortgage-deed, which was presumably in his possession, and that by the production of the mortgage-deed he could set the controversy at rest. In the case before me the transaction of mortgage in question appears to have been entered into orally. Therefore, the ratio decidendi of that case cannot be applicable to this case.

Another argument advanced by the learned counsel for the appellant has in my opinion considerable force. He contends that the entries of the khewats, which the mortgagee attested in the years 1258 Fasli and 1285 Fasli, not only save limitation as acknowledgments but amount also to a clear admission by the mortgagee that the mortgage had been made within sixty years before 1258 Fasli. The entry made in 1258 Fasli runs as follows:

"Mt. Jal Kunwar, wife of Umrao, mortgagee of the property of Gobind, Lachmi, Khamani, Budha and Baldeo, sons of Girja in equal shares, which according to the attestation of the parties is mortgaged on an oral

(1) [1919] 17 A. L. J. 330=51 I. C. 283.

agreement for Rs. 16 and is redeemable at any time when the mortgage money is paid up."

The entry of the khewat made in 1285 Fasli runs thus :

"Mussammat Jal Kunwar . . . mortgagee of the property belonging to the following persons, Gopal and others, mortgagors in lieu of Rs. 16 entered in the settlement file."

These entries were attested by Mt. Jal Kunwar, the mortgagee. It is conceivable that there may be an acknowledgment couched in language not amounting to an admission as regards the time when the mortgage was made. In such a case the mortgagor must furnish evidence aliunde to prove that his right of redemption subsisted when the first acknowledgment was made. But where the acknowledgment relied on is not only such an acknowledgment as is required by S. 19, Limitation Act, but goes further and contains an admission in unequivocal terms that the mortgagor's right subsisted till the date of the acknowledgment, the mortgagor should be deemed to have established that the mortgage had been made some time within 60 years before the date of such admission. The conduct of Mt. Jal Kunwar as shown by her attestation of the entries made in the year 1285 Fasli can be explained only on the hypothesis that the mortgage under which she held had been made within 60 years before 1258 Fasli. If it had been made more than 60 years before that date, she would have objected to being recorded as a mortgagee and to Gopal and others being recognized as owners. The implication arising from the entry and her attestation is prima facie evidence of subsisting title of the mortgagors and the suit having been admittedly brought within 60 years from the second acknowledgment cannot be considered to be time-barred. The Full Bench case reported in *Daia Chand* v. *Sarfaraz* (2) especially the judgment of Pearson, J., supports this view.

In the view of the case which I take this appeal must be allowed. The decree of the lower appellate Court is set aside and that of the Court of first instance is restored. The plaintiff-appellant will havo her costs in all the Courts from the defendant-respondents.

Let a fresh decree be prepared allowing the plaintiff to pay the mortgage money within six months from to-day and directing sale of the mortgaged property in default of payment within that period.

M.N./R.K. *Appeal allowed.*

(2) [1876] 1 All. 117 (F.B.).

A. I. R. 1929 Allahabad 210

SEN AND NIAMATULLAH, JJ.

Radhey Shiyam—Defendant—Appellant.

v.

Mewa Lal and *another*—Plaintiffs—Respondents.

Second Appeal No. 67 of 1927, Decided on 10th December 1928, from decree of Dist. Judge, Allahabad, D/- 16th September 1926.

(a) U. P. Excise Act, Ss. 40 and 41—Rules under.

Rules made in accordance with the provisions of Ss. 40 and 41 have the force of law. [P 211 C 1]

(b) U. P. Excise Act, Ss. 40 and 41, Rules under—R. 82—Licensee taking partner is not transfer or sub-lease of contract—Contract Act, S. 23.

Where an agreement is entered into between a licensee and a third person in consideration of money contributed by the latter for sharing the profits and losses in the business, the transaction does not amount to a transfer or sub-lease of the liquor contract contravening the provisions of R. 82 or S. 23, Contract Act : 39 *All.* 107, *Foll.* ; 12 *Bom.* 422, *Ref.* [P 211 C 1]

(c) Interpretation of statutes—Excise Act should be strictly construed.

A penal law like the Excise Act has to be strictly construed and should be interpreted generously in favour of the subject. [P 211 C 2]

Mushtaq Ahmad—for Appellant.

Kamlakant Verma—for Respondents.

Judgment.—This is a defendant's appeal in a suit for accounts instituted by Mewa Lal and Radhey Lal, the two sons of Lala Bharathji against Babu Radhey Shiam. The defendant held a liquor contract from the Government for a period from 1st April 1922 to 31st March 1923. The license was issued solely and exclusively to Radhey Shiam. The plaintiff came into Court with the allegation that Radhey Shiam, the defendant, had taken Bharathji into partnership with him, in the matter of profits and losses relating to the liquor shop, that a profit of about Rs. 2,000 had been made in the said business in which the share of Bharathji came to half, and that Bharathji had received only Rs. 850 on account of his share. The suit was for the recovery of the amount due to Bharathji during the continuance of the contract.

A variety of pleas were taken in defence; but we are concerned only with one of them. It was pleaded that the contract entered into between Radhey Shiam and the plaintiff's father contravened the provisions of S. 23, Contract Act, and that no claim under the said contract was enforceable by the sons of Bharathji. It is contended that the partnership with Bharathji amounted to a transfer or a sub-lease of the license and, as the license was purely personal to the grantee, the transferee or the sub-lessee or his legal representatives could not enforce a claim for the recovery of any benefit under such an agreement. Reliance was placed upon a certain number of rules contained in the Excise Manual of the United Provinces. These rules were manifestly made in accordance with the provisions of Ss. 40 and 41, United Provinces Excise Act (Act No. 4 of 1910) which have the force of law. It does not appear to us, however, that in admitting the plaintiff's father into the benefits or into the obligations relating to the profits and losses of the business, the defendant in any way transgressed against Rr. Nos. 80, 82 and 86, Excise Manual. These rules provide that the licenses issued to liquor contractors are personal and that transfers and sub-leases of these contracts are not permitted except with the sanction of the Collector. Where an agreement is entered into between the licensee and a third person in consideration of money, contributed by the latter, and the former agrees to give him certain benefits in the share of the profits arising from the business and the latter also takes upon himself the liability arising from losses accruing from the said business, it cannot be said that the transaction amounts to a transfer or sub-lease of the liquor contract.

It has been held in *Shiam Behari Lal* v. *Malhi* (1), that where a plaintiff in lieu of a pecuniary consideration enters into a contract with the defendant who had obtained a license relating to sale of contracts and if there was profit, the plaintiff was to get a certain percentage out of it and, in case of loss he was to share the liability with the licensee, the contract did not constitute a transfer or a sub-lease by the licensee and was not illegal as being in violation of R. 82 made under the Excise Act. We are entirely in accord with this view, and we do not think that the agreement which is sought to be enforced by the present suit contravenes the provisions of S. 23, Contract Act.

A penal law has to be strictly construed, and should be interpreted generously in favour of the subject.

Reliance is placed upon the case of *Hormesji Mota Bhai* v. *Pestanji Dhanji Bhai* (2). This was a decision with reference to S. 45 of the Act 5 of 1879, under the Bombay Abkari Act. It has not been shown that the provision of the United Provinces Excise Act is pari passu with S. 45, Bombay Abkari Act. Moreover we have not been shown that the restrictions placed under the Bombay Act have been adopted in the license issued under the United Provinces Excise Act. We consider that this appeal is without force. We dismiss it with costs.

M.N./R.K. *Appeal dismissed.*

(1) [1916] 39 All. 107=38 I.C. 178=14 A.L.J. 1035.

(2) [1888] 12 Bom. 422.

A. I. R. 1929 Allahabad 211

MUKERJI, J.

Daulat Singh—Defendant—Appellant.

v.

Sheo Nath—Plaintiff—Respondent.

Second Appeal No. 246 of 1927, Decided on 17th December 1928, from decree of Offg. Addl. Dist. Judge, Cawnpore, D/- 26th July 1926.

(a) Civil P. C., S. 151 — Execution — Act not providing for execution of order under it—Inherent power should be invoked.

Where an Act does not provide any clear procedure for execution of an order passed under it, the inherent powers of the Court to execute its own order should be invoked. [P 212 C 2]

(b) Adverse possession — Landlord and Tenant—Agreement to hold land rent-free ending—Tenant becomes trespasser.

A tenant held rent-free lands under an agreement An order was passed putting an end to the title of that tenant to hold on as a rent free grantee.

Held: that from the date of the order the position of the tenant was that of a trespasser and a suit after twelve years for ejectment was barred by limitation. [P 212 C 2]

(c) U. P. Tenancy Act, S. 34—Landlord cannot eject tenant holding by adverse possession.

A man who has been adversely in possession for more than 12 years, cannot be ejected under S. 34 by the landlord, who has lost his title by adverse possession. [P 213 C 1]

K. N. Katju for *M. L. Chaturvedi*—for Appellant.

M. L. Agarwala—for Respondent

Judgment.— A short history which gives rise to this appeal is this. In the year 1871, two brothers Laiq Singh and Thakur Singh sold their share in a zamindari property to Durga Singh, the predecessor-in-title of the plaintiff-respondent before me. Having regard to the fact that this sale left the vendors completely destitute, Durga Singh executed an agreement by which he allowed to each of the vendors certain lands, to be held by them rent free, till they made any attempt to transfer the same by mortgage or sale. Thakur Singh died and was succeeded by his wife, Mula Kuer. Mula Kuer is now dead and the present appellant Daulat Singh is in occupation of the land as a reversioner to Thakur Singh. The present suit was instituted on the allegation that the muafi held by Thakur Singh and after him by Mula Kuer, had been resumed by proceedings taken in Court in the year 1894 (judgment dated 18th December 1894). But since then, the defendant and his predecessor have been in possession "without consent and without any contract and without payment of rent." The plaintiff sued to eject the defendant as a mere non-occupancy tenant.

The suit was resisted, inter alia, on the ground that it was barred by 12 years' rule of limitation. It is said, that the possession of Mt. Mula Kuer, since the order for resumption was passed, on 18th December 1894, became adverse to the landlord and since the lapse of 12 years from the date, she and after her the defendant became the proprietor of the land. The suit failed in the Court of first instance but has been decreed by the learned District Judge on appeal. In this Court it is contended that the plea of limitation was a valid plea and ought to have been given effect to by the learned District Judge.

Act 12 of 1881 by S. 30 provided for a resumption of rent free land. The procedure was by an application. S. 30 gave two reliefs to the applicant. One was, "to resume such grants" and the second was, "to assess rent on the land." The copy of the decree, which is on the record as 55-A, shows that the former relief, namely resumption of the land was asked for and was granted. Now the question is, what is the effect of this decree?

It has been contended by the learned counsel for the respondent that the effect of the decree was the grant of a pure declaration namely, the defendant had ceased to hold the land rent free. In other words, the declaration given was that the defendant was not any longer entitled to hold the land under the terms of the agreement. It has been contended by the learned counsel that the Act of 1881 did not provide for execution of a decree for resumption. The only provision made for execution was as to the ejectment of a tenant (see Chapter 7, Act 12 of 1881). In my opinion the result is the same whether we read the order passed under S. 30, Act 12 of 1881 as a declaratory order or as an order for ejectment. Ordinarily speaking, the word "resumption" implies, a 'taking back,' re=again, and sumere=to take. Murray, in his English Dictionary gives as one of the meanings of the word, "to re-occupy." The fact that two reliefs are provided for, namely determination of rent and resumption, goes to show that the applicant could be granted a relief by way of possession. It may be that the Act 12 of 1881 did not provide any clear procedure for execution of an order like that. In that case, the inherent powers of the Court to execute its own order would have to be invoked. But, as I have said, for the purposes of this case, it is immaterial whether the order was of a declaratory nature or was capable of execution. If it was, in essence, a declaration, it put an end to the title of the defendant to hold on as a rent free grantee. From the moment the order was passed, the applicant, at whose instance the order was made, became entitled to take possession, unless both the parties, namely the applicant and the former grantee agreed that the latter should hold the land on a rent agreeable to both the parties. It is wrong to say that from the date of the passing of the order the position of the opposite party became that of a tenant. In this very case, in para. 3 of the plaint, the respondent says the defendant was in possession of the land

> "without any contract, without consent and without payment of rent."

In other words, the position of the former grantee was that of a tresspasser.

Again, if the order was capable of execution, the order not having been executed according to law, became valueless

and no fresh suit could be maintained for recovery of possession. It was contended by the learned counsel for the respondent that within 12 years of the order (1894), the Tenancy Act of 1901 came into force and under it, by virtue of S. 34, the landlord became entitled to sue the defendant as a trespasser, for ejectment, as if the latter were a tenant. Assuming all that, S. 34 is a rule of procedure and does not lay down any rule of limitation. Surely, a man who has been adversely in possession for more than 12 years, cannot be ejected by the landlord, who has lost his title by the adverse possession, under S. 34, Tenancy Act of 1901.

In my opinion, the learned Judge of the lower appellate Court was wrong in holding that the suit was not time barred. I hold that the present suit is not maintainable on account of the lapse of time. The appellant and his predecessor-in-title have together held the land for more than 12 years adversely to the plaintiff and his predecessor-in-title. The appeal is allowed and the respondent's suit is dismissed. The appellant will have his costs throughout.

M.N./R.K. *Appeal allowed.*

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* A. I. R. 1929 Allahabad 213

SULAIMAN AND KENDALL, JJ.

Sheo Shanker Upadhya and *others*—Defendants—Appellants.

v.

Partab Narain Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1412 of 1928, Decided on 4th January 1929, from decree of Sub-Judge, Ghazipur, D/- 11th July 1928.

*** Limitation Act, S. 18—Active concealment with intention to deceive is fraud within S. 18—Pre-emption.**

If a vendor or a vendee wishes that a sale should not be nullified by a pre-emption suit, it is necessary for him to inform the pre-emptor before the transaction and get his refusal but a mere omission to inform the pre-emptor or the bare fact of concealing the sale transaction from him cannot amount to a fraud, but where there is an active concealment of the transaction coupled with an intention to deceive the pre-emptor, there would undoubtedly be a fraud within the meaning of S. 18.

[P 214 C 1]

K. N Katju—for Appellants.

Judgment.—This is a defendants' appeal arising out of a suit for pre-emption. The sale-deed was executed on 8th March 1926, but the suit was filed on 17th June 1927. To extend the period of limitation the plaintiff alleged that the sale had been fraudulently concealed from him by the defendants, and he came to know of it only when in May 1927 the notice of the mutation proceedings was served on the village patwari. Both the Courts below have found that there was a fraudulent concealment of the sale transaction. The lower appellate Court has recorded a distinct and specific finding that in its opinion the defendants had actively and fraudulently concealed the sale transaction from the knowledge of the plaintiff and that therefore the provisions of S. 18, Limitation Act, were operative. This finding is based on the circumstances that the sale-deed instead of being registered at the Tehsil in which the property was situate was actually registered in another district; that in order to get the registration effected a small plot of land in the other district was included; the stamp paper also was purchased in the other district several months before the execution of the document; no written notice was served on the plaintiff, and the defendants vendees did not even take possession of the property purchased for over a year after the execution of the deed and allowed the vendors to realize rents from the tenants; the Government revenue was paid by the vendors during that time and lastly no step was taken within one year to apply for the mutation of names in favour of the vendees.

On these circumstances and the oral evidence the Courts below have come to the conclusion that there was an active and fraudulent concealment of the sale transaction on the part of the defendants. It has accordingly been held that the claim was not barred by time. The learned advocate for the appellants argues before us that it was no duty of the vendors or the vendees to inform the pre-emptor of the sale and that accordingly an omission to inform him did not amount to fraud. Fraud has not been defined in the Limitation Act, nor has it been defined in the General Clauses Act. But that its scope is very wide is apparent from its definition in S. 17, Contract Act, under which where there is an intention to deceive another party coupled with an active concealment of the fact by one having knowledge or belief of the fact or any other

act fitted to deceive the act amounts to fraud. If a vendor or a vendee wishes that a sale should not be nullified by a pre-emption suit it is necessary for him to inform the plaintiff before the transaction and get his refusal. In that sense there is a duty on the vendor to inform his co-sharers of his intention to sell. No doubt a mere omission to inform him would not amount to fraud, nor would the bare fact of concealing the sale transaction amount to such fraud, but where there is an active concealment of the transaction coupled with an intention to deceive the other party there would undoubtedly be a fraud within the meaning of S. 18, Limitation Act. The question whether the vendors in adopting the tortuous course which they did adopt had the intention of deceiving the pre-omptor was principally one of fact, and the Courts below were justified in inferring the existence of such an intention from the circumstances set forth above. It is impossible for us to say that there was no evidence before the Courts below to arrive at the finding that there had been an active and fraudulent concealment of the sale. We must aceept the findings of facts in second appeal. The appeal is accordingly dismissed under O. 41, R. 11, Civil P. C.

M.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 214

SEN AND NIAMATULLAH, JJ.

Rahim Bakhsh — Defendant—Appellant.

v.

Bachcha Lall—Plaintiff—Respondent.

First Appeal No 70 of 1926, Decided on 12th December 1928, from decree of Sub-Judge, Banda, D/- 27th January 1926.

(a) Tort—Defamation Suits for damages for tort are to be decided according to justice, equity and good conscience.

Suits for damages founded upon tort and more especially those based upon slander have to be decided according to the principles of justice, equity and good conscience and in the light of judicial principles laid down by eminent English Judges and recognized jurists. [P 215 C 2]

*** (b) Tort—Defamation—Every infringement upon a man's reputation affords good cause of action.**

As a principle of equity, every man is entitled to have his reputation preserved intact and any words calculated to infringe this right afford a good cause of action: *Dixon* v. *Holden*, (1869) 7 *Ex.* 492 and *Foulger* v. *Newcomb*, (1867) 2 Ex. 327, *Cons.*; 10 *All.* 425, *Rel. on*. [P 216 C 1]

(c) Tort—Defamation—Imputation of dishonesty made against tradesman is actionable per se and action lies without any regard to intent or bona fides.

An imputation of dishonesty to the person who is a tradesman is actionable per se and a suit for damages is maintainable without any regard to any question either about the bona fide or the intent of the person making the imputation at the time when he made it: *E. Hulton & Co.* v. *Jones*, (1910) *A. C.* 20, *Cons.* [P 217 C 2]

(d) Tort—Defamation—Slander—Malicious intent is not essential element.

Malicious intent or an intent to damage the reputation of a particular person is not one of the ingredients of actional slander: *Mahmood J.*, in 10 *All.* 425 *not Foll.* [P 217 C 1]

*** (e) Tort—Defamation—Counsel of a company asking witness whether that company was not biggest in that town—Counsel on opposite side remarking that it was also the most dishonest—Remark being defamatory and uncalled for—Counsel cannot plead privilege—Legal Practitioner**

Defamatory statements made by an advocate outside his duty as advocate and with no reference to the subject before the Court are irrelevant and are necessarily made in bad faith. A counsel might therefore be proceeded against in an action for defamation.

While examining a witness the counsel of a company, asked the witness whether his client company was not the biggest in the town. The witness said "yes", and the pleader on the opposite side remarked "and it is also the most dishonest in the town".

Held: that the remark was defamatory of the company, had no reference to the subject before the Court and was irrelevant. The counsel, therefore, could not plead privilege and was liable in damages: *Munster* v. *Lamb*, 11 *Q. B. D.* 588, *Cons.* and *Foll.* [P 217 C 2]

*** (f) Civil P. C., S. 35—Plaintiff finding difficulty in valuing his claim—He is entitled to full costs.**

In a case where it is extremely difficult for the plaintiff to value his claim at a particular figure, he is entitled to his full costs and not merely proportionate costs. [P 218 C 1]

Iqbal Ahmad and *T. A. K. Sherwani*—for Appellant.

K. N. Katju—for Respondent.

Judgment.—This is an appeal by the defendant from the judgment and decree of the Subordinate Judge of Banda in a suit for damages founded upon slander.

Plaintiff Bachcha Lal is a partner in the firm of Mulchand Ram Prasad, which carries on extensive business at Banda and as commission agents and in the purchase of sale and grain.

In 1924, one Chhedi Brahmen had agreed to purchase from the plaintiff's firm through Bachcha Lal 200 bags of gram of a particular kind and quality and had paid Bachcha Lal Rs. 200 by way of earnest money. This transaction led to a criminal complaint, which was filed by Chhedi against Bachcha Lal under S. 420, I. P. C. The trial of the case was in progress and while the cross-examination of Chhedi was proceeding, Babu Kesho Chandra Singh, a vakil for Bachcha Lal, asked Chhedi, the complainant whether the plaintiff's firm was the biggest arhatia firm for grain in the city or not. Chhedi answered that question in the affirmative. Rahim Bakhsh, who was a mukhtar for Chhedi in the criminal case and who was sitting close to Babu Kesho Chandra Singh immediately upon hearing that answer by the complainant is said to have interjected the observation that "they were the most dishonest men also in the city". The original words were '*bande men sab se bare be iman hain.*' It is said that Kesho Chandra Singh immediately protested and asked the Magistrate to make a record of this statement having been made by the defendant but the Magistrate said that he had not heard the remark in question and did not record the same in his proceedings. Plaintiff alleges that the complaint of Chhedi was thrown out on 21st January 1925 as false. It is not disputed before us that the complaint was dismissed. Lala Bachcha Lal instituted the suit which has given rise to the present appeal against Munshi Rahim Bakhsh Mukhtar on 9th April 1925 for recovery of Rs. 5,100 on account of damages sustained by him by the slanderous words uttered by Rahim Bakhsh in the Court of the Magistrate. The defendant denies having uttered the words which are imputed to him. In the alternative he claims privilege.

The Court below held on the evidence that the words imputed to the defendant were actually used by him and that the said words were of a defamatory character for which no privilege could be claimed by the defendant as a legal practitioner in the discharge of his duty to his client and, therefore, the action for slander was maintainable against the defendant. The Court below gave the plaintiff a decree for Rs. 200 as damages with proportionate costs and the defendant was directed to bear his own costs in the Court below. In appeal before us, it has not been seriously contended that the words described to the defendant were not uttered by him. In view of the evidence which was produced in the Court below consisting of the statement of Babu Kesho Chandra Singh, a gentleman of respectability and position, and the corroborative evidence of Gaya Prasad and Babu Prabhu Dayal, it was not possible for the Court below to arrive at a different conclusion. We hold that the defendant did utter those words in the Court of the Magistrate on 6th January 1925, and that the said words were heard by Kesho Chandra Singh and certain other persons in the Court-room.

It has been contended that the words were not uttered with any malicious intent, that they were not actionable per se and that the defendant in his capacity of Mukhtar in the case of Chhedi against the plaintiff was absolutely privileged and no suit was maintainable for damages against him by reason of his uttering those words.

The law in British India relating to civil liability in actions founded upon tort has not been settled by legislature. The English Common law of tort is not applicable to India in its entirety and rules of English common law as enunciated or recognized by English Court ought not to be applied to this country with inflexibility without regard to the dissimilarity in the two countries with reference to their customs and usages, the state of society and the conditions of things to be found therein.

The common law of England has rarely been applied in deciding cases relating to slander outside the Presidency towns. In the absence of any statutory provision, suits for damages founded upon tort and more specially which are based upon slander have to be decided according to the principles of justice. equity and good conscience and in the light of judicial principles to be found in the decisions of eminent English Judges and recognized jurists, which are broad-based upon human nature and common experience of mankind.

The distinction between slander being actionable per se in certain cases and not being actionable in other cases without proof of special damage has not been re-

cognized or followed with unanimity by the Indian High Courts.

As a principle of equity, every man is entitled to have his reputation preserved intact, and any words calculated to infringe this right afford a good cause of action. As was observed by Malins V. C. in *Dixon* v. *Holden* (1) a man's reputation is his property and possibly more valuable than other properties. Even under the common law of England, slander or oral defamation is actionable in certain cases without proof of special damage and one of such cases is where the plaintiff was affected by the words in his office, profession or trade. In such a case special damage in the sense that actual and temporal loss has, in fact, occurred need not be proved : *Foulger* v. *Nawcomb* (2). In *Dawan Singh* v. *Mahip Singh* (3), at 436 [*of* 10 *All.*] Mahmood, J., has laid down the following propositions :

"(1) That whilst the English law of defamation recognizes no distinction between defamation as such and personal insult in civil liability, the law of British India recognizes personal insult conveyed by abusive language as actionable per se without proof of special or actual damage.

(2) That such abusive and insulting language, unless excused or protected by any other rule of law, is in itself a substantive cause of action and a civil injury apart from defamation."

The words used by the defendant in this case which are the subject of dispute are not capable of being construed *mitiori sensu* and are indeed incapable of being interpreted in an innocent sense. The test is how will the words be understood by a man of ordinary intelligence where the person against whom the imputation is levelled is a merchant or a tradesman. The question that arises for determination is whether the words have a natural tendency to harm him in his occupation. The words uttered should not be taken out of the setting in view of the place, the occasion and the circumstance when the words were used. The defendant was the mukhtar of Chhedi in the case under S. 420, I. P. C. He is entirely within his rights to make any observation about the conduct, character or status of Bachcha Lal which might have been necessary or called for in the prosecution of the case which was then under enquiry. We have got to take into consideration the circumstance under which the words were used. The institution of a complaint under S. 420, I. P. C., against a merchant of the respectability and position of Bachcha Lal was not only a serious menace to his liberty but it was by itself a circumstance calculated to prejudice his personal reputation as a man and his credit in the market. Babu Kesho Chandra Singh was trying to vindicate the character and position of his client Bachcha Lal. He put the question to the complainant as to whether or not the firm of which Bachcha Lal was the member, was the biggest firm at Banda. The answer to that question was a categorical affirmative. The defendant Rahim Bakhsh was sitting in Court very close to Babu Kesho Chandra Singh, the remark made by him that the 'firm of which Bachcha Lal was a member was also the most dishonest firm in Banda' was a remark which was entirely uncalled for. It was a remark singularly inopportune because it was calculated to create an atmosphere of distrust about Bachcha Lal, about the time when his commercial honesty was itself a question in issue before a criminal Court. It is significant that the remark was not addressed to the Court. It could not be contended that the observation was made by Rahim Bakhsh in any way either in furtherance of the interests of his client in the case or in the discharge of his professional duty towards his client. The remark was evidently made for the illumination or edification of such of the persons who happened to be present in the Court-room in the immediate vicinity of Rahim Baksh. The learned advocate for the appellant relies on *Munster* v. *Lamb* (4) in support of the proposition that the statement in controversy bore the seal of privilege and could not form the basis of a civil action. It was held in that case that :

" words spoken by an advocate in the course of the defence of his client, however, defamatory, they may be of the prosecutor, are not actionable, provided they be relevant to the matter in hand, and spoken in good faith. An advocate has been allowed very extensive latitude in the matter of the freedom of his speech before a Court concerniug the action in which he is employed. "

Mathew, J., observes as follows at p. 594 :

(1) [1869] 7 Ex, 492.
(2) [1867] 2 Ex. 327=36 L.J. Ex. 169=15 W. R. 1181=16 L.T. 595.
(3) [1888] 10 All. 425=1888 A.W.N. 157.
(4) [1884] 11 Q. B. D. 588=52 L. J. Q. B. 726 =47 J. P. 805=32 W. R. 248=49 L. T. 252.

"It may be inconvenient to individuals that advocates should be at liberty to abuse their privilege of free speech subject only to animadversion of punishment from the presiding Judge. But it would be a far greater inconvenience to suitors, if advocates were embarrassed or enfeebled in endeavouring to perform their duty by the fear of subsequent litigation. This consequence would follow that no advocates could be as independent as those whose circumstances rendered it useless to bring actions against them. The passage in *Seaman* v. *Netherlift* upon which Mr. Waddy relied was not, it seems to me, intended to qualify the statement of the law contained in the earlier judgments relied upon by the defendant. All that was to be laid down was, that, for defamatory statements made by an advocate outside his office of advocate and with no reference to the subject before the Court, and which therefore were necessarily made in bad faith and were irrelevant, a counsel might be proceeded against in an action."

These observations are a clear authority against the contention of the appellant. In the present case the words used by the defendant were and could not in any sense be recognized as privileged and a suit for damages was clearly maintainable.

It is next contended that the words were not used with a malicious intent and, therefore, no suit for damages could be instituted against the defendant. In *Dawan Singh* v *Mahib Singh* (3) Mahmood, J. observes (at p. 456 of 10 All.) that :

"Malice is an element of liability for abuse and insulting language."

With great respect, we are not prepared to subscribe to this proposition in its entirety. Malicious intent or an intent to damage the reputation of a particular person is not one of the ingredients of actionable slander. Bigelow in his Law of Torts, Edn. 2, 1903, p. 151 observes as follows :

"The plaintiff in an action for defamation is entitled to recover upon proof of the publication (with special damage if the case does not fall under one of the four heads) ; proof of malice, in other words, malice as an entity, is not necessary, in any sense of the term, to make a case. It has indeed been common to say that malice is presumed or implied upon proof of the publication but that means nothing, and is only misleading, for the presumption or implication cannot be overturned by evidence of want of malice. Malice touching to making a prima facie case is only a name arbitrarily applied; it is simply a fiction."

We are in complete accord with this view. The law in this respect has been clearly enunciated by Sir Hugh Fraser in his Principles and Practice of the Law of Libel and Slander, Edn. 6, 1925 at p. 62,

. . . . .

"It is no defence that the defendant did not intend to refer to, or defame, the plaintiff ; and the defendant will not be excused merely because he published the words complained of in the honest belief that they were true unless the occasion of publication was one of qualified privilage or without negligence (unless he took only a subordinate part in such publicatipn and was not the author, printer or orignal publisher of the words, or by accident or mistake or in jest."

No facts have been brought out to bring the case of the appellant within one of the recognized exceptions referred to above. The words appear to have been uttered by the defendant with due deliberation in an audible voice and without any regard for the consequences that were to ensue. In *Eulton & Co.* v. *Jones* (5). Lord Loreburn is reported to have said:

"A person charged with libel cannot defend himself by showing that he intended in his own breast to defame, or that he intended not to defame the plaintiff, if, in fact, he did both."

As we have stated already the true test is, were the words of such a nature and character as in natural course of things calculated to harm the plaintiff's reputation. The correct principle has been laid down by Clement Catley in his Law and Practice of Libel and Slander in a civil section, 1924, at p. 66:

"Any words which have a tendency to hurt or prejudice a man in exercise of his trade or business are actionable without proof of special damage . . . . . thus it is actionable to say of a merchant or a tradesman that he has cheated in his trade or that he hath nothinbut rotten goods in his shop, or that he adulteg rates his goods or delivers inferior goods to those purchased, or keeps false books of accounts, or uses false scales or weights or takes the goods of his customers and pawns them."

We are clearly of opinion that an imputation of dishonesty to the plaintiff who is a tradesman is actionable per se and a suit for damages was maintainable without any regard to any question either about the bona fide or the intent of the defendant at the time when he used the words.

It follows from what we have stated above that this appeal is devoid of substance and we do hereby dismiss it with costs. The plaintiff has retorted by filing cross-objection which he has valued at Rs. 1586. The trial Court gave the plaintiff a decree for Rs. 200 only as damages for defamation and allowed him only

(5) [1910] A. C. 20=79 L. J. K. B. 198=2 T. L. R. 128=54 S. J. 116=101 L. T. 831.

proportionate costs. What the plaintiff claims is a higher sum than what he was allowed by the Court below. He ought to have led some evidence to show what was the extent of damage sustained by him by reason of the slander. The plaintiff has not produced any evidence whatsoever to establish either loss of trade or any other actual loss in any shape or form. Under these circumstances we are not prepared to differ from the trial Court in its assessment of damages.

We do not think that the Court below has exercieed a sound discretion in allowing the plaintiff costs proportionate to the claim allowed by it. The plaintiff's cause of action was well-founded. The defendant was clearly a wrong doer. We think that in a case where it was extremely difficult for the plaintiff to value his claim at a particular figure he was justified in assessing his claim at Rs. 5,100. We are of opinion that the plaintiff is entitled to his full costs of the Court below and to this extent we modify the decree of the Court below. We allow the plaintiff costs proportionate to his success in his cross-objection namely Rs. 586-1-6. The defendant-appellant will have to bear his own costs throughout.

S.N./R.K *Decree modified.*

A. I. R. 1929 Allahabad 218

SULAIMAN, J.

B. Ghurpat Sahi—Plaintiff— Appellant.

v.

Mahabir—Defendant—Respondent.

Second Appeal No. 951 of 1926, Decided on 16th January 1929, from decree of Sub-Judge, Gorakhpur, D/- 21st January 1926.

(a) Agra Tenancy Act (2 of 1901), S. 87—Abandonment by leaving village is question of fact depending on tenant's intention.

The question whether the leaving of the village by a tenant without arranging for the payment of rent to the laudlord amounted to aa abandonment, is primarily a question of fact dependent on the intention of the tenant. [P 219 C 1]

(b) Agra Tenancy Act (2 of 1901), S. 87—Tenant leaving village for more than 12 years without arranging to pay rent—Zamindar can prove abandonment without filing notice.

The giving of notice by the landlord is not the only way in which abandonment can be proved. If a tenant has left the village without putting his tenancy in charge of any person and without having made any arrangement for the payment of rent, and neither returned to the village for over 12 years, nor taken any care of his tenancy, the abandonment by him may be proved even though no notice has actually been filed by the zamindar under S. 87 : 5 *All. Un. Rev. Dec.* 371 *not Foll.* ; 1 *C. W. N.* 198 ; 3 *C. W. N.* 46 ; 4 *C. W. N.* 493 and 5 *All. Un. Rev. Dec.* 270, *Rel. on* 3 *All. Un. Rev. Dec.* 153, *Dist.* [P 219 C 1, 2 ; P 220 C 1]

Shiva Prasad Sinha—for Appellant.

M. Waliullah—for Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit for a declaration of proprietary title. The defendant brought a suit against the present plaintiff in the revenue Court for ejectment alleging that the present plaintiff was his sub-tenant. On a plea of proprietary title raised by him, the present plaintiff was referred to the civil Court to obtain a declaration of his title. The plaintiff's case as set forth in the plaint was that he was the zemindar of the village and the defendant was originally the occupancy tenant of the plots in dispute. The defendant then abandoned the lands which came into the plaintiff's possession as his khudkasht and have been cultivated by him. The defence was that prior to the plaintiff becoming a cosharer, his father had taken the lands in question for cultivation as a sub-tenant from the defendant's father, and that, therefore, the subtenancy continued even though the plaintiff subsequently became the zemindar. There was a further plea that before the partition which has taken place there were other cosharers with the plaintiff's father and even if the plaintiff's plea as to possession was assumed to be true the detendant's occupancy tenancy has not become extinguished.

The lower appellate Court has stated that the plaintiff is the zemindar of the village without suggesting that he has other cosharers with him, but the first Court has pointed out that he has cosharers. But they have both dismissed the claim on the ground that an abandonment of the holding has not been established. They have, however, found in favour of the plaintiff that the defendant has entirely failed to prove that his father had let out the plots in dispute to the plaintiff's father to cultivate them as a sub-tenant. The first Court hesitated to believe that the plaintiff and his father had been in possession of the holding since 1316 Fasli. The lower appellate Court, however, had not challenged the

plaintiff's case that the defendant and his father left the village 15 or 16 years ago when the possession of the plot was taken by the plaintiff. It has remarked that the plaintiff and his witnesses deposed to that effect, and then stated that :

"this does not amount to abandonment as contemplated under S. 87, Tenancy Act."

It has again remarked that :

"no notice was given by the plaintiff to the defendant and his father as required under S. 87, Tenancy Act."

It is quite clear that the finding of the lower appellate Court that there was no abandonment is not based on its disbelief of the plaintiff's evidence but on the ground that in its opinion the abandonment can be effected only after notice under S. 87, Tenancy Act, has been given. The lower appellate Court has adopted the opinion of the first Court that it was the duty of the plaintiff to have proved technically the abandonment :

"in accordance with the provisions of law laid down in S. 87, Tenancy Act."

For the support of that view it had relied on the case of *Sheo Nath Kurmi* v. *Autar Kurmi* (1).

The question whether the leaving of the village by a tenant without arranging for the payment of rent to the landlord amounted to an abandonment, is primarily a question of fact dependent on the intention of the tenant. But the finding of the lower appellate Court is not based on any inference of such intention. It is based entrely on its interpretation of S. 87, Tenancy Act. The finding accordingly is not a finding of fact binding upon me in second appeal. No reported case of this High Court has been cited before me. The Calcutta High Court when dealing with a similar provision of law in S. 87, Bengal Tenancy Act, has consistently adhered to the view that the giving of notice by the landlord is not the only way in which abandonment can be proved : vide *Lal Mamud* v. *Arbullah Sheikh* (2), *Bhagwan* v. *Bisheshri* (3), and *Samugan* v. *Mahaton* (4). There are also several previous cases reported in the *Weekly Reporter*.

A learned member of the Board of Revenue has undoubtedly expressed the contrary opinion in *Sheo Nath Kurmi's* case where it was remarked that inasmuch as the zamindar had taken no action under S. 87, the land could not be held to have been abandoned by the tenant-in-chief. An earlier case of the Board of Revenue *Mt. Makaraji Naikin* v. *Sheo Mangal Das* (5), is distinguishable because there the tenant had not left the village, although it was remarked that sub-S. (2) was imperative. On the other hand another learned member of the Board of Revenue in *Nawab Syed Muhammad Ali Nasir Khan* v. *Guptar* (6), remarked:

"So far as I make it, it has never been held that there is apparently no other way of establishing abandonment by an occupancy tenant except by proceedings under S. 87. Obviously this section is not meant to provide the only means for establishing this fact as it can only be brought into operation when the tenant has left the neighbourhood."

That, however, was a converse case where the zamindar himself was pleading that there had been no abandonment and was relying on his want of giving the notice.

In the absence of any clear authority binding upon me I must examine the section itself. It contemplates the entering into possession by the zamindar even within a year of the tenant's leaving the neighbourhood without making arrangement for the payment of rent, as the zamindar can take possession any time after the 15th May following. Sub-Cl. (3) contemplates a suit by the tenant for recovery of possession under S. 79. Sch. 4, group C, No. 30 prescribes six months as the period of limitation commencing from the date of dispossession. In cases where the landholder has taken possession promptly he can claim a presumption in his favour under sub-Cl. (3), if he has given notice under sub-Cl. (2). But even that presumption is not conclusive. The words

"before the landholder enters under this section he shall file a notice &c."

indicate that if he wishes to take advantage of the presumation under this section he must proceed by giving notice. I do not think that the effect of the section is to lay down that in no other case can there be an abandonment of the tenancy. If the tenant has left the village without putting his tenancy in charge of any person and without having made any arrangement for the payment of rent, and neither returned to the village for over

(1) 5 All. Un. Rev. Dec. 371.
(2) [1897] 1 C. W. N. 198.
(3) [1899] 3 C. W. N. 46.
(4) [1900] 4 C. W. N. 493.
(5) 3 All. Un. Rev. Dec. 153.
(6) 5 All. Un. Rev. Dec. 270.

12 years, nor taken any care of his tenancy, the abandonment by him may be proved even though no notice has actually been filed by the zamindar under S. 87.

If the plaintiff is the sole landholder entitled to recover the entire rent of this holding then his possession of the land for over six months has undoubtedly extinguished the tenancy. On the other hand if he is only one of several cosharers in the village and the rule laid down in *Rani* v. *Aidal Singh* (7), is correct then this is not a case of dispossession by the landholder but one of adverse possession against the tenant. Even then the tenant's right to the tenancy would be extinguished after the expiry of 12 years.

In the circumstances of the present case I am unable to accept the view of the Court below that the civil Court should invoke the aid of S. 34, Tenancy Act, which is meant principally for the revenue Courts, and hold that in spite of the adverse possession of the present plaintiff, a constructive sub-tenancy has come into existence and the defendant is entitled to treat the plaintiff as his subtenant. If the view accepted by the lower appellate Court be correct then no tenant can ever lose his tenancy no matter how many years have elapsed since he left the village. I am therefore unable to accept the finding of the lower appellate Court as conclusive. I may add that although the new Tenancy Act is not applicable the corresponding section, viz: S. 107 uses the word "may" instead of "shall" and make it quite clear that the giving of the notice is not the only course open to the land-holder.

Accordingly before disposing of this appeal finally I must have clear findings by the lower appellate Court on the following two points: (1) Whether the plaintiff is now the sole landholder i. e., entitled to recover the whole of the rent of the lands in dispute or whether there are other cosharers in the plots who are not members of his joint family? (2) When did the defendant's father or the defendant leave the neighbourhood of the village without making any arrangement for payment of the rent to the landholder, and for how long the plaintiff's father and he have been in possession of the lands?

(7) A. I. R. 1924 All. 431.

The findings should be returned within two months.

M.N./R.K. *Case remanded.*

A. I. R. 1929 Allahabad 220

BOYS, J.

Manohar Singh—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 825 of 1928, Decided on 3rd January 1929, from order of Addl. Sess. Judge, Moradabad, D/- 28th August 1928.

(a) Criminal P. C., S. 139-A—Court has discretion to decide whether materials are sufficient for not deciding question in Criminal Court.

A Magistrate is left an absolute discretion as to how far he will go or upon what materials he will act in considering whether the person proceeded against seems likely to have such a case in support of his denial as may make it seem unfitting for the criminal Court to proceed: [P 221, C 2]

(b) Criminal P. C., S. 139-A (2)—Presence of reliable evidence and not bona fides are to be considered.

The Court has not to consider whether a denial is bona fide or not but only whether there is reliable evidence in support of it. [P 222, C 2]

(c) Criminal P. C., S. 439—High Court can modify order under S. 137, Criminal P. C.

The High Court which has power to confirm the order under S. 137 has also power to modify that order to such extent as may seem fit. [P 222, C 2]

Sailanath Mukerji—for Applicant.

M. Waliullah—for the Crown.

Judgment.—The applicant applies in revision of an order under S. 140, Criminal P. C., directing him to remove a portion of his house on plot 43 across which there is held to be a public right of way. I have had considerable difficulty in ascertaining what are the actual facts. It appears that upon the defendant filing a written statement a Naib Tahsildar was called on to make measurements and report. I had proceeded thus far with the commencement of this judgment on the case as stated by counsel when I referred for another point to the written statement and from that it appears that the Naib Tahsildar had already made his measurements and made a report. This fact is sufficient to indicate the difficulty I have had in arriving at the facts to which I am asked to apply

the law. I will, therefore, proceed to state what is the case of the applicant for it is for him to show that there is proper ground for interference. The case, then as stated on behalf of the applicant, is that upon receipt of a notice issued under S. 133 the applicant appeared to show cause; that he showed that cause by filing a written statement; that in that written statement there was a denial that there was any public right of way over the plot in question; that the Magistrate did not, as he was required by law to do, S. 139-A (2), enquire into the matter and determine whether there was "any reliable evidence" in support of the applicant's denial; that if he had done so he would have felt compelled to stay the proceedings until the matter had been decided by a competent civil Court; that he had no power to proceed direct to the holding of the formal inquiry under S. 137. It is said that this irregularity vitiates the final order.

In the first place counsel is not able to satisfy me that there was in fact no such inquiry as is mentioned in S. 139-A (1), and on that ground alone I should have to dismiss the revision. Secondly, counsel has not been able to state what materials his client had ready to which the Magistrate could direct any preliminary inquiry. But on the other hand I have nothing to satisfy me that the Magistrate considered the possibility of holding or the obligation to hold any such inquiry, and I think it is desirable to state what in my view is the procedure that should be followed. It is matter of common knowledge that prior to the amendment of Ch. 10 by the Act, 1893, the Courts had engrafted on the Code a law which may be generally stated as having the effect of casting on the Magistrate the duty of determining whether a claim to title made by the opposite party was bona fide or mala fide, and directing the Magistrate, if he found the claim to be bona fide, to refer the parties to the civil Court. This graft on the Criminal Procedure Code was no doubt dictated by a feeling that it was undesirable where there was really some reliable evidence of title in the opposite party to allow the criminal Courts to order the destruction of property.

As it seems to me the legislature desired to clarify the law on this point by the enactment of S. 139-A. It will be noticed, however, that the legislature has very carefully avoided any reference whatver to any consideration of the bona fides of the denial of the opposite party except so far as there may be definite reliable evidence of that bona fides. The Court has not been directed, on the opposite party showing cause, to consider directly the question of his bona fides at all, but to consider whether there is any reliable evidence in support of his denial. The merit of this is obvious. A person may make a denial absolutely bona fide, but he may have no reliable evidence to put forward in support of his denial. He may have in fact no evidence to put forward at all. A denial need not necessarily be mala fide because a person cannot produce evidence to ssupport his denial. He may have a perfectly honest belief in his own denial. Bona fides was therefore a bad test to apply, and the legisiature has substituted a much better one. On the applicant showing cause the Magistrate must "inquire" into the matter and determine whether there is "any reliable evidence." This "inquiry" is clearly something to be kept quite distinct from the formal inquiry which may have to be held later under S. 137 if the Magistrate finds that there is no prima facie reliable evidence in support of the denial of the opposite party.

But I do not think that this Court should dictate any further than the legislature has gone as to the nature of that inquiry. There are other cases in the Code: cf. S. 476 and Ss. 523, 524, where a Magistrate has to hold an inquiry, but where nothing is laid down as to the form that inquiry shall take. It appears to me the legislature of deliberate purpose has refrained from binding the hands of the Magistrates in a class of cases in which the circumstances may be of infinite variety. As it appears to me the Magistrate is left an absolute discretion as to how far he will go or upon what materials he will act in considering whether the defendant seems likely to have such a case in support of his denial as may make it seem unfitting for the criminal Court to proceed. The opposite party may be able to produce along with his written statement or afer any such interval as the Court may see fit to allow him, titledeeds, or maps or affidavits or any other

material that the Court may also see fit to accept in support of his denial and indicating that he has reliable evidence. It is not merely because he produces material of some sort that the Court is bound to stay the proceedings. The Ccurt has to consider whether there is any "reliable evidence, and some force must be given to the word "reliable." If no material is produced before the Court suggesting that there is likely to be any reliable evidence in support of the opposite party's denial it will proceed with the inquiry under S. 137. If in its opinion the plaintiff has some reliable evidence in support of his denial it will in the exercise of its discretion stay the proceedings till the matter is determined in the civil Court. There is no discretion in S. 139A as to which of the parties is to be directed to go to the civil Court, but that appears to me to give rise to no real difficulty. The Court is not directed to quash the proceedings altogether but to stay the proceedings. Nor do I find any obligation on the Magistrate to force the opposite party or any particular party into Court. It is clearly within its inherent jurisdiction to stay those proceedings until the matter has been decided by a competent civil Court on such conditions as may to it seem fit in the varying eircumstances of each case.

I have only tried to indicate the lines on which it appears to me clear the Magistrate should proceed and no particular phrase that I may have used is to be regarded as in any way in the nature of a direction to the Magistrate.

I agree with the view expressed by, Dalal, J., in *Criminal Revision No.* 759 *of* 1928 *decided on 6th December* 1928, that it is unfortunate that S. 139-A was put into the statute book in a later position than S. 137. The position given to it is apt to lead to its being overlooked when a Magistrate who is not thoroughly familiar with the procedure in studying Chapter 10 with a view to seeing how he should proceed. I have been referred to *Munna* v. *Emperor* (1); *Ghurahu* v. *Shakal Raj*, (2), and *Raghunath* v *Emperor* (3), In *Munna* v *Emperor* (1) in one place the learned Judge says :

> **"In the present case it is impossible to say that there was no bona fide claim put forward by the accused or that there was no reliable evidence in support of his denial."**

I have already given my reasons for deprecating any reference to the bona fides of the opposite party. In my view it has no longer to be considered whether the denial was bona fide or not but whether there was reliable evidence in support of it—two matters which as I have explained are to my mind very different.

In reference to all these cases, if I may say so, it appears to me that a distinction was not borne in mind between the evidence which eventually came on to the record as a result of the proceeding under S. 137 and the material which may have been before the Magistrate before he commenced the proceeding under S. 137. It is not at all certain that if the Magistrate had made an inquiry under S. 139A (2) he would have had before him all the material which he subsequently had as a result of the formal inquiry under S. 137.

In this particular case I have, as I have already stated, no reason for being fully satisfied that the Magistrate did not hold any inquiry under S 139-A. But even if he did not do so I do not think that I should now interfere on that ground alone, in view of the fact that without objection taken by the opposite party the inquiry proceeded under S. 137 and the Magistrate has found as the result of an inquiry much more searching than it was incumbent on him to have held under S. 139-A that there is in fact no reliable evidence in support of the denial.

The question remains what order I should pass. It is clear that this Court would have power to confirm the order of the Magistrate but I see no ground for holding that it has not also power to modify that order to such extent as may seem fit. I maintain the order of the Magistrate with this modification that its execution will be suspended for the period of six months. If the opposite party fails to obtain the decision of a competent civil Court in his favour within six months the order of the Magistrate will be executed forthwith. If through no negligence of his own he is unable to obtain a decision in his favour within that period, it will be open to him to apply to this Court for

(1) A. I. R. 1926 All. 390.
(2) A. I. R. 1926 All. 157.
(3) A. I. R. 1925 All. 311.

an extension. With this modification the order of the Magistrate is maintained.

M.N./R.K. *Order maintained.*

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* A. I. R. 1929 Allahabad 223

SEN AND NIAMATLULAH, JJ.

Gaje Singh and *others*—Petitioners.

v.

Mt. Uchhaba and *others*—Opposite Parties.

Misc. Ref. No. 289 of 1928, Decided on 7th January 1929, made by Secy. to Govt., U. P.

(a) Land Tenure—Khaekar tenure.

History of Khaikari tenure, its origin, and its incidents and rights traced. [P 228 C 1, 2]

(b) Land Tenure—Permanent tenure—Succession to heritable permanent tenure is according to personal law—Allegation of special custom excluding collaterals from inheritance must be proved.

The rule of succession to a permanent tenure, heritable in its character, is in the absence of a statute, terms of a grant. if any, or valid and binding custom to the contrary, the same as is applicable to other properties left by a deceased tenant. If a special custom excluding collaterals from inheritance as regards a permanent tenure is pleaded, the party pleading such a custom must have the onus laid on it to prove by satisfactory evidence that such collaterals, though heirs under the personal law of the deceased tenant in respect of all other assets left by him, were excluded from inheritance as regards his rights in the permanent tenure. [P 229 C 2]

(c) Mortgage—Mortgage of non-transferable tenure is valid as between mortgagor and mortgagee.

The non-transferability of a tenure is not enough to invalidate it as between the mortgagee on the one hand and the mortgagor or those bound by his actions on the other.

[P 230 C 1]

(d) Hindu Law—Reversioner—Consent to alienation by attestation can be given only by presumptive reversioner.

It is only if the presumptive heirs, who alone are expected to take exception to an alienation, consent by attesting the deed, inference of legal necessity is justified. A remoter reversioner cannot by his action bind the presumptive heirs: *A. I. R.* 1918 *P. C.* 196, *Ref.*

[P 230 C 2]

(e) Deed—Recital.

A recital in a deed of recent date execute by a Hindu widow is no evidence of the fact recited. [P 230 C 2]

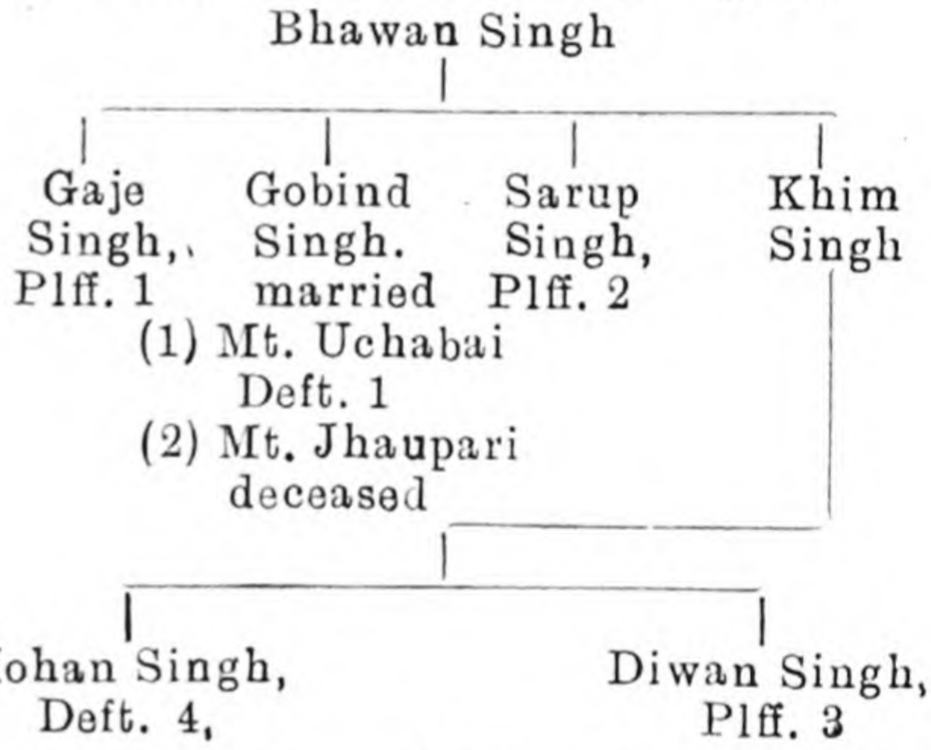
*** (f) Land Tenure—Khaekar tenure—Reversioners though not joint in cultivation with tenant or limited owner can succeed.**

A share of pacca khaekar tenure and its appurtenances belonging to a tenant in full heritable right can be inherited by his reversionary heirs even when not joint in cultivation either with him or the limited owner.

[P 231 C 1]

B. L. Dave—for Petitioners.

Niamatullah, J.—This is a reference by the Local Government. under R. 17 of the Rules and Orders relating to Kumaun Division, made on the petition of Gaje Singh and others who were plaintiffs in a suit brought by them to challenge the validity of a mortgage-deed dated 18th August 1925 executed by Mt. Uchabai, widow of Govind Singh in favour of Kalyan Singh and Tika Singh, in respect of property to which she had succeeded on the death of her husband, issuless, a few years before the date of the mortgage. The relationship of the plaintiffs with the deceased husband of Mt. Uchabai will appear from the subjoined pedigree.



The suit as brought is simple. Plaintiffs claim to be the nearest reversioners and presumptive heirs of Gobind Singh on the death of Mt. Uchabai. The alienation is impeached on the usual ground that it was not warranted by such legal necessity as justifies a mortgage by a widow under the Hindu law. Defendant 4 has been impleaded as he attested the mortgage-deed, probably, in token of the same having been executed under justifying circumstances. The plaintiffs do not suggest that they formed with the deceased a joint Hindu family.

Written statement filed by the mortgagees (defendants 2 and 3) raised two main questions, viz., (1) that the property mortgaged, consisting of lands in a sub-division of the village Sirda and a cowshed, is part of pacca khaikari tenure in which plaintiffs, as separated collaterals, can have no right of inheritance and, therefore, by themselves and without joining all other cosharers of the entire tenure, they cannot maintain the suit and (2) that the mortgage was justi-

fied by legal necessity as shown by the attestation of defendant 4 a person equally entitled with the plaintiff.

The Assistant Collector of Ranikhet who heard the case in the first instance upheld both the pleas. On first appeal, the Deputy Commissioner, and on second appeal the Commissioner, decided only the first plea and expressed no opinion on the second which related to the existence or otherwise of legal necessity for the mortgage effected by the widow. In arriving at a conclusion on the question of the plaintiff's right to inherit on the termination of the life-estate of defendant 1 all the three Courts considered that it was concluded by certain decision which had ruled that collaterals are not entitled to succeed to khaikari tenure unless they were joint in cultivation with the deceased tenant.

Dissatisfied with the decisions of the Kumaun Courts the plaintiffs moved the Local Government to make a reference to the High Court for the latter's opinion on the questions arising in the case, one of which is of general importance and likely to arise in other cases. This reference has been accordingly made.

It may be stated at once that the first plea does not relate to any family or local custom modifying the ordinary Hindu law to which the parties are subject in matters of inheritance but refers to a peculiar incident of the khaikari tenure which, according to the defendants' case is lineally heritable but cannot descend on the collaterals unless they were joint in cultivation with the last male holder or his widow. The judgments of the Courts whose decisions are questioned are based on that footing. The earlier decisions which the Courts profess to follow, likewise, treat it as an incident of the tenure and not as part of the personal law of the holders.

Whether the tenure in the hands of a male holder is transferable to any extent need not be considered but it may be safely premised that it is a permanent tenure and the holder thereof enjoys absolute immunity from ejectment by the proprietor. That it is not limited in duration to one or more lives will be equally clear from such materials as are available. It is admittedly heritable by the male lineal descendants. Indeed, the defendants' written statement and the judgments of the Courts which uphold it unquestionably imply that the male holder has an estate of inheritance but that collaterals as such cannot inherit, being excluded in the matter of inheritance by the whole body of cosharers in the khaikari tenure. Such being the characteristics of the tenure as alleged by the defendants and found by the Courts the whole controversy boils down to the question whether the tenure being heritable, collaterals, not sharing in the cultivation of a deceased holder, are excluded from inheritance by the whole body of cosharers in the particular tenure. It may be observed that the collaterals as such are excluded but can apparently succeed if they are cosharers in the whole tenure.

It must be conceded that an incident of such an extraordinary character, attaching to an estate of inheritance, and so much opposed to ordinary notions of nature justice should be established by cogent evidence. Cases of hardship may frequently occur now when separation between the sons of the same father and and between uncle and nephew is common enough.

Now, an incident of the kind mentioned above may come into existence in one of the three ways, viz. (1) by statute (2) by the terms of the grant creating the tenure or (3) by usage. Admittedly there is no rule of any enactment on the subject. The necessity of a codified law dealing with this and similar tenures in Kumaun has been pointed out several times by experienced Revenue Officers and it is high time that uncertainty in such matters should cease. The origin of a given tenure and the terms of the grant, if any, are lost in antiquity and cannot be ascertained with any degree of precision except in so far as may be gathered from usage and subsequent treatment of the tenures. The investigation must, therefore, mainly rest on the third alternative which, again, reduces itself to what we can gather from settlement reports which were the only source of knowledge of officers who have had to administer that part of the country. Mr. Stowell's valuable Manual of the Land Tenures of the Kumaun Division is based mostly on the reports mentioned by him in the Bibliography given by him in the preface and on cases decided by Commissioners of Kumaun Division whose orders are final. Mr. Stowell's Manual is found to be freely quoted in the judgments produced in this

case as also in those of the three courts which decided it. I have preferred to refer to such of the original reports as could be found in the Court library or the Government Secretariat library in order tc discover if there is anything in them to support the proposition that collaterals are not entitled to succeed to a share in pacca khaikar village unless they shared the cultivation of the deceased khaikar and the conclusion that I have reached is that this disability, assumed by some officers, is an innovation imported from a statutory provision in the Rent Act 12 of 1881 in force in the plains. A reference to the views of the successive officers who settled Kumaun and compiled the settlement reports will bring out my reasons for arriving at that conclusion.

It was in 1815 A. D. that Kumaun was annexed to British India by conquest. The first settlement was very summary, the 2nd was for one year, the 3rd and 4th for 3 years each, the 5th and 7th for five years each The last of these expired in about 1838. All these settlements were made by Mr. Traill whose long official connexion with the Kumaun region entitles him to be regarded as an authority where his pronouncement on a question relating to land tenures in Kumaun is to be found. He is freely quoted by succeeding settlement officers and Mr. Stowell has made copious and frequent use of his writings. The next settlement and the first long term (20 years) settlement was concluded by Mr. Batten in 1840. On the expiry of this term it was followed by another similar settlement made by Mr. Becket (1861-1864) but before he could write his report he had to proceed to England owing to ill health and Sir Henry Ramsay the Commissioner compiled the report of that settlement.

The third long settlement was made in about 1896 by Mr. Pauw whose report is very illuminating and has been made full use of by Mr. Stowell (I have collected the above information from the report of Mr. Pauw, pp 55-58) It will thus appear that we must depend on Messrs. Traill, Batten, Becket, Sir Henry Ramsay and Mr. Pauw for guidance as regards the incidents of a given tenure in Kumaun and any one who has had to write on that subject or to decide any question in controversy has relied on the views of one or the other of these officers.

An idea of khaikar tenures and rules of succession relating thereto, as also a general conception of the relations subsisting between the proprietors and Government on the one hand and between the proprietors and their subordinate holders on the other can be obtained from the following extracts taken from Sir Henry Ramsay's and Mr. Pauw's settlement reports which are largely based, so far as the characteristics of the tenure are concerned, on Mr. Traill's writings. I was not able to procure any compilation of Mr. Trail himself.

"The khaekur" says Sir Henry Ramsay, "enjoys hereditary though not a transferable right in the land of cultivators; and on the death of a father the sons generally make a subdivision of the land, which not unfrequently reduces the holding of each so much that these khaekurs are obliged to cultivate other land as sirthans or in paekashtee in some distant village, where they make their own terms with the proprietor. Paekashts of long standing have now assumed the position of khaekurs. No paekashts are in the position of contractors or sirthans."

"There is no tenure corresponding to what is known in the plains as zamindaree. Where maafee rights which had been undisturbed since the conquest of the province existed, they invariably include the proprietary right, and the cultivators are only khaekurs. Where proprietary rights which had been recognised at the 20 years' settlement, or rights of the same kind acquired by purchase, existed, they could not be interfered with: but, with these exceptions, the cultivators have been recorded as the owners of the land they occupy, while the permanent tenants can never be disturbed or interfered with by the enhancement of rent. In fact these tenants are in all respects equal to proprietors, with the exception that they cannot sell their holding: and they pay a small sum in addition to the quota of revenue due from the land recorded in their names. Sirthans must make their own arrangements."

"The only other tenure requiring notice is that which exists in some parts of the district, where whole villages are in possession of the permanent tenants, khaekurs. The proprietor residing in another part has no power to interfere with these khaekurs or their land, waste or cultivated" (Sir Henry Ramsay's settlement report of 1875 p. 15-16.)"

Mr. Pauw quoting from Mr. Traill gives the following account of khaikari tenures:

"Where the land granted," says Mr, Traill, "was already held in property by others, those occupant proprietors, if they continued on the estate, sank into tenants of the new grantee, who, moreover, by the custom of the country was permitted to take one-third of the estate, into his own immediate cultivation or *sir*. Of

the remainder of the estate, the right of cultivation rested with the original occupants, who were now termed khaekars or occupants in distinction from thatwan or proprietor. In Nagpur there are a number of villages illustrative of this system, the high castes, Bartwals, Bhandaris, Rawats, &c., no doubt the more recent grantees, being the proprietors of the whole village with cultivating rights in part only, while the Khasiya castes, no doubt the earlier occupants, hold the remainder of the village as khaekars of the high caste proprietors. It would appear that if the grantee did not at once exercise his right to take part of the village into his own immediate cultivation, he was subsequently debarred from getting a footing there at all, and remained entitled merely to his manorial dues. Mr. Batten derives the word khaekar from khana, to eat, and kar the royal revenue, that is, he may enjoy the land, so long as he pays the revenue. Besides the Government revenue (sitri) the khaekar was called on to pay to the proprietor various dues known as bhent (special cash payments) dastur (dues in kind) and pithai (an annual trifling cash rent)."

"The khurnis were tenants and settled on the estate by the proprietors, and by long continued occupancy might come to be considered in the light of khaekars from whom indeed they differed little, except in the nature of the rent to which they are liable. As the khurni or kaini according to Mr. Traill paid a higher rent than any other description of tenant, it was no doubt found convenient to allow him an hereditary right to cultivation, though strictly this right belonged only to the khaekar. The land of the childless khurni would, moreover, naturally revert to the proprietor at his death, and this may not improbably be the reason why the khaekar, who, in villages, where the grantee forbore to take cultivating possession in the beginning, now entirely excludes his heirs, so that on a khaekar in such a village dying without an heir or even collateral, his land reverted to the village body of khaekars should he die in a village where the proprietor holds land in cultivating possession, the holding passes not to the body of khaekars, but to the proprietor. The analogy of position between khaekars and khurnis would probably have been quite sufficient to establish this custom. Mr. Batten says regarding the khurnis : "This class of tenants is fact becoming merged into that of khaekars." It seems doubtful whether during the period of British rule they were ever distinguished, as no mention is made of khurnis in the oldest settlement papers ; they appear to have been treated exactly as khaekars, and certainly not only is no distinction made now, but the very name is lost, and it would be impossible to find out whether any given khaekar acknowledged for his ancestors a vassal tenant, or a reduced occupant proprietor. Sir H. Ramsay, however, is said to have acknowledged a distinction between pakka and kachchha khaekars, having reference no doubt to the under-proprietary and occupancy rights discussed in this paragraph. and in a settlement dispute relating to Mangaon, patti Dug in the Almora District, decided by Pandit Amba Datt, Deputy-Collector, in 1843 A. D., the same technical expression, pakka khaekar " is used."

"The hissedari right is, as before mentioned, said to have been an introduction of the British rule. The idea of land without a private owner seems to have been repugnant to the earliest British administrators and as in the plains the proprietary right was conferred on the zamindars, or revenue collectors, so in Garhwal it was conferred on the occupant cultivators unless some one else could show that a grant of the land and not merely an assignment of the revenue, had been made to him. The cultivators were then termed hissedars or cosharers in the estate, and were allowed full rights of transfer in the cultivated land of the viilage. (Pauw's Settlement Report 1898, pp. 33-35 paras 37, 38 and 40)."

" Another kind of resident tenants, however, says Mr. Traill, "who rent the land which the proprietors from absence or other causes are precluded from cultivating themselves, have no right of occupancy, either acknowledged or prescriptive. The tenants pay their rent either in kut kind (commonly at one-third of the produce), or in money, according to existing rates or engagements or to former usage. Where there is little demand for the land it is usually let for a moderate money rate, which tenure is termed sirtan, that is the renter pays merely sirti." The term sirti meant the Government land revenue proper under the Rajas, the original "agricultural assessment. (Pauw's settlement report p. 35 para. 41)."

It should be borne in mind that the word 'hissedar' has become a technical expression denoting only proprietary cosharer.

"At the outset a distinction must be made between khaekars in a village held entirely by khaekars, and khaekars in a village in which the hissedars have khudkasht, which is the modern form which the under-proprietary and occupancy rights have respectively assumed. In the former case (to quote Mr. J. R. Reid's words in the case of *Padmu of Timli, Lagga Pali, Khatli* v. *Gauri Datt*, in an order dated 28th March 1889, as Commissioner), "the khaekars alone have a right to arrange for the cultivation, pasturage, etc., includiug the succession to land lapsing owing to the death, heirless, of khaekars, the breaking up of waste etc., while the hissedars have no right beyond the collection of revenue cesses and "padhanchari." It would be hardly necessary to give instances, by quoting cases, of such a well-known and well-established principle were it not that owing to the absence of any written law on the subject of these tenures, and to the unscrupulousness and untruthfulness of litigants, new authorities are apt, merely from inability to ascertain the correct custom, to give decisions absolutely opposed to all recognized rights. It is sufficient to give one such instance. The village of Milai is held entirely by khaekars, who pay revenue to the muafidar. At the last settlement the khaekars who represent the old cultivators who have sunk into tenants of the grantee were recorded as proprietors in consequence of their independent position. On appeal they were subsequently reducsd to the position of khaekars. But there could be no

question of their under-proprietary right or the fact of their holding the whole village. Balmukand the present muafidar sued a khaekar Lalmani for recovery of possession of land broken up by the latter on the ground that it was his khudkasht (a perfectly preposterous plea ; a similar suit had in fact been dismissed in 1888) and by some means or other got a decree. The defendant in appeal pleaded that the whole village was in possession of khaekars, and that the muafidar by custom could only take the malikana and had no right to interfere with the cultivation. The Commissioner, however, refused to modify the decision (5th May 1893) and an appeal to the Board of Revenue met with the same fate (2nd September 1893), though in the case of *Padmu* v. *Gauri Datt*, quoted above, the Board had themselves decided that the khaekars in a similar village were entitled to the possession of land which the hissedars had actually partitioned out amongst themselves. The cases of *Khushal Singh of Dyuna, Talla Dora* v. *Lachi* (8th June 1889), and *Gangapuri of Mangaon, Dug* v. *Parsi Sah* (20th December 1893), both of which went up at one time or another to the Board are perhaps the leading cases on the subject of the holdings of khaekars in villages held entirely by khaekars. Both are Almora cases and in both the custom was held to apply not only to principal but also to lagga villages held entirely by khaekars, when there was any evidence that the khaekari holding represented an old under-proprietary tenure. They both refused to the hissedar the right to resume the land of an heirless khaekar and in both cases it was decided that the land should go to the common body of khaekars.

The principle is, however, by no means a modern one. Sir H. Ramsay mentions it in the Settlement Report of Kumaun, and a judicial decision by him to the same effect exists in *Harak Singh of Chyurkot Sabli* v. *Dalip Singh of Jukani lagga of Bangar Sabli*. in which the hissedars wanted to divide among themselves the unassessed waste land of the village of Jukani held entirely by khaekars, Sir H. Ramsay ruled : "Since all Jukani is in possession of khaekara the unmeasured land will not be divided amongst the hissedars" (30th November 1877). In the case of *Banwa* v. *Bala Datt, of Rauthiya, Chalansyun*, in which the defendant, a hissedar, got a deed of relinquishment from a khaekar in a village held entirely by khaekars and the plaintiff,a khaekar, sued for the land, Mr. Ross, Commissioner, ruled : "The hissedar cannot get possession of any khaekar land. If a khaekar wishes to give up any of his land, it must go to the other khaekars. It was also ruled that the hissedar had no right to cultivate unmeasured land in the village (9th April 1888). Nor does the hissedar improve his position by obtaining by fraud or collusion the cultivating possession of land in the village. It has been laid down in the case of *Devi Datt* v. *Prem Singh*, decided, by Mr. J. R. Reid, Commissioner, on 9th January 1889, that a hissedar so obtaining land is on precisely the same footing as regards rights and privilege as any other khaekar, and that the land so cultivated is not equivalent to khudkasht nor does it affect the under-proprietary rights of the other khaekars."

"In the case of villages in which the hissedars have land in their own cultivation or khudkasht, the khaekar's land, in the event of his leaving no heir, or collateral in cultivating possession, reverts to the proprietor. This reversion was noted in the last settlement agreement, though not the reversion to the body of khaekars. In the case of Ude Singh in 1876 this matter was discussed between Mr. Colvin, the Officiating Commissioner, and Mr. Backet, the latter explaining that the agreement was a "mere form". The khaekar may also relinquish his land at any time by a deed of relinquishment, ladawa, executed in favour of his landlord, but not to the prejudice of his partners in the holding. Thus, in the case of *Choti* v. *Jivanand of Uprainkhet, Bachhansyun*, the plaintiff, widow of a deceased khaekar, sued to cancel a ladawa given by her eldest son to the hissedar defendant, as she had a younger son. Sir H. Ramsay ruled ; If Paunlya did not wish to cultivate the land, his youger brother had the right to all, and Paunlya had no right to give it up by ladawa. The deed of relinquishment was accordingly cancelled (4th September 1878)."

"As regards the right of relatives to succeed, no doubt has ever been expressed as to the son's right. The daughter's right is more doubtful, though in the case of *Mt. Sauni* and *another* v. *Parsadu, Pauri, Nandalsym*, the plaintiffs sued to succeed their mother as kheakars, and got a decree which was upheld by Colonel Erskine on appeal (19th may 1890). In a former case a nephew had been preferred to a daughter and a daughter's son, even when the latter were supported by the proprietor, while still earlier cases had declared the nephew incapable of succeeding at all ; facts which only show the necessity for a clear exposition of existing rulings. The daughter's right is no doubt a highly equitable one, and would apply a fortiori in the case of a gharjawain and daughter's son, though it can hardly be said that the rights of either are generally recognized. The fact is that nine out of every ten hillmen are hissedars and every curtailment of the right of succession of the khaekar is to their advantage, as it brings in more lapsed holdings, which can now be let out at far better profit than 20 per cent on the revenue. As regards heirs other than descendants, the widow has an undoubted claim to succeed in the absence of sons, and in this is preferred to the daughters. In the case of *Rattan Singh* v. *Dhaunkalu of Sirwana, Iriya Kot*, the plaintiff hissedar sued to obtain land from the defendants cultivating on behalf of the deceased khaekar's widow, Sir H. Ramsay ruled: "while the wife of a deceased khaekar is alive this claim is inadmissible" (9th May 1872). Collaterals, as a rule, are only allowed to succeed if they share in the cultivation of the holding (i.e. are what is known as shikmi). There are no definits rulings on the subject, but Mr. J. R. Reid has expressed his opinion that S. 9 of Act 12 of

1881 might fairly regulate succession in this case. The right of an adopted son to succeed would not be worth noticing were it not that it was denied in several cases by Mr. Ross while Commissioner. Sir H. Ramsay, however, in the case of *Kamrup* v. *Narain Singh, Kirkhu, Mawalsyun* (1st February 1882), clearly upheld the right of an adopted son to succeed, and in the cases of *Sri Ram* v. *Gaje Singh of Bhawain, Khatsyun* (9th September 1892), and *Kirpa, of Ghiri, Kapholsyun* v. *Kedaru* (1st August 1894) this view has been re-affirmed. Succession by relatives other than those mentioned can take place with the consent of the cosharer but not otherwise, but this may be regarded rather as a renewal of the khaekari right than a continuation of it. (Pauw's Settlement Report 1898 pp. 45-46 paras. 49 and 50). "

"The khaekari right is only heritable, not transferable." This was definitely laid down by Colonel Fisher, as Commissioner, in the case of *Suraj Singh* and *others* v. *Amardeb Gurasyun* (2nd February 1885)." (Pauw's Settlement Report 1898 p. 47 para. 51).

"The ejection of khaekars can only take place on a decree of Court which is usually only made in case of proved inability to pay the assessment, for instance non-satisfaction of a decree for rent. It thus happens that the ejection of khaekars is almost unknown. The hissedar is also very cautious in interfering with a khaekari holding unless armed with a ladawa as it generally ends in his being mulcted in costs, (Pauw's Settlement Report p. 48, para. 51)."

Mr. Stowell has succinctly described the khaekar tenures, their origin and incidents in Chap. 3 of his Manual and defines a khaekar as

"a permanent tenant with a heritable but nontransferable right in his holding and paying a rent fixed at settlement which cannot be altered during the currency of a settlement."

He says in a foot-note that the heritable and nontransferable character of the tenure was recognized by Mr. Traill as far back as 1829.

It will appear from these extracts that persons holding under the proprietors or hissedars are roughly divisible into two main classes, viz., (1) khaekars and (2) sirtans or tenants at will. Khaekars who are exproprietors fall in two categories, (a) pacca khaekars who hold the entire village in which the proprietor has no khudkasht and can only recover land revenue and manorial dues from khaekars and (b) kacha khaekars who hold part of the village, the remaining portion being cultivated by the proprietor entitled to recover rent from khaekars who, otherwise, have a permanent tenure. The word 'under-proprietor' has been used to denote the former of the last two but it is materially different from the under-proprietary tenure in Oudh, which is heritable and transferable in all respects and is recognized as full ownership. There is absolutely nothing in the origin of these tenures to justify the assumption that only a restricted right of inheritance exists. As a rule a permanent tenure not limited to one or more lives is fully heritable. It is quite clear that from Mr. Traill down to Mr. Pauw all settlement authorities recognise that a khaekar tenure is heritable without qualification or reservation of any kind and a question of its lapsing would only arise on total extinction of heirs. The earliest indication that we can trace of the collaterals (who are undoubtedly heirs under Hindu law) being excluded is found in an opinion of Mr. J. R Reid the Commissioner (noted at p. 46 of Mr. Pauw's report) who considered that S. 9, Act 12 of 1881 "might fairly regulate succession in this case." This must have been in or about 1889 when he was Commissioner of Kumaun. Mr. Pauw quotes an earlier case *Suraj Singh* v. *Amerdeb* (2nd February 1885) in which khaekar's right was described as "heritable, not transferable." Mr. Pauw pointed out in noting the opinion of Mr. Reid, that "there are no definite rulings on the subject" which suggests that he was not in accord with Mr. Reid's view based on analogy drawn from S. 9, Act 12 of 1881.

Revenue officers who administered justice in civil cases in Kumaun based their judgments on the equities of each case as it arose and, in many instances, their decisions were not strictly according to Hindu law, see for example, cases of daughter, nephew and even adopted son, noted by Mr. Pauw at p. 46 of his report. They are so conflicting that no rule can be deduced from them. Indeed they do not profess to be based on any rule but on the circumstances of individual cases.

In deciding the case under reference the Kumaun Courts considered themselves bound by the decision of the Commissioner in the case of *Upan Deo* v. *Bachi Singh of Thala Manral, Malla Salt* (dated 18th July 1892). I have not been able to get a full copy of the judgment but portions of it given at p. 85 of Mr. Stowell's book show fairly clearly that the question in that case related to the right of hissedar to a lapsed tenure as against the body of khaekars in a pacca

khaekari tenure and a reference is also made to the rights of collaterals. The relevant passage is this :

"The custom of Kumaun is believed to be as alleged (" that is "), says Mr. Stowell, " as regards the hissedar's not succeeding. " But under the custom it is understood that collaterals have no prior title to lapsed khaekari lands ; such lands lapse to the khaekari community. "

No evidence of the alleged custom is referred to. How it was " understood " or " believed " to exist is not indicated. I am inclined to think that this halting expression of opinion is only an echo of the view previously expressed by Mr. Reid to which reference has already been made and which is based on an analogy drawn from the provisions of Act 12 of 1881. The decision in Upan Deo's case appears to have been accepted by Courts subordinate to the Commissioner in some subsequent cases and copies of judgments in two of such cases are on the file. One of these is the judgment of Mr. Dible. Assistant Commissioner, 1st Class dated 20th Nov. 1915 which quotes the judgment of Mr. J. S. Campbell in Special Civil Appeal No. 3 of 1913 *Tili* v *Bhawan Singh etc.*, Mr. Campbell ruled that :

" *in this individual case* the plaintiffs have failed to prove any custom by which lands in the possession of a *khaekar* in a purely *khaekari* village, possession passes on his death without direct heirs, to the panch *khaekars* rather than to collaterals not in joint possession with him at the time of his death. "

Mr. Campbell underlined (italicized) the words which I have underlined (italicized) in the passage quoted above, probably to indicate that he enunciated no general rule. This has introduced a further complication viz,, that in some pacca khaekar tenures the collaterals do succeed. Accordingly the ratio decidendi adopted by Mr. Dible and presumably by other officers was that there was only a presumption that collaterals not joint in cultivation with the deceased could not succeed but evidence in a given case may show that they had such a right.

If a question of burden of proof arises, and it will arise if a special custom excluding collaterals from inheritance as regards a permanent tenure is pleaded, the party pleading such a custom must have the onus laid on it to prove by satisfactory evidence that such collaterals though heirs under the personal law of the deceased tenant in respect of all other assets left by him, were excluded from inheritance as regards his rights in khaekari tenure. Generally speaking, proof of a custom of exclusion in such cases should consist either (1) of evidence showing that the Sovereign authority, while granting proprietary rights to others, imposed a condition on the resulting khaekar tenure that collaterals not joint in cultivation would not succeed in the event of khaekar dying without a lineal male descendant and widow or (2) of evidence of usage ancient. uninterrupted, uniform and certain, of exclusion of collaterals, such as is considered sufficient in law to override the ordinary law to which the parties may be subject. I have already pointed out that the rule of succession to a permanent tenure, heritable in its character, is in the obsence of a statute, terms of a grant, if any, or valid and binding custom to the contrary, the same as is applicable to other properties left by a deceased tenant.

It seems to me that Kumaun Courts which excluded the collaterals in certain cases were either under a misapprehension as regards the right of inheritance possessed by a separated collateral under Hindu law, taking it for granted that separation so far affects his status as to make him a total stranger. or considered that the law as laid down in S. 9, Act 12 of 1881, should be applied as an equitable rule in the absence of a custom specifically referring to the rights of collaterals. It was not, however, accepted by officers of standing without demur. I have already referred to the remark of Mr. Pauw in reference to the view of Mr. J. R. Reid. Mr. Stowell has likewise commented on it and urged its reconsideration. He says :

"As regards succession by heirs of a deceased khaekar the same rules have been observed as in the case of khaekars in mixed villages. Thus only a limited class of heirs can claim to succeed. This is evidently on the analogy of the "occupancy tenant" position of the khaekar in mixed villages. It is inequitable on the under-proprietary theory and remembering the special character of these communities. Succession in these cases, it would seem reasonable, should be regulated by the ordinary rules of Hindu law as in the case of hissedars."

In the case of *Upan Deo* v. *Bachi Singh of Thala Manral, Malla Salt* (*order of* 18*th July* 1892),the Board applied the rule, excluding collaterals from any claim to succeed as of right, to a wholly khaekari village, but the ruling is not a very positive one. From the phrases used in this decision it would seem that the Board were rather tentatively accepting a

view of the case than laying down a decisive ruling. "The custom of Kumaun is" they say, believed to be as alleged" (i. e. as regards the hissedar's not succeeding.) "But under the custom it is understood that collaterals have no prior title to lapsed khaekari lands; such lands lapse to the khaekari community." Otherwise I have found no rulings laying down specifically that the same rules must apply to cases of inheritance in the villages as are applicable to khaekars in mixed villages. There seems, therefore, to be some room for an unfettered consideration of the question by the higher Courts." (p. 85).

It is possible to make an attempt to defend the view of the Kumaun Courts on the ground that the whole community of khaekars in a village hold the lands as a corporate body, rights of individuals not being recognized, so that if a sole tenant dies, land cultivated by him goes by survivorship to the whole body of remaining khaekars. Such a theory is farfetched and no indications in support of it can be discovered in any settlement report or judgments of Courts. On the contrary a tenure of such a character excludes all rights of inheritance and will admit of only survivorship, firstly in favour of shares in the cultivation and failing them in favour of the entire khaekar community of the village. In that view a separated son or other male lineal descendant will be in no better position than a collateral and yet the unqualified right of a son and other male lineal descendants, separate or joint is conceded on all hands, rights of individual holders inter se are recognized which militate against such a theory. Reports are full of references to partition and where division of land is permitted, compensating one cosharer at the expense of another will be very often inevitable. This, again, will negative the existance of what would be, technically speaking, joint tenancy belonging to a corporate body as distinguished from a tenancy-in-common held by a few individuals. I must, therefore, dismiss this line of argument. I have mentioned and examined it because the opposite party is unrepresented.

The only other question that called for decision was whether, assuming the plaintiffs are competent to question the mortgage made by defendant 1 in favour of defendants 2 and 3, the same is valid and binding. The mere fact that the tenure is not transferable is not enough to invalidate it as between the mortgagee on the one hand and the mortgagor or those bound by her actions on the other. The decisive factor, therefore, is whether the mortgage was justified by legal necessity. The Assistant Collector, in disposing of issue 5 says:

"Both parties have adduced evidence on this issue. It is admitted by both parties that Gobind Singh's property was self-acquired and it is also proved from defendant's evidence that he built a number of retaining walls and also a big compound wall and a house and cowshed. He must have spent a lot of money. Defendant 4, Mohan Singh is also a collateral of the deceased, Gobind Singh. He is a witness to the mortgage-deed which is in favour of outsiders. In the deed the rukka executed by Gobind Singh is mentioned. The total amount of mortgage-deed may have been exaggerated but it looks probable that Mt. Uchhaba did take a loan to pay up legal debts and expenses. In view of decision of issue 2 against the plaintiff, this issue is not of much importance. This issue is decided in the affirmative."

In my opinion the finding, such as it is, is not justified on the grounds on which it proceeds. That it is a self-acquired property of Gobind Singh is not relevant. That he must have borrowed money to make certain constructions which he did make is nothing better than a surmise. To justify such a conclusion there should be legal evidence. That defendant 4, Mohan, a remoter collateral than plaintiffs, attested the mortgage-deed has no value. If examined as a witness, he might have given useful information but this was apparently not done. It is only if the presumptive heirs who alone are expected to take exception to the alienation in question, consent by attesting the deed inference of legal necessity is justified. A remoter reversioner cannot by his action bind the presumptive heirs: see *Rangasami* v. *Nachiappa* (1).

A rukka alleged to have been executed by Gobind Singh was produced but the Assistant Collector does not treat it as duly proved. He relies on it because it is recited in the mortgage-deed. A recital in a deed of recent date executed by a Hindu widow is no evidence of the fact recited. The learned Assistant Collector throws doubt on the defendants' case by observing that:

"the total amount of mortgage-deed may have been exaggerated but it looks probable Mt. Uchhaba did take a loan."

The two Courts of appeal did not enter into this question.

(1) A. I. R. 1918 P. C. 196=42 Mad. 523=46 I. A. 72 (P.C.).

I may note that I construe the concluding paragraph of the letter of the Government making the reference as calling for the opinion of this Court on all the questions arising in the case and mentioned in the petition to which it (the letter) refers.

In answering the reference I summarise my opinion as below: (1) The share of pacca khaekar tenure and its appurtenances in dispute in the case belonged to Gobind Singh, deceased husband of defendant 1 in full heritable right and the plaintiffs as his reversionary heirs are not debarred from succeeding to that share by reason of their not being joint in cultivation with him or defendant 1. (2) The finding of the Assistant Collector that the mortgage relied on by defendants 2 and 3 was justified by legal necessity is not correct.

Sen, J.—I entirely agree.

M.N./R.K. *Reference answered.*

A. I. R. 1929 Allahabad 231

DALAL, J.

Bisheshwar Upadhia—Defendant—Appellant.

v.

Jagdeshwar Prasad and *others*—Plaintiffs—Respondents.

Second Appeal No. 745 of 1927, Decided on 11th January 1929, from a decree of the Sub-Judge, Mirzapur, D/- 15th March 1927.

(a) Transfer of Property Act, S. 60—Right of redemption exists till mortgage is extinguished.

Until a mortgage has been extinguished there is a repeated cause of action to sue for its redemption. It is only when it has been extinguished finally by a final decree for redemption or when the mortgagor fails to redeem and the property is sold that the rights of a mortgagor to redeem come to an end.

[P 231 C 2, P 232 C 2]

(b) Occupancy holding—Proprietor mortgaging *sir* plots—Proprietary rights purchased by stranger--Purchaser treating mortgagor as exproprietary tenant—Mortgagee cannot resist mortgagor's tenancy rights.

Plaintiffs mortgaged their *sir* plots to defendants who continued in possession even after the proprietary title of the mortgagors was purchased by strangers who got the plots assessed by an action against both the parties. The mortgagors sued for redemption and possession.

Held, that the zamindar purchaser having treated the plaintiffs as exproprietary tenants, by getting rent assessed against the plaintiffs, the defendant cannot resist the claim of the mortgagors to take possession on payment of the mortgage money. [P 232 C 1]

U. Upadhiya—for Appellant.

A. P. Bagchi—for Respondents.

Judgment.—The plaintiffs sued to redeem a mortgage of 29th September 1902. They are successors-in-interest of Debi Prasad and Durga Prasad, who were proprietors at the time and mortgaged *sir* plots to Bisheshar and others. Under the Tenancy Act of 1901 prevailing at the time. Debi Prasad and Durga Prasad acquired the right to occupy the land as exproprietary tenants under S. 10 of that Act. They did not avail themselves of this privilege and the defendant remained in possession. In 1906 the proprietary title of the mortgagors was sold at auction and purchased by strangers who took action under S. 36, Land Revenue Act, for assessment of rent. This action was taken both against the plaintiffs and the defendant in 1908 and rent was assessed. In 1923 some of the plaintiffs sued for redemption but their suit was dismissed under O. 9, R. 8, by reason of their absence and the presence of the defendant on the date of hearing. The present suit was subsequently brought in 1926 by all the plaintiffs.

The lower appellate Court granted a decree for redemption and hence the defendant Bisheshwar has come here in second appeal. First of all the argument that the dismissal of the redemption suit in 1923 barred the present suit, may be examined. It was argued that this dismissal put an end to the mortgage. Such however, was not the decree. There was no decree passed putting an end to the mortgage and the mortgage therefore survived. A Privy Council ruling in the case of *Shanker Bakhsh* v. *Daya Shankar* (1) was quoted but that has no relevance. In that case it was held in the first suit that the right of redemption did not exist. Such a finding would be binding in the subsequent suit. There was no such finding in the suit of 1923. Until a mortgage has been extinguished there would be a repeated cause of action to sue for its redemption. It is only when it has been extinguished finally by a final decree for redemption or when the mortgagor fails to redeem and the property is

(1) [1888] 15 Cal. 422=15 I. A. 66=5 Sar. 107 (P.C.).

sold that the rights of a mortgagor to redeem come to an end.

The next argument was that Bisheshwar had become tenant of the land because the mortgagors did not claim exproprietary title within six months of 29th September 1902. Various rulings were quoted as to what is to happen when on a sale of proprietary interest, or of sir land the vendor does not claim exproprietary tenancy rights within six months. No case of a mortgage was quoted. When there is a mortgage, the rights of the mortgagor to take possession on payment of the money cannot be barred because a mortgagee cannot deny the title of his mortgagor. Whatever may happen after the mortgage the mortgagee must deliver possession for the plaintiffs will lose their rights only if the purchaser of the proprietary interest had chosen to disown them and make a fresh contract of tenancy with the defendant. The zamindar was entitled to put an end to the exproprietary tenancy and to settle the land with some one else on the vendors not claiming actual physical possession of the land within six months. In the present case the zamindar has on the contrary behaved favourably to the plaintiffs in so far that he got rent assessed of the land as against the plaintiffs treating them as exproprietary tenants. When the zamindar purchaser has treated the plaintiffs as expropri tary tenants, the defendant cannot resist the claim of the mortgagors to take possession. So long as the mortgage existed there was no forfeiture of exproprietary rights. In my opinion redemption was rightly granted by the lower appellate Court and I dismiss this appeal with costs.

M.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 232

DALAL, J.

Mt. Jahandar Begam and *another*—Defendants—Appellants.

v.

Chinta—Plaintiff—Respondent.

Second Appeal No. 480 of 1927, Decided on 22nd January 1929, from decree of Addl. Dist. Judge, Moradabad, D/- 30th October 1926.

(a) Jurisdiction—Civil Court is barred by decision of revenue Court that a person is agricultural tenant — But when revenue Court's decree is void by fraud, civil Court can re-agitate the question whether he was grove-holder or agricultural tenant.

A decision of the revenue Court that a person was merely an agricultural tenant bars the jurisdiction of the civil Court to re-agitate the matter whether he is grove-holder or an agricultural tenant: *A. I. R.* 1924 *All.* 744, *Rel. on.* But when the revenue Court's decree becomes void through fraud, the civil Court has jurisdiction to determine the question over again as to whether the person was an agricultural tenant or a grove-holder.

[P 232 C 2, P 233 C 1]

*** (b) Jurisdiction—Civil Court is proper Court to declare a decree to be void by fraud —Finding of revenue Court is not binding on civil Court.**

The civil Court is the proper Court to determine the question of fraud and the finding of the revenue Court is not binding on the civil Court. Even when a decree is obtained by fraud in the revenue Court, the jurisdiction of the civil Court arises to have it declared null and void by reason of the fraud. [P 233 C 1]

Mushtaq Ahmad—for Appellants.

K. N. Laghate—for Respondent.

Judgment.—The opinion of the lower appellate Court is partly wrong but on the finding of fact of fraud this appeal cannot succeed. The plaintiff is a grove-holder and sued for such declaration with respect to the plot in suit and in the alternative for possession. It happened that for arrears of rent the defendants zamindars had taken action against the plaintiff to eject him under S. 57 (a), Tenancy Act of 1901. In pursuance of these proceedings the plaintiff was ejected. The lower appellate Court held: (1) that the revenue Court had no jurisdiction to eject the plaintiff because the property in suit was a grove and not tenancy land and (2) that the decree was obtained by the defendants through fraud practised on the plaintiff and that therefore the decree was not binding on the plaintiff.

The first finding is not correct. It was open to the revenue Court to hold that the plaintiff was an agricultural tenant and not a grove-holder and there would be no want of jurisdiction if the revenue Court decided that the plaintiff was merely an agricultural tenant. Such a decision would bar the jurisdiction of the civil Court to re-agitate the matter: see *Kundan Lal* v. *Prasadi* (1).

Wherever, however, a decree is obtained by fraud, even in the revenue Court the jurisdiction of the civil Court arises to

(1) A. I. R. 1924 All. 744=46 All. 570.

have it declared null and void by reason of the fraud. In the present case there is a definite finding of the lower appellate Court which is binding on this Court that fraud was practised on the plaintiff and that the decree for ejectment was obtained through such fraud. Such fraud, when proved, vitiates the proceedings in the revenue Court. When the revenue Court decree became void through fraud, the civil Court had jurisdiction to determine the question over again as to whether the plaintiff was an agricultural tenant or a grove-holder. There is a finding of fact that he was a grove-holder. He was, therefore, entitled to the possession granted to him by the lower Courts.

Lastly there is the argument that the revenue Court held in an application for review of judgment that no fraud had been practised on the plaintiff. The civil Court is the proper Court to determine the question of fraud and the finding of the revenue Court in review proceeding is not binding on the civil Court. I dimiss this appeal with costs.

R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 233

MUKERJI AND NIAMATULLAH, JJ.

Badruddin and *others*—Defendants—Appellants.

v.

Tej Ram and *others*—Plaintiffs—Respondents.

Second Appeal No. 1583 of 1925, Decided on 22nd January 1929, from decree of District Judge, Bareilly, D/- 22nd July 1925.

Bengal Alluvion and Diluvion Regulation (11 of 1825), S 2—Custom of "dhardhura" pleaded—Incidents of custom must also be pleaded and proved—Custom—Evidence of.

A mere statement that a custom of "dhardhura" (which means that a stream shall be the boundary) exists, will not be enough, where such a custom is pleaded, but all the incidents of the custom must be pleaded and proved: *A. I. R.* 1928 *All.* 399 (*F. B.*) and *A. I. R.* 1927 *All.* 221, *Cons.* [P 234 C 2]

B. Malik—for Appellants.

S. N. Gupta—for Respondents.

Judgment.—This appeal and appeal No. 1584 of 1925 as also the appeals Nos. 1878 and 1879 of 1924 were connected for the purposes of arguments, although the two sets of appeals are, in one sense, independent. We had heard the last-mentioned two appeals, viz., Nos. 1878 and 1879 of 1924 and delivered a short judgment, which, however, had neither been signed nor sealed. On hearing appeals Nos. 1583 and 1584, we considered it desirable that the respondents' counsel in the appeals Nos. 1878 and 1879 of 1924 should be reheard and we reheard him accordingly. We are now in a position to decide all the four appeals on the same broad principle.

It appears that the river Bhakra flows between several villages, the village of Jatpura being on one side of the river. The defendants in each of the several suits out of which these appeals have arisen are the zamindars of the village of Jatpura. By suit No. 103 of 1923 the zamindars of village Hurhari, by suit No. 118 of 1923 the zamindars of mauza Mirnagar, by suit No. 112 of 1923 the zamindars of mauza Gularia and by suit No. 308 of 1923 the zamindars of mauza Sangarh, each laid claim, separately, to certain tracts of land on the ground that these lands had been cut off from the village of Jatpura by the river Bhakra, and had been attached to their respective villages. It was alleged on behalf of the plaintiffs that there was a custom by the name of "dhardhura" by which the deep stream of the river has always been the boundary between the village of Jatpura on the one side and the respective villages of the plaintiffs on the other. The defence was, in some cases, that there was no such custom of "dhardhura" as has been alleged and, in others, while it was admitted that there was such a custom of dhardhura, it was contended that that custom did not cover the present case. A distinction was sought to be drawn on the ground that, on this particular occasion, the river had not merely shifted its course on a wide bed, but had entirely made for itself a new channel, with the result that a large tract of land without even being submerged, became divided by the stream. It was contended that the custom alleged did not cover a case like this.

Our attention has been drawn to a recent case decided by a Bench of five Judges of this Court, viz., *Kunjbehari Lal* v. *Jaimal Singh* (1). This case draws attention pointedly to one thing and it is this. The term "dhardhura" is

(1) A. I. R. 1928 All. 399=50 All. 691 (F.B.).

not a term of art and a mere statement that there is a custom of dhardhura does not necessarily mean that the custom is wide enough to apply to a case where an entirely new channel is cut by a river. In the Full Bench case, the plaintiff laid claim to what was undoubtedly his property before the river Deoha carved out for itself a new channel. The plaintiff said that the land on the other bank of the new channel continued to be his property in spite of the coming into existence of a new channel. The defence was that a custom of "dhardhura" prevailed and by it the deep stream of the river formed boundary between the villages of the parties. The plaintiff admitted that there did exist a custom of dhardhura but he said that such a custom did not apply to the circumstances of the particular case, viz., where a new course is dug out by a river for itself. The defendants failed to prove that the custom alleged by them and admitted by the plaintiff was wide enough to cover the case before the Court. The result was that the Full Bench agreed with the Court of first instance in decreeing the plaintiff's suit.

It is clear from the Full Bench case that there is no charm in the term "dhardhura" and that the mere allegation of the existence of the custom of dhardhura cannot be taken to mean that the custom applies so as to confiscate what was, the day before, the property of another man. It will be noted that the case of *Gulab Rai* v. *Girwar Singh* (2) was referred to and considered by the Full Bench. It will be also noticed that one of the learned Judges who was party to the earlier case was a party to the Full Bench case. There are a few sentences in the earlier case which are capable of being construed as laying down that it is enough to pronounce the words "dhardhura" in order to make it applicable to a case of the cutting out of a new channel by a river. With all respect, the case of *Gulab Rai* v. *Girwar Singh* (2) was decided rightly, on its own merits, and on the evidence before their Lordships. At the end of para. 1 of the judgment there occurs the following sentence :

"In the present case, an immemorial usage is established of old settlements and it is not denied that on several occasions in the past land cut off by the river has been incorporated in the opposite village."

The Bengal Regulation No. 11 of 1825 by S. 2 lays down that where an immemorial custom determining the rights of proprietors of two or more contiguous estates divided by a river exists, such custom shall govern their rights. An instance is quoted, there, of such a custom, but such instance is not exhaustive. There may be other kinds of customs. Evidently the regulation means that where any custom (provided it is not unjust or against the law) exists, that custom alone will prevail and it is only in the absence of a custom that the rule laid down by the regulation shall apply. The custom that may prevail at any particular locality, may be a custom absolutely identical with the rule laid down by the regulation itself, or the incidents of the custom may be different from the rule laid down by the regulation. In the illustration given in S. 2 of the regulation, there is nothing which implies that the custom quoted is a custom by which estates, cut off by the sudden change of the course of a river, cease to be the property of the original owner. This will be clear from the language of the entire section. It runs as follows :

"Whenever any clear and difinate usage of *shekust pywust*, respecting the *disjunction* and *junction* of land by *encroachment* or *recess* of river ..... (such as that the main channel of the river divide the estates shall be the constant boundary between them, whatever changes may take place in the course of the river, by *encroachment on the one side* and *accession on the other*) ....."

It will be noticed that the framers of the regulation were not considering at all a case of what is known under the Roman law as avulsion, i. e., tearing out of an estate by the sudden change in the course of a river. The words underlined (italicized) in the above quotation will amply justify this view. But as we have already stated, all customs that may have, from time immemorial, been governing the rights of the parties shall continue to do so, in spite of the Regn. 11 of 1825. Such an immemorial custom may be one applicable even to a case of a sudden change in the course of the river, as this Court had before it in the case of *Gulab Rai* v. *Girwar Singh* (2). Only such a custom which has a very far-reaching consequence must be established by clear and cogent evidence. A mere statement, therefore, that a custom of "dhardhura" exists will not be enough, where a custom is pleaded. All the incidents of the cus-

(2) A. I. R. 1927 All. 221=49 All. 195.

tom must be pleaded and will have to be proved.

Having cleared the ground as to what was essential to be pleaded and established by the plaintiffs in these cases, we have examined the several judgments. While we find some indications that in his judgment in suit No. 112 of 1923 (S. A. No. 1878 of 1924) the learned Subordinate Judge was prepared to find for a custom such as would cover the sudden change of a river, there are also indications that the learned Judge was led away by the literal meaning of the word "dhardhura." He says:

"The term dhardhura is very expressive, it literally means that the channel of the river is the boundary."

In sentences which follow the learned Subordinate Judge rightly puts forward the respective cases of the parties, but we are not quite sure that he realized the full significance of the defence. The learned Judge in appeal, Mr. Saksena, was certainly led astray, to a greater extent, by the term 'dhardhura'. At one place in his judgment he says:

"In the present case it has been proved that the custom of dhardhura, i. e. the stream is the boundary, prevails in the village and there is no difficulty in the application of the custom as to the land gained by gradual accretion or by sudden change."

It appears that the learned Judge was not prepared to draw any distinction between the land gained by gradual accretion and land gained (if the word 'gained' can be properly used) by sudden change. The appeals in the two suits No 112 and 308 of 1923 were decided by the same learned Judge. The two other suits, viz. 103 of 1923 and 118 of 1923 were decided, by the same Subordinate Judge who had heard the two other cases, mainly by reference to his own previous judgment. The appellate Court in these two cases was presided over by a different Judge. That learned Judge, it appeare to us, took it for granted that the rule of dhardhura applied, without any further proof, to a case of sudden change in the course of a river. He was cognizant of the defendant's case. But he laid the burden of proof on the defendants, although it is clear to us that it was for the plaintiff, who claimed what was, so to say, a day before, the defendant's land, to prove the custom by which he claimed. The learned Judge says,

"One significant fact emerges from this, and that is, that the appellants (defendants) have been unable to give any instance in which a block of land on one side of the stream has been in the possession of the zamindars of the village on the opposite side. Had the rule of dhardhura been interpreted in the past as they would now have it, there must have been cases in which recognizable plots of land of greater or less size were cut off by the river and separated from the village to which they had originally belonged and such plots would have continued in the possession of their old owners."

This, as we have said, is putting the burden of proof on wrong shoulders. In the earlier judgment of Mr. Saksena, we find that he was pressed with the argument that the plaintiffs had not proved any instances by which the custom alleged applied to the present case. Mr. Saksena recognized that there was some force in the argument and thereby recognized the rule of law that the burden of proof lay on the plaintiff. In this, no doubt, he was right.

With respect to the claim relating to the village of Hurhara, a distinction is to be drawn. The claim was based, in the alternative, on custom and contract. If there was no custom, no contract in derogation of the rule of law as laid down by the Regn. 11 of 1825 would, probably, be binding on the parties, especially where they were not dealing with the present circumstances but with future contingencies. This will be a matter which will have to be considered by the Courts below. The result is that we set aside the decrees of the Court of first instance and the lower appellate Court and remand the suits to the Court of first instance with the direction that they will be retried after giving the parties a further opportunity to adduce evidence. In deciding the cases, the Court will have the observation of this Court as to the necessity of the plaintiffs' proving the incidents of the alleged custom, viz., whether they cover a case of avulsion or sudden change in the Course of the river. Costs here and hitherto will abide the result.

M.N./R.K. *Cases remanded.*

* A. I. R. 1929 Allahabad 236

DALAL, J.

Gur Diyal—Defendant—Appellant.

v,

Sukhnandan Lal—Plaintiff—Respondent.

Second Appeal No. 524 of 1927, Decided on 16th January 1929, from a decree of Dist. Judge, Saharanpur, D/- 25th August 1926.

(a) Civil P. C., S. 20 (a)—Cause of action partly arises where partnership is entered into.

The cause of action partly arises where a partnership is entered into, and, therefore, although the partnership is not carried on in that place, a suit for dissolution of partnership can be brought there. [P 236 C 1,2]

(b) Civil P. C., S. 21—Scope.

The objection as to the place of suing cannot be allowed by an appellate Court, unless there has been a consequent failure of justice. [P 236 C 2]

(c) Partnership—No suit for recovery of money lies until amount is known.

When there has been a partnership there can be no suit for the recovery of the money due until it is known what amount is due. [P 236 C 2]

*** (d) Contract Act S. 254—Failure.**

The mere failure of a company does not dissolve a partnership. [P 237 C 1]

(e) Practice—Evidence.

The evidence or a witness cannot be admitted until the opposite party had an opportunity of cross-examining him. [P 237 C 2]

M. L. Agarwala and *Damodar Das*—for Appellant.

M. N. Kaul for *Kailas Nath Katju*—for Respondant.

Judgment.—The grounds of appeal may be taken up one by one. The suit was one for dissolution of partnership and rendition of accounts. A preliminary decree has been passed by the Court of the Munsif of Dehra Dun. An appeal to the District Judge of Saharanpur failed, and this is a second appeal by the defendant. In the first two grounds it was urged that the Munsif had no pecuniary jurisdiction to hear the suit. Those grounds, however, were not argued. What was argued before me was that the suit ought to have been filed in a civil Court in Lucknow, and not at Dehra Dun. In the present case the partnership was entered into at Dehra Dun. So clearly the cause of action arose partly there. The business was to be carried on at Lucknow So under the provisions of S. 20 (c), Civil P. C., it was open to the plaintiff to choose the place of suit between Dehra and Lucknow. Two rulings were cited by learned counsel for the defendant-appellant ; *Niranjan Singh* v. *Kundan Singh* (1) and *Tika Ram* v. *Daulat Ram* (2). In neither of them any question was raised as to the cause of action not arising partly at the place where the contract of partnership was entered into. The respondent's learned counsel drew the Court's attention to the provisions of S. 21, Civil P. C. The objection as to the place of suing cannot be allowed by an appellate Court, unless there has been a consequent failure of justice. I have gone through the proceedings and read the judgments of both the subordinate Courts. The learned District Judge has written a well-considered judgment. The Munsif has made a note of the dilatory proceedings of both the parties. It is clear to me that full justice has been done to the parties, and to order a retrial would be a waste of public time without rendering any greater justice to either party.

In the third ground of appeal it is urged that the suit should have been for the recovery of money due to the respondent, and not for dissolution of partnership. This ground is difficult to understand as it stands. When there has been a partnership there can be no suit for the recovery of the money due until it is known what amount is due. Possibly this ground is based on the fact that some time in 1919 the defendant executed a pro-note in favour of the plaintiff for a sum of Rs. 20,000. The trial Court has stated that this was by way of security. Under the circumstances no suit could be filed on the basis of that pro-note until it is known what amount is due from the defendant to the plaintiff. The defendant never entered the witness-box. When I remarked on the shyness of the defendant to face the music it was pointed out that the plaintiff also did not enter the witness-box. The default of the plaintiff cannot justify the conduct of the defendant who made various allegations which could only be substantiated by his own statement. In the fourth ground of appeal it is argued that the partnership was dissolved in 1919. Both the subordinate Courts have held that there was no dissolution of partner-

(1) [1919] 17 A. L. J. 1015=52 I C. 655.
(2) A. I. R. 1924 All. 530=46 All. 465.

ship. In this Court my attention was drawn to an answer to a notice, Ex. 4 sent by the plaintiff, Sukh Nandan Lal to a person who desired to recover rent of a house in Lucknow from Gur Dayal defendant. As the habit of an Indian is, it is long-winded and reiterates a point which could be put in a small compass that the business had failed and that since the failure of the business Gur Dayal was no longer either the servant or the mukhtar-i-am of the company and that, therefore, the plaintiff as a partner of the company was not liable to pay the rent of a house occupied by Gur Dayal. There is no admission in this answer that the partnership had been dissolved. In fact the plaintiff bases his immunity, not on the ground of dissolution of partnership, but on the ground that the defendant was no longer the servant or mukhtar-i-am of the company which had ceased to exist. The mere failure of a company does not dissolve a partnership, otherwise the most dishonest partner could misappropriate money and make the business of the partnership cease, and thereby automatically claim that he was no longer liable to render accounts as the business had failed. The next evidence of the dissolution of partnership quoted before me was the execution of the pro-note already referred to. As I have stated above, the finding of the Munsif is that the pro-note was not executed in settlement of account, but by way of security, and there is nothing on the record to controvert that finding. The fifth ground of appeal is based on the allegation that the partnership was dissolved in 1919. Only in that case would the suit be beyond time. The learned Judge of the lower appellate Court has pointed out that the defendant himself is not sure whether the partnership was dissolved in July or November 1919. Clearly, therefore, the defence is one put forth at a venture to escape rendition of accounts. As there has been no dissolution of partnership no question of limitation can arise.

Lastly, there is a ground that documentary evidence produced by the defendant-appellant was wrongly excluded by the trial Court. The trial Court has given very satisfactory reasons for excluding it. He wrote a long order on the 28th October 1925 pointing out the laches of the defendant as regards witnesses who had to be examined by commission in Lucknow. On 28th October he again gave an opportunity for the cross-examination of these witnesses. The evidence of a witness cannot be admitted until the opposite party had an opportunity of cross-examining him. The commission was again returned to Lucknow with a distinct intimation to the defendant that the witnesses should be produced by him before the Commissioner. The defendant took no steps, was absent from the Commissioner's office, and a notice issued to him could not be served. A defendant who takes such little interest in the prosecution of his defence deserves no indulgence. The evidence was rightly put aside by the trial Court. The appeal is dismissed with costs.

S.N /R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 237

SULAIMAN AND KENDALL, JJ.

Ram Lal—Defendant—Appellant.

v.

Harpal and *another*—Plaintiffs—Respondents.

First Appeal No. 134 of 1926, Decided on 4th January 1929, from a decree of Sub-Judge, Muzaffarnagar, D/- 15th December 1925.

*** (a) Civil P. C., O. 20, R. 14 (b)—Pre-emptor's right accrues from date of deposit—Registration is not necessary.**

Under O. 20, R 14 (b), the title of the pre-emptor to the property accrues from the date of the deposit, and a registered document is not necessary for passing of title to the pre-emptor. [P 238, C 1]

(b) Evidence Act, S. 115—Fraud—Party is estopped from pleading his own fraud.

It is not open to a party to plead his own fraud against another, not a party to the fraud. [P 238, C 2]

Kailas Nath Katju and *Brijmohan Lal Dave*—for Appellant.

P. L Banerji and *S. G. Goyal*—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for pre-emption. The only point for consideration before us is whether the defendant is a co-sharer in the village. Previous to the disputed purchase, the defendant Ram Lal had purchased a share in the village which was pre-empted by two sets of plaintiffs. One suit was brought by Shanker and another was brought by

three plaintiffs including Harpal Singh who is one of the present plaintiffs. Both the claims were decreed and it was ordered that the pre-emptors would obtain certain shares on payment of the pre-emption money. Shanker deposited the whole amount, but the other plaintiffs apparently did not. Thus Shanker Singh became entitled to the property. This was in early 1923. But Shanker did not apply for execution and delivery of possession. In July 1925 the present suit was instituted to pre-empt property purchased by the defendant in July 1924. The main defence was that the previous suit of Harpal Singh was a collusive suit and title did not actually pass to Shanker. Shanker Singh was examined as a witness on behalf of the defendant and stated that his suit was a collusive suit and that, in fact, the amount which he deposited had beeu taken from the present defendant Ram Lal himself who was the vendee in the previous suit. The Court below has disbelieved the evidence of Shanker and has held that he has not proved that the previous suit was a collusive suit, and has accordingly held that the effect of the deposit of the pre-emption money was to pass title to Shanker.

We agree with the Court below that the evidence of Shanker is not worthy of belief. There is no doubt that under O. 20, R. 14 (b) Civil P. C., the title of the pre-emptor to the property accrues from the date of the deposit. Under the express language of this rule it cannot now be contended that for the passing of title any registered document as required by the Transfer of Property Act is necessary. Indeed the title is deemed to have passed automatically and cannot be reconveyed to the vendee unless there is a proper deed of transfer or a fresh acquisition of title by adverse possession.

Over and above this we are of opinion that the defendant is precluded from pleading his own collusion and fraud. In the former pre-emption case one of the objects of Harpal and others was to keep out a stranger from the village. So long as a cosharer of theirs, namely Shanker, succeeded on recovering the property from the stranger the plaintiff might well be satisfied. By having made the deposit Shanker got the whole property. Harpal Singh and others acquiesced in that position. If there was really any collusion or fraud intended by Shanker and Ram Lal, that fraud succeeded. It is not now open to Ram Lal to plead his own fraud against Harpal. The equitable doctrine of estoppel obviously stands in his way. The appeal has no merits and is dismissed with costs.

M.N./D.D. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 238

BANERJI AND KING, JJ.

Mt. Akram-un-nissa and *others*—Defendants—Appellants.

v.

Mt. Mustafa-un-nissa—Plaintiff—Respondent.

First Appeal No. 78 of 1926, Decided on 21st January 1929, from decree of Addl. Sub-Judge, Budaun, D/- 18th November 1925.

*** (a) Transfer of Property Act, S. 53—Transfer under decree of Court—Principles should be applied though section does not apply.**

The principles embodied in S. 53 are in accordance with the general principles of justice equity and good conscience and as such should be taken as a guide by the Courts even in cases such as when a party bases his title on a transfer by a decree of the Court where the provisions of S. 53 do not apply : 74 *P. R.* 1912; *A. I. R.* 1924 *Lah.* 707 and 25 *Bom.* 202, *Rel. on.* [P 239 C 2]

Iqbal Ahmad and *Akhtar Husain Khan*—for Appellants.

Mushtaq Ahmad—for Respondents.

Judgment.—This appeal arises out of a suit for a declaration that certain zamindari property and a house belonged to the plaintiff, Mt. Mustafa-un-nissa, and are not liable to attachment and sale in execution of a decree obtained by the contesting defendants against Shaukat Ali, the plaintiff's husband. Shaukat Ali had two wives, namely, Qutub-un-nissa, the first wife, and Mustafa-un-nissa, the plaintiff, the second wife. Shaukat Ali had practically no property of his own and was maintained by his father, Qudrat Ali. On 15th April 1924 Qudrat Ali died and the bulk of his property passed to Shaukat Ali by inheritance. The first wife, Qutub-un-nissa, had died some time before Shaukat Ali inherited the property, and soon after Qudrat Ali's death the heirs of Mt. Qutub-un-nissa demanded her dower debt from Shaukat Ali. They filed a suit on

3rd July 1924 claiming Rs. 23,000 as the dower debt and obtained a decree against Shaukat Ali for Rs. 18,750 on 17th September 1924. The decree-holder sought to attach the property in suit in execution of their decree but were resisted by the plaintiff who claimed that the property had been transferred to her by a decree dated 8th July 1924 which had been passed on the basis of an award in lieu of her dower debt. The decree-holders maintained that the transfer of the property by Shaukat Ali to Mt. Mustafa-un-nissa was a colourable transaction. The execution Court gave effect to their contention and dismissed the plaintiff's objection. Hence the present suit for the establishment of the plaintiff's title to the property in dispute.

The plaintiff's case was that her dower was fixed at Rs. 51,000 at the time of her marriage, about 27 years before the suit. Soon after Qudrat Ali's death she demanded her prompt dower from her husband and the matter was referred to an arbitrator who delivered an award on 28th May 1924 deciding that Rs. 17,000 of the dower was prompt dower and that the plaintiff should be owner of the property in suit in lieu of her claim for dower. Mutation was effected in the plaintiff's name and she claims to have been in proprietary possession. The defence was that the amount of dower was much less than Rs. 51,000 and that the award and decree upon which the plaintiff bases her title are collusive and fraudulent and were obtained with a view to defeat the defendants' claim for the dower debt of the deceased wife, Qutub-un-nissa. There was an issue whether the plaintiff was the legally wedded wife of Shaukat Ali, but this contention was not seriously pressed in the trial Court and has been abandoned in appeal. We must take it, therefore, that the plaintiff is the lawful wife of Shaukat Ali.

The trial Court found that the plaintiff's dower was Rs. 51,000 and held that there was a real transfer of the property in suit in accordance with the decree passed on the basis of the award. The Court took the view that Shaukat Ali was merely preferring one creditor to another and that the transfer was not vitiated by collusion or fraud. The trial Court accordingly decreed the plaintiff's suit.

The first question for our determination is whethar the plaintiff's dower was fixed at Rs. 51,000 as alleged. (The judgment then discussed evidence and deciding this point in plaintiff's favour proceeded.) The next question is whether the award and decree passed upon its basis are vitiated by fraud and collusion with a view to defeating the claims of the heirs of Qutub-un-nissa. On this point we are unable to agree with the view of the trial Court. The provisions of S. 53, T.P. Act, do not in terms apply to this case since the plaintiff bases her title on a transfer by a decree of a Court and under S. 2 (d) T. P. Act, such a transfer is not affected by the provisions of S. 53. It has been frequently held, however, that the principles embodied in S. 53, T. P. Act, are in accordance with the general principles of justice, equity and good conscience and as such should be taken as a guide by the Courts even in cases where the provisions of S. 53 do not apply. These principles have, for instance, been held to be of general application and have been applied in the Punjab where the Transter of Property Act itself is not in force, *Champo* v. *Shankar Das* (1) and *Ibrahim* v. *Juvan Das*, *A. I. R* 1924 *Lah.* 707. The same view was also taken by the Bombay High Court in *Bhagwant Appaji* v. *Kedari Kashinath* (2). If we come to the conclusion, therefore, that the decree upon which the plaintiff bases her title is fraudulent and intended to defeat creditors the plaintiff cannot succeed.

There are several indications of fraud and collusion in this case. In the first place it is not shown that there was any dispute between the husband and wife which led to the appointment of an arbitrator for deciding the dispute. The husband and wife had lived together, apparently in perfect amity, for about 27 years and there is nothing to show why the wife should suddenly demand her prompt dower. Moroever, it is admitted the there was no dispute either regarding the amount of dower, or regarding the property which should be awarded to the plaintiff in lieu of dower, in the proceedings before the arbitrator. The husband admitted all along that the dower was Rs. 51,000 and made no objection to the transfer of the property which he had inherited in lieu of his wife's claim.

(1) [1912] 74 P. R. 1912=165 P. L. R. 1912=14 I. C. 232=148 P. W. R. 1912.
(2) [1901] 25 Bom. 202=2 Bom. L.R. 986.

The arbitrator himself was summoned as a witness by the plaintiff and was present in Court but was not produced for examination. This suggests that the plaintiff was afraid of producing him lest the true nature of the collusive proceedings should come to light. The plaintiff has not even produced a copy of the agreement to submit the alleged dispute to arbitration. Moreover the plaintiff herself did not venture into the witness-box. We draw an adverse inference from her reluctance to face cross-examination.

Another significant point is that the transferor and transferee stood in the relation of husband and wife and this fact of itself tends to throw some suspicion upon the proceedings. Another important point is that the husband retained to himself the benefit of the property transferred. It is expressly laid down in the decree that the husband should have the right of residence in the dwelling-house and there is a very important provision that the wife should have no power to transfer the property during the lifetime of her husband without his consent. The trial Court remarks that it was a matter between husband and wife, so the husband was justified in imposing restrictions, but in our view these provisions show that the husband was careful to protect his own interests in the property and that he never intended to surrender the beneficial ownership. We note the fact that the husband had mutation effected in his wife's name although the wife did not apply for execution of the decree. This shows that everything was done with the husband's consent.

Moreover, it is shown that the husband actually remained in possession of the zamindari property by realizing rent. The husband's position is clearly shown by the lease dated 10th July 1924 by which the husband and wife jointly leased the property for a peried of 20 years to one Niaz Ali upon receipt of Rs. 1,000 as premium together with a covenant for annual rent. The lessee was evidently not willing to accept a lease from the wife alone although she was the nominal owner. The lease recites that the wife is the owner in possession but, as the husband realizes rents and is also the lambardar, and as under the award the husband has a right to remain in possession during his lifetime along with the wife, therefore, the lessee desires that both husband and wife should join in executing the lease. The respondent contends that under the decree the husband was only entitled to possession of the house but the fact remains that in the lease he is spoken of as entitled to remain in possession of the zamindari property also, and we have no doubt that this was in accordance with the reality. To all intents and purposes, therefore, the husband remained in possession and enjoyment of the property which he purported to have transferred to his wife. It is worth noting that after the defendants obtained their decree in the dower suit the lessee considered his position to be precarious and gave up his lease upon recovering the premium of a thousand rupees which he had paid. This money was paid by the husband and the lessee certified in his petition of compromise dated the 18th November 1924 that nothing was due from Shaukat Ali. This clearly shows that the lessee at least regarded Shaukat Ali as the real lessor. Another indication of fraud and collusion is that under the decree the whole of the property inherited by the husband was transferred to the wife, the husband retaining nothing for himself. It is most unlikely that the husband would have meekly consented to such an arrangement in the absence of collusion.

There is a passage in Dr. Gour's commentary on the Law of Transfer, Edn. 5, Vol 1, p. 631, which is very applicable to the facts of the present case The learned Commentator remarks :

"Indeed it is too well known that benami or fraudulent transfers are only too often made by Muhammadan debtors in favour of their spouses ostensibly in consideration of mehar but really with the object of withholding the property from their creditors. In such cases it would be pertinent to inquire as to what were the circumstances of the husband when the mehar was fixed; what was its nature, and if prompt, why it had remained unpaid and what circumstances had precipitated the transfer and how it was effectually carried out. Nor should it be forgotten that a debtor having many debts to pay can rightly place his property beyond the reach of his creditors by alienating to his wife and it cannot therefore be free from the taint of suspicion, which is all the more enhanced if after the transfer he is shown to have continued in its possession and to have participated in its benefit."

In the present case, as we have shown, there are many circumstances throwing suspicion upon the bona fides of the award and decree in the plaintiff's favour. In

our opinion there was no dispute between husband and wife regarding the dower, and the appointment of an arbitrator was a mere trick for the purpose of obtaining a colourable award and a decree upon its basis. The object of these fictitious proceedings was to save the property from the impending claim from the heirs of Mt. Qutub-un-nissa, and the husband and wife colluded so as to pass a nominal title to the wife, while the husband remained in possession and enjoyment of the property. On these findings the nominal transfer will not save the property from attachment and sale in execution of the defendants' decree.

There is one small point remaining for determination. The plaintiff claimed a decree that 14 out of 20 sihams of a house was not liable to attachment and sale. The defendants admitted that Shaukat Ali had a 1/3 share in this house and a 1/3share had been attached in execution of their decree. They denied that the plaintiff was entitled to any larger share, such as 14 out of 24, which she claimed. The plaintiff did not produce any evidence to prove that she was entitled to anything more than the 1/3 share which had been admitted. Moreover she had no cause of action in respect of more than the 1/3 share which had been attached. So upon any view of the case she was not entitled to any declaration in respect of more than 1/3 share in the house and we hold that the Court below was wrong in decreeing the whole claim in respect of the house. In accordance with our findings above we allow the appeal and dismiss the plaintiff's suit with costs throughout.

M.N./D.D. *Appeal allowed.*

A. I. R. 1929 Allahabad 241

MUKERJI, J.

Bhartu—Defendant—Appellant.

v.

Deedar Singh and *another*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 549 of 1927, Decided on 7th January 1929, from decree of Addl. Dist. Judge, Meerut, D/- 15th January 1927.

Landlord and Tenant—Abadi—Tenant not authorized to sell house—Cosharer not authorized to build without other's consent cannot buy.

The inability of the tenant to sell a house does not cease to operate as soon as the purchaser is a cosharer in the village, because a cosharer who cannot build on joint land without the permission and consent of the other cosharers cannot, by merely procuring a sale-deed from one of the tenants of a house improve his position: 4 *A.L.J.* 196, *Foll.*; 3 *A.L.J.* 669, *Dist.* [P 242 C 1]

Uma Shankar Bajpai and *N. Upadhiya*—for Appellant.

N. C. Vaish—for Respondents.

Judgment.—The plaintiff Deedar Singh who is one of the cosharers of the village instituted the suit out of which this appeal has arisen for the ejectment of the defendants granting them a chance to remove the materials of a house It appears that defendant 3 and the plaintiff are two of the cosharers of the village and defendant 1 was a tenant occupying the house in question in the village site. Defendant 1, Kaley, rented the house to defendant 2 and, subsequently, on 2nd October 1925, sold it to defendant 3. On these facts the suit was instituted. Defendant 3 contested the suit on the ground that although a tenant had no right to sell the house without the consent of the cosharers of the village, yet the house having been transferred to one of the cosharers in the village, the plaintiff had no cause of complaint and had no remedy. The suit was dismissed by the Court of first instance but it has been decreed by the lower appellate Court. The learned Additional District Judge found that not only the materials, but the site of the house had been sold and he laid stress on the fact that the tenant had no right to sell the house.

On an examination of the original sale-deed which was in possession of the appellant's counsel and a copy of which was in possession of the respondents' counsel, it became clear that Kaley never purported to sell the site. What he did purport to sell was his right to residence and the materials of the house. He expressly exempted the site of the house from sale. The Judge's finding, therefore, that the site had been sold is wrong. The question, however, remains whether defendant 3 can retain possession of the house and keep the materials there in the shape of a house for the simple reason that he is a cosharer. In other words, does the admitted inability of the tenant to sell the house as such cease to operate as soon as the purchaser is a cosharer in the village. No authorities have been cited on either side, except the one to be mentioned pre-

sently on behalf of the appellant. On principle, as enunciated by this Court, the fact that defendant 3 is a cosharer does not improve his position, in law. It has been held in this Court that one of several cosharers in a joint village could not build on joint land without the permission and consent of the other cosharers. That view of the law must be taken as established, so far as this Court is concernd. If that is so, it ought to follow that a cosharer, by merely procuring a sale-deed from one of the tenants of a house, cannot improve his position. This view was taken by one of the learned Judges of this Court so long ago as in the year 1907, see : *Raghunandan Das* v. *Ram Krishan Das*, *S. A. No.* 1013 *of* 1905 reported in *Reporters Diary*, 4 *A. L. J.* 196. The learned counsel for the appellant relied on the case of *Shib Narayan Lal* v. *Muhammad Abdul Rafi Khan* (1) decided by two learned Judges of this Court. It was a case in which one of the cosharers of the village took a lease from a tenant and the tenant died. The other cosharers of the village wanted to oust the cosharer from the land and it was held that they could not. The land in question was ordinary cultivatory land and the cultivation of that land by one of the cosharers of the village was a perfectly legitimate use of the land. The occupancy by one of the cosharers of the cultivable land did not imply and did not involve an ouster of the other cosharers. That was the basis of the decision. As I have already mentioned, in the case of constructing a house, it is the view of this Court that a cosharer is not permitted to do it, because the act amounts to an ouster of other cosharers. The two cases are therefore clearly distinguishable.

The result is that the appeal fails and is hereby dismissed with costs.

M.N./R.K. *Appeal dismissed.*

(1) [1906] 3 A. L. J. 669=1906 A. W. N. 289.

A. I. R. 1929 Allahabad 242

MUKERJI, J.

Chheda Lal and *others*—Defendants—Appellants.

v.

Ghulam Abbas and *another*—Plaintiffs—Respondents.

Second Appeal No. 281 of 1927, Decided on 17th January 1929.

Mortgage—Redemption—Admission by defendant that he is mortgagee in possession is acknowledgment that he is liable to be redeemed.

An admission by a mortgagee in his written statement that he is a mortgagee in possession of the land in dispute is a sufficient acknowledgment that the maker of the statement thinks and believes that he is liable to be redeemed at the date of the making of the statement : *A. I. R.* 1925 *All.* 353, *Appr.* [P 243 C 2]

Baleshwari Prasad—for Appellants.

M. A. Aziz—for Respondents.

Judgment.—The only question urged before me is that the lower Courts were wrong in holding that the defendant acknowledged the subsistence of the mortgage and their liability to be redeemed within the meaning of S. 19, Lim. Act. It appears that the mortgage sought to be redeemed was made on 30th January 1864. A suit for redemption was brought by certain persons against the present appellants in 1904. The written statement filed by the defendant-appellants has been put in the record of this case and it was on foot of that written statement that the learned Judges in the Court below held that there was a good acknowledgment on the part of the defendants. To satisfy myself in the matter, I sent for the record of the previous litigation and now the plaint and the written statement are both before me. The plaintiffs of the suit of 1904 stated in para. 2 of the plaint as follows :

" The land aforesaid (described in para. 1 of the plaint) is in possessory mortgage with the defendants Nos. 1 to 3 under a deed executed by ..... in favour of ..... : and dated ..... "

This statement was admitted by the present appellants by para. 2 of the written statement. I have gone through the entire written statement and I have found nothing therein, from which I could infer that it was ever the intention of the defendants to deny the mortgage. That being the case, there can possibly be no reason to suggest that the admission of correctness contained in the written statement of the statement made in the plaint in para. 2 was not a clear admission of what was stated in the plaint, viz., the defendants were in possesssion as mortgagees.

It was contended on behalf of the appellants that an acknowledgment to be good must be a conscious acknowledgment of the fact that the defendants were liable to be redeemed. A case decided by myself, viz., *Sham Devi* v. *Bhagwat Da-*

yal (1) has been cited before me. I accept as good law what I stated in that case viz :

" An acknowledgment to be good should be a conscious acknowledgment of liability. It should signify to the mind of the person making the statement that the maker of the statement thinks and believes that he is liable to be redeemed at the date of the making of the statement."

I agree with the Courts below that such an acknowledgment exists in this case. The result is that the appeal fails and it is hereby dismissed with costs.

M.N./D.D. *Appeal dismissed.*

(1) A. I. R. 1925 All. 353.

** A. I. R. 1929 Allahabad 243

ASHWORTH AND KING, JJ.

Madan Lal and *others*—Plaintiffs—Appellants.

v.

Gajendrapal Singh—Defendant—Respondent.

Second Appeal No. 195 of 1926, Decided on 8th January 1929, from decree of Dist. Judge, Bulandshahr, D/- 16th December 1925.

**** (a) Civil P. C., O. 41, R. 33—" Parties " include person not a party to appeal—Decree cannot be passed against person not party to appeal.**

The word " parties " in O, 41, R, 33, is intended to connote persons other than those who have been arrayed as appellants or respondents in the appeal. A decree can, therefore, be passed in favour but not against a person who is no party to the appeal: *A. I. R.* 1928 *All.* 746, *Doubted.* [P 244 C 1, 2]

**** (b) Hindu Law—Alienation—Manager—Transferee from coparcenary body can challenge validity of prior alienation by manager—Voluntary transferee of equity of redemption cannot challenge the mortgage as his deed would define his interest—Purchaser in execution, however, can challenge the mortgage.**

A transferee of any property or interest in property from a coparcenary body acquires along with that property or interest the right of the coparcenary body to call in question a previous alienation made by the manager of the family, otherwise than for legal necessity, for the purpose of protecting or defining the property or interest acquired. The power of avoidance in the hands of the transferee cannot be greater than that which would have been excercised by the coparcenary body at the moment immediately preceeding the transfer. The power cannot be used by a mortgagee to resist a suit for redemption by a subsequent alienee of the equity of redemption, since this would be using it for a purpose beyond protection of the mortgagee's interest. Nor can it be used by the transferee of a mere equity of redemption under a voluntary deed of transfer; for in this case the deed would have sufficiently defined the interest acquired. A purchaser, however, at a Court sale in execution of a decree for sale of property subject to a mortgage can use the power to impugn the mortgage unless the validity of the mortgage has been decided by the Court as against the mortgagor i. e., the coparcenary body : 33 *All.* 783 (*F.B.*), *Cons.* and *Rel. on* ; *A. I. R.* 1924 *All.* 51, *Expl.* and *Dist.*; *A. I. R.* 1925 *All.* 339; *A. I. R.* 1926 *All.* 718, *Rel. on.*; *A. I. R.* 1926 *P. C.* 109, *Cons.*; 42 *All.* 50, *Dist.* [P 248 C 2]

(c) Compromise—One filed in suit affects only decree.

A compromise filed in a suit is intended, in the absence of anything expressed to the contrary, to be for the purpose only of affecting the decree in the suit and not for any ulterior purpose. [P 249 C 2]

**** (d) Civil P. C., S. 11—Might and ought—Compromise.**

A compromise decree cannot be taken to decide every point that ought to have been pleaded, as a decree on the merits must; *All S. A.* 2024 *of* 1925, *Rel. on.* [P 249 C 2]

Iqbal Ahmad and *Shiva Prasad Sinha*—for Appellants.

U. S. Bajpai, *P. L. Banerji* and *S. N. Seth*—Respondent.

Judgment.—This appeal is by the plaintiffs. It arises out of a suit for sale of property mortgaged under a mortgage-deed dated 3rd May 1912 executed by one Ganeshi Lal, defendant 1. in favour of Paras Ram, father, of the plaintiff-appellants for Rs. 900. There are three sets of defendants, namely Ganeshi Lal, defendant 1, first party, his sons, defendants 2 to. 5, second party, and defendants 6 to 13, subsequent transferees of the mortgaged property, third party. The respondent Gajendrapal Singh is one of the subsequent transferees. He was the only defendant to contest the suit. He did so on the ground that the mortgage by Ganeshi Lal in favour of the plaintiffs was invalid for want of consideration and also of legal necessity. The trial Court rejected this defence and decreed the suit in favour of the plaintiff-appellants. Gajendrapal Singh respondent appealed. The District Judge of Bulandshahr came to a finding that the actual consideration paid for the mortgage was Rs. 550 but that even for this sum there was no legal necessity. Accordingly he allowed the appeal and set aside the decree of the trial Oourt. He set aside that decree not only as against Gajendrapal Singh the appellant but as against all the defendants, that is to say as against the rest of the defendants who had not contested the suit.

The plaintiffs, i. e., the first mortgagees, have filed this second appeal to the High Court, asking for the restoration of of the trial Court's decree as against all the defendants. But they have impleaded only Gajendrapal Singh out of the defendants. This respondent has raised as a preliminary objection to the appeal the contention that this is not permissible. The decree of the lower appellate Court is a decree against all the transferees. Indeed a decree in favour of the plaintiffs must inevitably be a decree against all or none of the co-transferees.

In reply to this objection counsel for the appellants invokes O. 41, R. 33, which enacts that an appellate Court shall have power to pass any decree which ought to have been passed, and that this power may be exercised

"in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection."

Now it is obvious that this provision will not assist the appellants unless it is construed to mean that the appellate Court can pass a decree against a person who has not been made a respondent. On behalf of the respondent it is contended that the word "parties" in the rule must be construed to mean "parties to the appeal" and that no decree can be passed either for or against a person who although a party to the suit is not a party to the appeal. There is no doubt the authority of *Rukia* v. *Mewa Lal* (1) recently decided by a two Judge Bench of this Court for holding that the word "parties" in O. 41, R. 33

"was not intended to cannote persons other than those who had been arrayed as appellants or respondents in the appeal."

If it were nccessary to hold thus, for the disposal of the present objection, we should have much hesitation in following this decision, or holding that it was rightly decided. The rule, in our opinion, clearly allows a decree in favour of a plaintiff who has not appealed. Otherwise we should have found in the rule in the place of the words "all or any of the respondents or parties" the words "all or any of the appellants or respondents." O. 41, R. 4 permits a decree in favour of a plaintiff who has not appealed against a respondent, where another plaintiff has appealed on a ground common to both plaintiffs, and there can be no reason for not allowing a decree in favour a plaintiff who has not appealed when the decree is one not asked for but one that ought to have been passed. But the question that arises is whether a decree can be passed against a person who is no party to the appeal. R. 33 states that the appellate Court shall have power to pass any decree which ought to have been passed, and this is wide enough to allow a decree against a party to the suit who is not a party to the appeal. But the rule by using the expression "in favour of all or any of the respondents or parties" seems to imply that the rule shall not be used to the prejudice of a person who is not a party to the appeal. This is consonant with equity. A person who has been heard in the appeal cannot object to a decree in favour of a person, merely because that person is not a party to the appeal, whereas it would appear inequitable to pass a decree against a party who has no chance of being heard in the appeal. It has been argued for the appellants that the lower appellate Court's decree was only in favour of Gajendrapal Singh, and consequently the present appellants could only appeal against him. This is to repeat a fallacy pointed out in a recent decision of a two-Judge Bench of this Court of which one of us sat, namely *Nannu Prasad* v. *Nazim Husain* (2). It was there pointed out that there can be only one decree in a suit existing at any one time, and that a trial Court's decree after an appeal was replaced by the decree of the appellate Court whether the appellate Court's judgment resulted in a totally different decree or only in a decree having the effect of modifying the trial Court's decree. In the present case the effect of the lower appellate Court's judgment was to bring into existence a decree in favour of all the transferees and not only in favour of Gajendrapal Singh. It was, therefore, necessary for the appellants to make all the transferees respondents in order to get set aside the decree of the lower appellate Court. Not having done so, they cannot be allowed to ask us to pass a decree against not only Gajendrapal Singh but also against the other transferees.

This objection then appears to us to be fatal to this appeal as brought. But counsel for the appellants has asked us to allow him to add the names of the other

(1) A. I. R. 1928 All. 746.

(2) A. I. R. 1928 All. 274=50 All. 517.

transferee-defendants as respondents if we hold that it is necessary to do so. The question of the propriety of our doing so will not arise, if we hold that the appeal should be dismissed on its merits, and consequently we proceed to consider the grounds taken in the memorandum of the appeal. Four grounds are set out. The fourth maintaining that the sons of Ganeshi Lal were under a pious obligation to pay the debt in dispute has not been pressed and clearly had no chance of success on the findings of fact of the lower appellate Court. The first plea, namely that the District Judge was not entitled to reverse the trial Court's decree as against those defendants who did not appeal to him is clearly unsustainable in view of the provision of O. 41, R. 4, Civil P. C., which authorizes an appellate Court, in a case like this, to reverse, in favour of all the defendants to a suit, a decree of the trial Court against them. The two remaining pleas respectively are: (1) that it was not open to the transferees to impugn the mortgage in suit on the ground of its being executed by a manager of the family otherwise than for legal necessity, the contention being that the right of avoidance is restricted to the coparceners and cannot be passed on to their transferees, and (2) that in view of the fact that in a previous suit when the respondent Gajendrapal Singh and his co-transferees were suing on a second mortgage they had entered into a compromise with the appellants, as first mortgagees, that the property should be sold in pursuance of the second mortgage but subject to the first mortgage, it was not open to Gajendrapal Singh etc. to impugn the validity of the first mortgage. Although these pleas are taken in the memorandum of appeal in the inverse order, we find it convenient to discuss them in this order, since for the decision of the latter plea, we shall require to invoke certain legal conclusions arrived at in our discussion of the former.

The argument is that the right of coparceners (in this case the sons) to avoid a transfer made by the managing member of the family (in this case, the father) on the ground that it was made without legal necessity is a right restricted to the coparceners which cannot be assigned by them to other persons and which does not pass along with the interest of the coparceners when that interest passes to strangers either by voluntary sale or by a sale by the Court in execution of a decree. There was a certain amount of argument as to whether a transfer by a manager otherwise than for legal necessity was void or merely voidable, but it was agreed that it was now to be taken as settled law that it is only voidable. There is such a weight of authority in favour of this that it does not appear to us to be necessary to cite any decision. The question, however, is whether such a transfer is liable to be avoided merely by the sons or coparceners or whether it may be avoided by transferees of the interest in the property of the coparceners. A Full Bench of this Court *Muhammad Muzamli-ullah-Khan* v. *Mithu Mal* (3), in 1911 decided with no uncertain voice in favour of the transfer being voidable by transferees of the coparceners' interest. The head-note in the *Indian Law Reports* is not accurate and that in the *Allahabad Law Journal Report* is insufficient.

In that case the head of a joint Hindu family had mortgaged property belonging to the joint family, but neither for legal necessity nor to pay an antecedent debt. Subsequently the mortgagor sold the property to a third person who remained in possession for more than 12 years. Richards, C. J., held that the transferee of the property by the subsequent transfer having acquired title against the coparcenary body by 12 years adverse possession must be deemed a transferee of the coparcenary body and held that such transferee could avoid the mortgage. Banerji, J. held that the fact of the coparceners having allowed the transferee under the subsequent transfer to remain in possession raised a presumption that the sale to him was for family necessity and with the assent of the other members. Chamier, J., held that although their Lordships of the Privy Council in the case of *Balgovind* v. *Narain Lal* (4), had by their language suggested that the mortgage was voidable and not absolutely void, yet until there was a definite pronouncement on the point by the Privy Council he

(3) [1911] 33 All. 783 = 11 I. C. 220 = 8 A. L. J. 901 (F.B.).
(4) [1893] 15 All. 339=20 I. A. 116=6 Sar. 313 (P.C.).

was bound by a Full Bench decision of this Court *Chandradeo Singh* v. *Mata Prasad* (5), to hold that the transfer was absolutely void and not merely voidable. Consequntly he held that the question did not arise whether, if it was voidable, it was voidable only by the coparceners themselves and not by their transferees. He added, however, as an obiter dictum that assuming that a transferee of the coparcenary body could question an assignment by the manager, a transferee in possession could only do so

"if a trial of its validity was necessary for his protection against the claim of another person."

The context clearly showed that by the words "for his protection" he meant

"for the protection of his particular possessory interest."

The condition laid down in this obiter dictum appears to us sound but not to go far enough. We think that the transferees can use the power of avoidance not merely for the protection of the particular right or interest transferred to him but also for the definition of that interest, when there can exist a doubt as to the quantum or nature of the interest acquired by him.

It is clear then that the majority of the Full Bench in that case held that transfer by a manager otherwise than for legal necessity could be avoided by the transferees of the coparceners, and it was held by one judge, namely Richards, C. J., that it was voidable even by persons who had acquired the title of the coparceners merely by adverse possession. The case of *Jageshar Pande* v. *Deodat Pande* (6), has been cited but does not appear to us relevant. In that case it was held that where a certain person had, as manager of the family consisting of himself and his son, made a deed of gift in favour of his widow the reversioners could not call in question the deed of gift, as the only persons who could do so would be the coparceners, and the reversioners had not acquired the coparcenary interest. The decision has probably been cited, because it contains the passage :

"there is ample authority for the view that an alienation by the manager of a joint Hindu family is not absolutely void. It is voidable at the instance of the persons whose interests are affected by it, namely the coparceners in the property."

But the context left it open whether by the expression "the coparceners in the property" the Judges included or excluded the transferees of the coparceners. It was immaterial to decide this question for the purposes of that case. The next case cited is *Sarju Parsad* v. *Mangal Singh* (7). It was there held that a next reversioner could challenge a mortgage executed by a father as manager of a joint Hindu family consisting of himself and his son and could challenge a decree obtained through fraud or collusion against the mortgagor's widow. The use of the term in the judgment "next reversioner" seems to suggest that the widow was alive. If so, this decision was in direct conflict with *Jageshar Pande* v. *Deodat Pande* (6), just noticed. This decision is at any rate authority for holding that the reversioners who come into property on the death of a widow are entitled to challenge a transfer made by the manager of the family whose rights they inherit. Reliance is placed on the Full Bench decision of *Muhammad Muzamil Ullah Khan* v. *Mithu Lal* (3) referred to above,

The last mentioned Bench decision was again followed more recently by a two-Judge Bench of this Court on which one of us sat, namely *Raj Ballaw* v. *Dalip Narain Singh*, *A.I.R.* 1926, *All.* 718, where it was held that a transferee of the whole interest in joint family property, by an execution sale under a money decree, is entitled to contest the validity of a transfer made by one of the members of the family on the ground of want of legal necessity. In *Subba Goundan* v. *Krishnamachari* (8), it was held that a sale by a father or managing member of a joint family for alleged necessity will be good till avoided, as it is open to the other coparceners to affirm the transaction. This decision is only of importance in the present connexion, owing to the fact that it states that the coparceners may affirm the transaction which we take to mean that an affirmation by the coparceners raises an unrebuttable presumption that the alienation was for necessity, and we agree with the proposition in this sense.

There remains the only decision by the Privy Council bearing on the point which

(5) [1909] 31 All. 176 = 1 I. C. 479 = 6 A. L. J. 263.
(6) A.I.R. 1924 All. 51=45 All. 654.
(7) A.I.R. 1925 All. 339=47 All. 490.
(8) A.I.R. 1922 Mad. 112=45 Mad. 449.

we can discover. This is the case of *Nasir Uddin* v. *Ahmad Husain* (9). In that case a Hindu father as head of a joint family contracted to sell certain property to the plaintiffs but subsequently sold it to one set of the defendants in breach of his earlier contract. A suit for specific performance was brought by the plaintiffs against the father and the subsequent purchasers. The subsequent purchasers pleaded that the contract in favour of the plaintiffs was an improvident one, that is to say, was a contract to sell for an insufficient sum. It was accepted that the coparceners could have avoided the contract on this ground. A two Judge Bench of the Allahabad High Court had held that the subsequent purchasers as being only transferees of the coparceners could not call in question the validity of the contract. Their Lordships stated that they

"are not satisfied that the Judges in the appellate Court were right upon this ; but they did not feel it necessary to pronounce upon this point."

They decided the case on the ground that the contract was for sale at a sufficient price. We cannot but regard the remarks by their Lordships in this case as at least showing that at the time they were not disposed to accept the proposition that a transferee of coparceners could not avoid a sale by the manager otherwise than for legal necessity. As the point was not determined, it is no authority for holding the contrary, but it does justify the argument that at any rate in that case their Lordships, though asked to accept the view that the transferees could not avoid, refused to do so.

There remains a decision of a two Judge Bench of this Court which has been strongly relied upon by the appellants in support of their contention that the transferees of the coparceners cannot exercise the right of avoidance. It is *Durga Prasad* v. *Bhajan* (10) decided by Pramada Charan Banerji, J. and Wallach, J., An examination, however, of this decision shows that it in no way helps the appellants and has no bearing on the present question. In that case the father of a joint Hindu family with two sons mortgaged some of the joint family property. Subsequently a later managing member of the family, as it existed at a later date sold the mortgaged property, and the purchasers of it brought a suit for redemption of the mortgage. The suit was resisted by the mortgagee on the ground that the later sale of the property was not for legal necessity, and it was held that this plea was not open to the mortgagee. Now it is obvious that what the mortgagee acquired at the time of the mortgage was only the rights of a mortgagee and that he could not thereby acquire the interest of the coparceners to avoid a subsequent sale. The mortgagee was therefore 'never the successor-in-interest of the coparceners in respect of the right to avoid. The decision would appear to be correct and consistent with the view expressed by Chamier, J., in the obiter dictum in the case of *Muhammad Muzam-il-Ullah Khan* (3), discussed above. For the mortgagee was attempting to use avoidance of the later transfer for the purpose of resisting redemption of his mortgage and not merely for the protection or definition of his mortgage. At any rate this decision is no authority for anything more than that it is not everybody whose interest it might be to get a transfer effected by a manager declared invalid who can challenge that transfer but only persons who have acquired property from the coparceners carrying with it a right of avoidance.

It is, therefore, clear that there is a consensus of authority that a transferee of the interest of the coparceners may call in question a transfer made by the manager even after the coparceners themselves have ceased to have any interest in the property. Apart from this, there is a consideration which appears to us decisive for holding that this is so. If the transferees of the coparceners could not exercise the powers of the coparceners to avoid a transfer then this fact would operate adversely to the coparceners in disposing of their interest in the property. This being so, the improper sale by a manager otherwise than for legal necessity would operate to the disadvantage of the coparceners unless they, previous to the alienation of their interest, took steps to avoid the transfer by the manager. It does not appear equitable that the unlawful action of the manager should put the coparceners to this trouble and expense. We take it as settled law that the coparceners can avoid an improper

(9) A.I.R, 1926 P.C. 109.
(10) [1920] 42 All. 50=58 I. C. 487=17 A. L. J. 947.

transfer by the manager otherwise than by bringing a suit. They can merely refuse to be bound by it. The only ground that appears to us to exist for refusing to the transferees of the coparceners the right to avoid is that in cases where the coparceners sell property previously mortgaged by the manager or subject to that mortgage it would seem inequitable that the transferees having paid a smaller price for the property by reason of the existence of the mortgage should be able to deny the validity of the mortgage. This result, however, is avoided by holding, as suggested above, that a transferee from a coparcenary body can only invoke a power to avoid a previous alienation by a manager when it is necessary for the protection or definition of the property or right acquired by his transfer. In the case of a voluntary transfer by deed the coparceners define the property or right transferred ; there is no occasion for further definition ; and the transferee is bound by the definition of the coparceners.

We would summarize our view of the law as based on the above decisions on this subject as follows : A transferee of any property or interest in property from a coparcenary body acquires along with that property or interest the right of the coparcenary body to call in question a previous alienation made by the manager of the family, otherwise than for legal necessity, for the purpose of protecting or defining the property or interest acquired. Certain results follow from this definition. Such transferee cannot call in question a subsequent alienation since at the time of the acquisition to which the right attaches, there was exhypothesi no alienation to avoid. The power cannot be used by a mortgagee to resist a suit for redemption by a subsequent alienee of the equity of redemption, since this would be using it for a purpose beyond protection of the mortgagee's interest. Nor can it be used by the transferee of a mere equity of redemption under a voluntary deed of transfers ; for in this case the deed would have sufficiently defined the interest acquired A purchaser, however, at a Court sale in execution of a decree for sale of property subject to a mortgagee can use the power to impugn the mortgage unless the validity of the mortgage has been decided by the Court as against the mortgagor, i. e., the coparcenary body ; because the purchaser purchases at the risk of getting something worse and also on the chance of getting something better than stated as sold in the proclamation sale ; "*caveat empter, gaudeat empter.*"

The power of avoidance in the hands of the transferee cannot be greater than that which would have been exercised by the coparcenary body at the moment immediately preceding .the transfer. Hence if the coparcenary body at that moment were a father and sons and the manager, the father; the transferee would be bound by the sons' obligation to pay a father's antecedent debt. Hence again if the coparceners had affirmed the previous alienation, the transferee would be bound by the unrebuttable presumption that the alienation was for legal necessity.

Now in this suit the defendant-respondent Gajendrapal Singh and his co-transferees (defendants) relied on two transfers in their favour. One was the second mortgage executed in their favour by the mortgagor coparceners ; and one was the Court sale of the property in pursuance of their second mortgage but subject to the appellants' first mortgage. The deed of second mortgage is not before us but we understand that it contained no mention of the first mortgage. If it had, the interest of Gajendrapal Singh etc. would have been sufficiently defined by that mortgage-deed, and they could not have impugned the validity of the first mortgage. Assuming, however, as we must in the absence of evidence before us. that it did not, the question arises whether as second mortgagees they were entitled to impugn the validity of the first mortgage. On the conclusions reached above they would be. For by not expressing the second mortgage as being subject to the first, the mortgagor coparceners must either be held to have called in question the first mortgage or at any rate to have made it necessary for the second mortgagees to call it in question in order to define their interest. Their interest as second mortgagees has now merged in their interest as purchasers by Court sale (in execution of their decree as second mortgagees) of the property subject to first mortgage. This being so, it is unnecessary for them to claim to avoid as second mortgagees (possibly they might keep their mortgage alive for this purpose) as they can claim

to avoid as successors-in-interest to the mortgagor-coparceners of the rights to avoid.

The second plea is that Gajendrapal Singh as subsequent mortgagee was not entitled to challenge the mortgagee's interest by reason of a certain compromise arrived at in a previous suit. The previous suit was one brought by Gajendrapal Singh and others on the basis of a mortgage. The plaintiffs were parties to that suit, but it is not stated in the judgment of the lower appellate Court in what precise capacity they were impleaded. In the course of the argument, counsel for the respondent stated that they were impleaded as the holders of a third and later mortgage to that held by Gajendrapal Singh etc. Any way they set up a prior mortgage, i. e., the mortgage in question in this present suit. Gajendrapal Singh etc., entered into a compromise admitting that the mortgage set up by the plaintiffs was prior in time to their mortgage and agreeing that the mortgaged property should be sold on foot of their mortgage, i. e., the second mortgage, subject to the first mortgage of the plaintiffs, i, e., subject to the present mortgage. It is urged that after entering into such a compromise it is not open to Gajendrapal Singh to dispute the validity of the present mortgage. The District Judge repelled this argument on the ground that the compromise did not amount to any direct admission as to the validity of the prior mortgage but only amounted to an agreement that the property should be sold subject to the prior mortgage whatever that mortgage was worth. Now it is urged as ground 2 in the memorandum of appeal that

"on a correct interpretation of the compromise it is not open to the defendants to challenge he mortgage in suit."

This clearly amounts to a plea of estoppel based on the compromise itself, and not on the decree and as such in our opinion it fails. We have already held that Gajendrapal Singh etc., could have called in question in that suit the validity of the first mortgage because it was necessary to do so to define their interest. So far from doing so, they agreed to the sale of the property for the discharge of the second mortgage subject to the first mortgage. The question there is whether their doing this amounted to an agreement never to call that mortgage in question or merely to an agreement not to call it in question in that suit. The compromise is not before us, nor have the appellants got it printed as they were bound to do if they relied on its terms. We must rely, therefore, on the description of it contained in the judgment of the lower appellate Court. Generally speaking, it may be said that a compromise filed in a suit is intended, in the absence of anything expressed to the contrary, to be for the purpose only of effecting the decree in the suit and not for any ulterior purpose. So construed we concur with the District Judge in holding that the compromise should be construed merely as an agreement that the property should be sold subject to the first mortgage (whether valid or invalid). Gajendrapal Singh etc., were not bound to make the first mortgagees a party to their suit, and if they had not done so, and the property had been sold, they, in a subsequent suit by the first mortgagees could have called in question that first mortgage.

It is unnecessary to consider whether apart from the compromise the compromise-decree in any way operates as res judicata to prevent Gajendrapal Singh etc., questioning the validity of the first mortgage. The plea of res judicata has not been taken. We may state, however, that without the pleadings in that suit it would have been impossible to hold that a plea that the second mortgage was voidable was taken and adjudicated upon by the compromise-decree. For a compromise decree cannot be taken to decide every point that ought to have been pleaded, as a decree on the merits must. See Bower's Res Judicata (1924) p.24. and our recent judgment *Lala Ram Narain* v. *Mt. Kaitki Kuer*, Second Appeal No. 2024 of 1925, decided on 14th December 1928.

Consequently we hold that Gajendrapal Singh etc., as transferees from the mortgagor-coparceners are entitled to call the mortgage in suit in question, and on the findings of fact that mortgage must be deemed void. The present appeal is also unmaintainable against Gajendrapal Singh alone, and we see no reason for allowing any other of the defendants to be joined as respondents at this stage. The appeal, therefore, fails and is dismissed with costs.

R.K. *Appeal dismissed.*

* A. I. R. 1929 Allahabad 250

SEN AND NIAMATULLAH, JJ.

Ram Autar Kurmi and *others*—Defendants—Appellants.

v.

Ghulam Dastgir and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 158 of 1926, Decided on 11th January 1929, from decree of Addl. Sub-Judge, Jaunpur, D/- 12th October 1925.

(a) Mahomedan Law — Mahomedan usufructuary mortgagee dying—Mortgage debt paid to one of his heirs without concurrence of others—Such payment is not valid discharge.

Upon the death of a Mahomedan usufructuary mortgagee, his estate devolves upon a number of heirs and each of such heirs has a distinct and defined interest in the mortgaged property ; and payment to one of the heirs without the concurrence of the rest, cannot operate as a valid discharge of the mortgage debt : *Decharms* v. *Harwood*, 10 *Bing. Reports* 526 ; 25 *All.* 155 ; 27 *Bom.* 292 and 32 *All.* 164, *Rel. on.* [P 250 C 2 ; P 251 C 1]

*** (b) Mahomedan Law — Guardianship — Brother is not legal guardian—If he, without being authorized by legal guardian assumes management of minor's property, he cannot impose obligations on minor except such as afford protection to his estate.**

A brother under the Mahomedan law is not a legal guardian and if, in the absence of derivative authority from the guardian, i.e., from either the father or the paternal grandfather, he assumes the management and control of the minor's property, he is only a de facto guardian and as such cannot impose any obligations upon the minor excepting such as afford protection to minor's estate.

[P 251 C 1]

*** (c) Mahomedan Law—Debt secured by usufructuary mortgage—Property in possession of minor and his de facto guardian—Minor not competent to give his assent—Guardian cannot release property.**

Where debt is secured by a usufructuary mortgage of immovable property which is in the possession of a Mahomedan minor and his de facto guardian, it is beyond the range of the latter's authority to release the property at a time when the minor is not competent to signify his assent to the transaction : *A. I. R.* 1918 *P. C.* 11, *Ref.* [P 251 C 2]

Haribans Sahai—for Appellants.

S. Majid Ali—for Respondents.

Judgment.—This is an appeal by the defendants in a suit for possession of a 6 annas 1 pie share out of 16 annas in certain immovable property mortgaged by Darshan Kurmi, ancestor of the defendants-appellants in favour of Sheikh Mohammad Jan, ancestor of the plaintiffs and the pro forma defendants 10 to 18. The plaintiffs claimed Rs. 351 by way of mesne profits. Alternatively, they claimed a decree for recovery of Rs. 681-7-0 being their share in the mortgage money according to the account set out at the foot of the plaint. The mortgage in suit was a usufructuary mortgage made on 12th December 1888 to secure a sum of Rs. 898. The mortgagee died about the year 1904 leaving three sons, five daughters and two widows. Sheikh Ghulam Mohiuddin, a stepbrother of plaintiffs 1 to 3 managed the estate for himself and the other members of the family between the years 1904 and 1921. On 20th May 1919, Sheikh Ghulam Mohiuddin received the entire mortgage money from defendants 1 to 9 and released the property in their favour. This was at a time when admittedly Ghulam Dastgir, plaintiff 1, was a minor.

The plaintiffs allege that Sheikh Ghulam Mohiuddin was not competent to release the mortgaged property during the minority of Ghulam Dastgir at a time when he was not capable of giving his concurrence to the release and that they are not bound by the transaction dated 20th May 1919.

The defendants contended inter alia that Sheikh Ghulam Mohiuddin was the manager of the family consisting of the plaintiffs and of the other defendants who have been arrayed as pro forma defendants, that he was competent to discharge the mortgage debt and that the plaintiffs were bound by the release granted by him. This contention was sustained by the Court of first instance which dismissed the plaintiffs' suit. The lower appellate Court concurred with the finding of the trial Court that Sheikh Ghulam Mohiuddin was the manager, *karpardaz* and guardian of the minor plaintiff between the years 1904 and 1921, but it held that under the Mahomedan law it was beyond the competence of Sheikh Ghulam Mohiuddin to release the mortgaged property during the minority of one of the plaintiffs. It is contended before us that the Court below has erred in arriving at this conclusion. We have considered the question in all ts aspects and have not the slightest doubt in holding that the decision of the Court below is right. Where, upon the death of a usufructuary mortgagee, his estate devolves upon a number of heirs under the Mahomedan law, each of such heirs has a distinct and

defined interest in the mortgaged property ; and payment to one of the heirs without the concurrence of the rest, cannot operate as a valid discharge of the mortgage debt. The several heirs of Mohammad Jan upon whom the inheritance devolved must be considered as a single unit. Tindal, C J., observed as follows in *Decharms* v. *Harwood* (1), at p. 529:

"The authorities all agree that whatever be the number of parceners, they all constitute one heir. They are connected together by unity of interest and unity of title."

Where the mortgagee rights have devolved upon a number of persons by inheritance under the Mahomedan law, the various co-heirs are interested in the property according to their Quranic shares and constitute tenants-in-common. In *Manzur Ali* v. *Mahmud-un-nissa* (2), it was held by Stanley, C. J., and Banerji J , that where the obligees are tenants-in-common, the discharge by one of the obligees cannot be set up as a defence against the other obligee or obligees suing for his or their shares of the debt. A similar view was taken by a Bench of the Bombay High Court in *Sita Ram* v. *Shridhar* (3), and it was held that where property was mortgaged to one person, who subsequently died leaving a number of heirs jointly entitled to the estate, payment made by the mortgager of the entire amount due upon the mortgage to only one of the heirs without the concurrence of the others did not amount to a valid discharge to the mortgagor. The same view was taken by this Court in *Ram Chandra* v. *Goswami Rajjan Lal* (4).

It ought to be remembered that Ghulam Mohiuddin was not the legal guardian of the plaintiffs 1 to 3 under the Mahomedan law. Where a brother, who has no derivative authority from the legal guardian, i. e., from either the father or the paternal grandfather of the minor, assumes the management and control of the minor's property, he cannot impose any obligations upon the minor excepting such as afford protection to the minor's estate. Ghulam Mohiuddin was only a de facto guardian, and in arrogating to himself the management of the minor's property he was no more than a fazuli. The powers of a guardian under the Mahomedan law to deal with the property of the minor are extremely limited and his authority to treat the immovable property of the minor, which is technically described as akar, is more restricted still. It is not necessary for us to decide whether a person in the position of Ghulam Mohiuddin was or was not competent to discharge a simple debt in which he was jointly interested with the minor. But where the debt is secured by usufructury mortgage of immovable property which was in possession of the minor and himself, it was clearly beyond the range of his authority to release this property at a time when the minor was not competent to signify his assent to the transaction. The nature of the powers possessed by the de facto guardian to deal with the minor's property has been discussed by the Judicial Committee in re. *Imam Bandi* v. *Mutsaddi* (5). At p. 894 their Lordships observed:

"Whilst an executor guardian (wasi) may "sell or purchase movables on account of the orphan under his charge either for an equivalent or at such a rate as to occasion an inconsiderable loss," dealing with his immovable property are subjected to strict conditions."

In fact the Mussulman law appears to draw a sharp distinction between moveble and immovable property (akar) in respect of the power of the guardians, as will be seen from the following passage in Baillie's "Digest," p. 689:

"With regard to the executor of a mother or brother,—when a mother has died leaving property and a minor son, and having appointed an executor, or a brother has died leaving praperty and a minor brother and having appointed an executor, the executor may lawfully sell anything but *akar* belonging to the estate of the deceased, but can neither sell the *akar*, nor lawfully buy anything for the minor but food and clothing, which are necessary for his preservation etc."

We are of opinion that Ghulam Mohiuddin was not competent to release the minor's interest in the mortgaged property which constituted *akar* under the Mahomedan law

An exception has been taken to the fact that the question of the plaintiff's share in the estate of Mohammad Jan has not been determined by either of the Courts below. This objection is well founded ; but we have worked out the

(1) [1874] 10 Bing. 526=3 L. J. C. P. 188=4 M. & Scott 400.
(2) [1902] 25 All. 155=(1902) A. W. N. 216.
(3) [1903] 27 Bom. 292=5 Bom. L. R. 91.
(4) [1910] 32 All. 164=5 I. C. 129=7 A. L. J. 99.
(5) A. I. R. 1918 P. C. 11=45 Cal. 878=45 I. A. 73 (P.C.).

shares of the plaintiffs who can under no circumstances be entitled to less than a six annas one pie share in the estate of Mohammad Jan as claimed by them. If the defendants 1 to 9 have any grievance, they can proceed against Ghulam Mohiuddin. They made the payment to an unauthorized person and they cannot ask this Court to pass a decree not as against them but as against Ghulam Mohiuddin. We dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 252

BANERJI AND KING, JJ.

Kalloo and *another*—Defendants—Appellants.

v.

Niadar Singh and *another*—Plaintiffs—Respondents.

Second Appeal No. 159 of 1926, Decided on 10th January 1929, from decree of Addl. Dist. Judge, Moradabad. D/- 24th October 1925.

(a) Civil P. C., O. 34, R. 5—Court while passing final decree cannot re-open questions determined by preliminary decree.

At the time of the passing of the final decree Court has no power to go behind the preliminary decree in which the rights and liabilities of the parties had been determined. [P 253, C 1]

*** (b) Civil P. C., S. 11—Person brought on record after preliminary decree as representative of mortgagor challenging mortgage—Court refusing to go behind preliminary decree and passing final decree — Final decree will not bar suit for declaration that mortgage was not binding on him.**

Where, after preliminary decree was passed in a mortgage suit for sale, certain persons were brought on record as legal representatives of the deceased mortgagor, who challenged the mortgage for want of consideration and legal necessity but final decree was passed against them, the Court having refused to go behind the preliminary decree, the final decree would not operate as res judicata in a separate suit brought by them for declaration that the decree was not binding on them. [P 253, C 1]

*** (c) Civil P. C., S. 47—Questions going behind decree and not decidable by execution Court—Suit raising such questions is not barred.**

Section 47 cannot bar a suit which raises questions which do not merely relate to the execution, discharge and satisfaction of the decree, but go behind the decree and are such as the execution Court could not have decided. [P 253, C 1]

Baleshwari Prasad for *M. Waliullah*—for Appellants.

Panna Lal—for Respondents.

Judgment.—This appeal arises out of a suit for a declaration that a mortgage decree obtained by the defendants against the father of the plaintiffs was null and void as against the plaintiffs. The defendants obtained a preliminary decree against the plaintiffs' father alone without making the plaintiffs parties to the suit. After the passing of the preliminaey decree, and before the final decree was passed, the plaintiffs' father died and the plaintiffs were substituted as legal representatives of their father. After the plaintiffs had been thus impleaded as legal representatives the final decree was passed ex parte. Subsequently the plaintiffs applied to set aside the ex-parte decree and upon its being set aside they raised objections to the preparation of the final decree. They objected that they were not legal representatives of their father, Ram Lall, and proceeded to attack the mortgage-decree on the ground that the mortgage was without consideration and without legal necessity.

The Court decided that the plaintiffs were the legal representatives of their father and held that it was not entitled to go into the question of consideration and legal necessity for the mortgage and accordingly disallowed the objection and ordered the preparation of the final decree. The plaintiffs did not appeal against the final decree but instituted the present suit for a declaration that the decree was not binding upon them. Their claim has been decreed.

The defences with which we are concerned in second appeal are that the suit was barred, firstly, by the rule of res judicata, and secondly, by the provisions of S. 47, Civil P. C. Both the Courts below have found these points against the defendants, who are the appellants before us. The only questions which we have to consider in second appeal is whether the suit was barred on either of the grounds suggested. As regards the question whether the suit was barred by the rule of res judicata the learned counsel for the appellants contends that the final decree was passed against the plaintiffs themselves who had been impleaded as legal representatives of their father and that as they have not appealed against the final decree they are bound by it and are not entitled to challenge it by a separate suit.

The question, on its merits, depends upon whether the Court at the time of passing a final decree was entitled to go behind its own findings in passing the preliminary decree. In our opinion the Court was right in holding that at the time of the passing the final decree it had no power to go behind the preliminary decree in which the rights and liabilities of the parties had been determined. At the time of passing the final decree the Court's powers are limited to acting in accordance with O. 34, R. 5. Where it is found that payment has not been made of the sum specified, then the Court is bound to pass a decree that the mortgaged property or a sufficient part thereof be sold. We hold that the Court in taking action under this rule is not empowered to re-open the questions which have already been determined by the preliminary decree. As the Court in passing the final decree had no power to decide the questions which were raised by the plaintiffs in the present suit we hold that the rule of res judicata does not apply.

The next question is whether the suit is barred by the provisions of S. 47, Civil P. C. Here again we think there is no force in the appellants' contention. The questions which are now raised in the present suit go to the root of the mortgage decree. They are not questions which merely relate to the execution, discharge or satisfaction of the decree. The questions, if decided in the plaintiff's favour as they have been, go behind the decree itself and could not be determined by an execution Court under S. 47.

The counsel for the respondents has also pointed out that his suit was instituted in the Court executing the decree and the Court could have treated the suit as a proceeding under S. 47 if it thought fit. In any case there is no force in the contention that the suit was barred by S. 47. Agreeing with the Courts below we dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 253

DALAL, J.

Mt. Maharani and *another*—Judgment-debtors—Applicants.

v.

Debi Das — Decree-holder — Opposite Party.

Civil Revn. No. 315 of 1928, Decided on 18th January 1929, from order of Munsif, Fatehabad, D/- 25th August 1928.

*** Limitation Act, Art. 182—Period will run from amendment of decree only if original decree was incapable of execution.**

If there has been an amendment of a decree which was incapable of execution, the period shall run from the date of the amendment, otherwise it must date back to the date of the original decree. [P 253 C 2]

Baleshwari Prasad—for Applicants.

Krishn Bahadur for *Shiva Prasad Sinha*—for Opposite Party.

Judgment.—The learned Judge of the lower Court has stated the law correctly. If there has been an amendment of a decree incapable of execution, the period shall run from the date of the amendment, otherwise it must date back to the date of the original decree. The view taken of the circumstances of this case by the learned Judge is, however, perverse in my opinion. It is obvious that the decree-holder has taken advantage of a slight mistake in orthography, and really did not consider the decree incapable of execution. First of all, he tried subsequent to the decree being time barred to make out that Rs. 10 had been paid by the judgment-debtor within time. The decree was passed on 6th January 1925, and on 3rd April 1928 he applied to the Court certifying a payment of Rs. 10 within the period of limitation. This application was contested and dismissed. No question then was raised of the previous decree as it existed being incapable of execution. Then he clearly took advantage of Jwala being written as Joti and applied for amendment on 16th June 1928. The amendment was granted ex parte on 20th June.

The original decree was passed against the assets of one Joti Prasad in the hand of Mt. Maharani and Sukhlal. There was no mistake as to Mt. Maharani and Sukhlal. It is alleged that Joti Prasad was written as Jwala Prasad in the decree, and, therefore, the decree was incapable of execution. No attempt whatever was made by the decree-holder to execute the

decree within limitation. Joti and Jwala may easily be mixed up in Urdu writing, and nobody would have thought of any such mistake if the decree-holder had not wished to take advantage thereof in order to revive a time barred decree. I do not think that any objection would have been sustained if the assets of Joti Prasad in the hands of the applicants had been attached in execution of the first decree. It is clear to me that the first decree was capable of execution, that the error in orthography was immaterial and that the decree-holder was never prevented from executing the decree, nor was the decree incapable of execution. The decree-holder has taken advantage of a slight mistake in writing in order to execute a decree which is time barred. I set aside the order of the Munsif of Fatehabad dated 25th August 1928, uphold the objection of the applicants, and dismiss the application for execution of the decree. The applicants shall receive their costs.

S.N./R.K. *Order set aside.*

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* A. I. R. 1929 Allahabad 254

SULAIMAN AND KENDALL, JJ.

Kundan Lal and *another*—Defendants—Appellants.

v.

Sahu Bhikhari Das-Ishwar Das and *another*—Plaintiffs—Respondents.

First Appeal No. 443 of 1925, Decided on 3rd January 1929, from decree of Sub-Judge, Meerut, D/- 27th July 1925.

(a) Negotiable Instruments Act, S. 98 (e)—If acceptor is one of drawers, both drawers would be liable though no notice of dishonour is given—(*Obiter*).

The use of the singular "drawer" followed by the plural "drawers" in S. 98 shows that if the acceptor is one of the drawers, both the drawers would be liable even though no notice of dishonour has been given. [P 255 C 1]

*** (b) Evidence Act, S. 91—Hundi embodying only part of contract between parties being inadmissible in evidence as not properly stamped — S. 91 does not exclude evidence showing terms of whole contract—Contract Act S. 62.**

If a hundi is an embodiment of the whole of the contract between the parties and it is not admissible in evidence and cannot be looked at for the purpose of finding out the terms of the contract, other evidence to prove the terms of such contract cannot be allowed. But where the hundi embodies only a part of the contract between the parties, it cannot be said that the whole contract is reduced to the form of a hundi and S. 91 does not exclude evidence showing the terms of the whole contract which cannot be determined from the hundi alone: 7 *Cal.* 256; 28 *All.* 298; 34 *All.* 158; 7 *A. L. J.* 459; 16 *I. C.* 33, *Discussed*; 38 *Mad.* 660; *A. I. R.* 1921 *Lah.* 217 and 23 *Cal.* 851, *Ref.* [P 256 C 2]

(c) Evidence Act, S. 91—Bill of exchange or hundi does not necessarily embody whole contract between parties.

From the mere fact that a bill-of-exchange or hundi has been executed, it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of such a document. [P 256 C 2]

(d) Contract Act, S. 70—Suit on hundi—Hundi held inadmissible—Plaintiff can still succeed if his suit can be treated for money had and received or for compensation of money paid to defendant's creditor.

Where a suit was brought on the basis of a hundi, but the hundi was held to be inadmissible, the plaintiff is still able to succeed if his suit can be treated as one for recovery of the amount had and received or for compensation of money paid by him on behalf of the defendant to the creditor of the latter: 16 *I. C.* 32, *Rel. on.* [P 257 C 2]

K. N. Katju—for Appellants.

N. C. Vaish—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit for recovery of Rs. 9,000 and odd on thebas is of two hundis for Rs. 5,000 and 4,500 respectively, executed by the defendants Kundan Lal and Suraj Bhan in favour of the plaintiffs. The case as put forward in the plaint was that the defendants were partners of a firm styled Kundan Lal and Suraj Bhan carrying on business at Hapur, and they executed these hundis on 15th December 1922 on receipt of consideration and made them over to the plaintiffs; that these hundis were accepted by Kundan Lal, defendant 1 who was a proprietor of a firm styled Banwari Lal Kundan Lal on which these hundis were drawn; that the hundis were presented for payment and they were dishonoured. The defendants pleaded that the hundis were not properly cancelled and that the interest of 15 annas per cent. per mensem claimed in the plaint was excessive. They also denied the receipt of consideration, and pleaded that these hundis were executed merely as security for loss that might be incurred in certain gambling transactions. Suraj Bhan, defendant 2, further pleaded that no notice of dishonour had been given to him and he was not liable under the hundis. The Court below has held that the hundis were not properly cancelled

and are not admissible in evidence. But it has allowed the plaintiffs to fall back on the original consideration and has decreed the claim against both the defendants, holding that there was no defect of want of nctice of dishonour so far as Suraj Bhan was concerned.

These hundis were not on single stamp papers. Three stamps were used for one hundi and two for the other. There was no actual deficiency in the value of the stamps employed but these impressed stamps were pasted one upon the other leaving writing space only on the last stamp on which alone the hundis were written. The other stamps were merely pasted on to them and they were not in any way cancelled, nothing having been actually written on them. The Court below has held that, in view of the provisions of S. 13, Stamp Act, which requires that every instrument written upon paper stamped with an impressed stamp shall be written in such manner that the stamp may appear on the face of the instrument and cannot be used or applied to any other instrument, the stamps were not properly cancelled. The finding of the Court below on this point has not been challenged before us. It must therefore be taken that the stamps used for the hundis were not properly cancelled and that these hundis therefore are not admissible in evidence.

It would be convenient to dispose of the plea of want of a notice of dishonour to Suraj Bhan at the outset. In the first place, as the hundis are not admissible in evidence, the claim on the basis of these hundis cannot be decreed, and, therefore, no plea as to want of a notice of dishonour really arises in the case. Furthermore S. 98, sub-Cl. (e), Negotiable Instruments Act, makes it quite clear that no notice of dishonour is necessary to charge the drawers when the acceptor is also a drawer. The use of the singular 'drawer' followed by the plural 'drawers' in the section shows that if the aceeptor is one of the drawers both the drawers would be liable even though no notice of dishonour has been given. Kundan Lal who was one of the drawers was the acceptor, and therefore a notice of dishonour was not necessary even as regards Suraj Bhan.

The main question which has been argued before us is whether when the hundis are inadmissible in evidence the plaintiffs can fall back on the consideration alleged to have been paid by them. It is well settled that if a promissory note or a bill of exchange is executed in lieu of previously existing debts, and the document becomes inadmissible in evidence, the promisee can fall back on the original consideration and prove it. The learned advocate for the appellants, however, contends that when the consideration has passed on the bills of exchange themselves then the latter embody the contract between the parties and no other evidence can be given to prove such contract in view of the provisions of S. 91, Evidence Act.

The leading case on this point is *Shaik Akbar* v. *Shaik Khan* (1) which has been followed, distinguished and discussed in numberous subsequent cases. Garth, C. J. did remark in that case that when a cause of action for money is once complete in itself and the debtor then gives a bill or note to the creditor for payment of the money the creditor may sue for the original consideration and may disregard the bill or note; but when the original cause of action is a bill or note itself and does not exist independently of it there is no cause of action for money lent otherwise than upon the note itself. That case was one where in consideration of *A* depositing money with *B*, the latter contracted by a promissory note to repay the amount with interest at a future date.

So far as this Court is concerned there are numerous cases which have laid down that even on failure of the bills of exchange the creditor can fall back on the original consideration. In *Banarsi Prasad* v. *Fazal Ahmad* (2) the case of *Shaik Akbar* was followed and it was held that when a cause of action for money was once complete in itself and the debtor then gave a bill or note to the creditor, the latter could then sue for the original consideration even if the note was not cancelled. The learned Judges remarked that the plaintiff in that suit had stated the consideration of the note, viz: money borrowed by the defendant and alleged that the security was given to him for the loan by the making of the note in question. They accordingly held that it was open to the plaintiffs to give evidence aliunde to prove the considera-

(1) [1881] 7 Cal. 256=8 C. L. R. 528.
(2) [1906] 28 All. 298=3 A.L.J. 25=(1906) A. W. N. 9.

tion even though the note was not admissible in evidence Similarly in *Srinath Das* v. *Angud Singh* (3) it was held that a creditor who has got a security for an advance of the money made by him may as a rule sue for the original consideration provided that he has not endorsed or lost or parted with the bill of exchange or promissory note which he may have under such circumstances as would render the debtor liable upon it to some third person. In that case both the father and the son had borrowed money from the plaintiff and the son alone who was a minor had given the promissory note for the amount.

In *Ram Sorup* v. *Jasoda Kunwar* (4) the previous authorities were considered and the case of *Shaek Akbar* distinguished. The conclusion at which the Bench arrived was that where the plaintiff is able to prove the loan independently and without the assistance of a promissory note which not having been properly cancelled is inadmissible in evidence, he can succeed. The argument that where the lending of money and taking of note was a simultaneous transaction and the parties all along contemplated that the loan should be secured by the giving and the receiving of note, the plaintiff must stand or fall by the claim based upon the promissory note and that if he is unable to give the note in evidence the whole suit fails, was not accepted. These cases proceed principally on the principles of equity, and do not expressly consider the provisions of S. 91, Evidence Act. In a later case, viz : *Baijnath Das* v. *Salig Ram* (5), the previous authorities were reconsidered at considerable length and the applicability of S. 91 was not overlooked. The learned Judges came to the conclusion that none of the previous cases laid down that where a promissory note, which is inadmissible in evidence, is taken in consideration of the money advanced, the plaintiff cannot sue for money had and received by the defendant for the plaintiffs use, and held that such a suit may be treated as a suit for money had and received, if the pleadings are properly framed without treating it as such a suit. On the other hand it cannot be doubted that the opinion of other High Courts has been somewhat different. We may only refer to *Muthu Sastrigal* v. *Visvanatha Pandarasannadhi* (6) and *Gurdas Mal Singh* v. *Iswar Das* (7), where greater stress has been laid on the provisions of S. 91. We may also note that the case of *Shaik Akbar* was distinguished by the Calcutta High Court itself in *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (8).

It is true that in considering this point we cannot be solely guided by the equitable considerations which are given effect to in English cases. The express provisions of S. 91, Evidence Act, cannot be ignored. Under that section where the terms of a contract have been reduced to the form of a document, no evidence can be given in proof of the terms of such contract execpt the document itself or secondary evidence of its contents where it is admissible. If, therefore, the hundis are the embodiment of the whole contract between the parties and those hundis are not admissible in evidence and cannot be looked at for the purpose of finding out the terms of the contract, the plaintiffs cannot be allowed to adduce other evidence to prove the terms of such contract. It is conceivable that in special cases a bill-of-exchange or a promissory note may be the only document containing the terms of the contract between the parties, and in such a case if that document cannot be adduced in evidence the creditor may be prevented from recovering the amount. This is clear from illustration (c) to S. 91. On the other hand from the mere fact that a bill-of-exchange or hundi has been executed it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of such a document. A hundi is principally a written promise to pay a fixed amount on or after a certain date. It does not necessarily contain all the terms of the agreement between the parties as a bond, for instance, would do. In many cases a promissory note or a hundi may merely be a written security taken for the loan. The promise to pay the amount may be only a part of the whole contract between the parties, in which case it cannot be said that that contract has been reduced to the form of a hundi.

(3) [1910] 7 A. L. J. 459=6 I. C. 126.
(4) [1912] 34 All. 158=13 I. C. 138=9 A.L.J. 72.
(5) [1912] 16 I. C. 33.
(6) [1914] 38 Mad. 660=26 M. L. J. 19=21 I. C. 864=(1914) M. W. N. 58.
(7) A. I. R. 1921 Lah. 217.
(8) [1896] 23 Cal. 851.

In such cases it would be impossible to hold that the provisions of S. 91 would exclude evidence showing the terms of the whole contract which cannot be determined from the hundi alone.

In the present case we find that on 15th December 1922 four documents were executed. Besides the two hundis referred to above the defendants executed a receipt which referred to the two hundis stating the amount of Rs. 9,500 for which they were drawn and the period of their maturity. It further contained an acknowledgment of the receipt of consideration, viz : Rs. 9,500 on account of the hundis. They also wrote a letter addressed to the Bombay firm Bhikari Das Hazari Lal stating that they had paid to this firm in full whatever was found due to it by them, and acknowledging receipt of interest and profit. The receipt and the letter per se cannot be said to be inadmissible in evidence. They show that the arrangement between the parties was that the plaintiffs were to discharge the defendants' liability to the Bombay firm and the defendants promised to pay this amount to the plaintiffs and in token thereof the hundis were executed. The whole of this arrangement cannot certainly be found in hundis which cannot contain the terms of such an agreement. There is no doubt that the plaintiffs can independently of the hundis prove the passing of consideration, and they can also independently of them prove that the consideration was paid in pursuance of a contract between the parties which could not have been entered in the hundis. We therefore think that the receipt and the letter are admissible for the purpose of showing the whole arrangement between the parties, and do prima facie show that the receipt of consideration of Rs. 9,500 was admitted by the defendants, and there was a promise to repay the amount in consideration of the plaintiffs paying the same to the Bombay firm to which the defendants were indebted.

That the hundis were not the documents embodying the whole of the contract between the parties but they were executed in token of the advance made by the plaintiffs is partially admitted by both the defendants, inasmuch as in their written statement they pleaded that the hundis were executed by way of security for the prospective losses in certain transactions. Suraj Bhan, one of the defendants who was examined as a witness in this case, also stated that he was approached by Dal Chand of Bombay to clear off the Bombay account and that the hundis were written partly for the losses of the Bombay transaction and partly as security for the future transactions to be made by Kundan Lal.

We further think that even if the plaintiffs were not able to prove the whole contract by this additional evidence they could succeed if their suit were treated as one for recovery of the amount had and received or for compensation for the amount paid by them on behalf of the defendants to the creditor of the latter under S. 70, Contract Act. The suit, therefore, cannot necessarily fail because the hundis are not admissible in evidence.

It is, however, obvious that the plaintiffs are not entitled to fall back on the original indebtedness of the defendants to the Bombay firm. No doubt the nature of the Bombay transactions, that is to say, whether they were of a wagering character or not, is wholly immaterial if the plaintiffs have discharged the defendants' liability. Admittedly the firms at Hapur and Bombay are different, and the plaintiffs as representing the Hapur firm are not entitled to recover the amount due to the Bombay firm. Nor can they be allowed to do so when many more defences might have been open to the defendants if the Bombay firm had sued. But if the plaintiffs can establish that they have paid off the Bombay firm and thereby discharged the defendants' liability at their request they will be entitled to recover the amount with interest to the extent that they have been out of pocket. But it is incumbent on them to establish that they have discharged such liability of the defendants.

In the Court below there was some dispute as regards the burden of proof. Initially the burden undoubtedly lay on the plaintiffs, because in the absence of the hundis no presumption of the passing of consideration could have been made in their favour but there were written admissions of the defendants which could have shifted the burden of proof. The plaintiffs, however, chose to lead evidence as to consideration also in the first instance without expressly reserving their

right to produce rebutting evidence. After the close of the oral evidence an attempt was made to obtain permission of the Court to produce some rebutting evidence. This was refused. The defendants had also summoned the account books of the Bombay firm which has some partners common with the Hapur firm. Owing to some reason or other these account books did not not arrive in time.

Dal Chand who is both a partner in the Bombay firm and the Hapur firm was present. The Court declined to allow the plaintiffs to produce Dal Chand merely as a witness, but was prepared to allow Dal Chand to be examined provided he was produced with the account books relating to the shop at Bombay. As the account books were not in Court Dal Chand was not examined. We further find that although Bhajan Lal, one of the partners in both the firms, was examined as a witness and he attempted to prove that debit and credit entries were duly made in respect of the amount advanced by the plaintiffs to the defendants which went to discharge the latter's liability to the Bombay firm, yet even the account books of the Hapur firm were not tendered in evidence although they were actually present in the Court room. Bhajan Lal the manager referred to the entries in the account books without those books being before the Court. It seems to us that the best documentary evidence which would have been much more satisfactory than the mere oral evidence has not come before the Court owing to default on the part of both parties. We further think that it is absolutely necessary to ascertain definitely whether the plaintiffs have actually discharged the defendant's liability to the Bombay firm or not. The plaint did not contain any express allegation as regards this matter because it was principally based on the two hundis. We accordingly think that before we finally dispose of the appeal it is necessary to have additional evidence and a fresh finding on the question of the extent to which the plaintiffs have discharged the defendant's liability to the Bombay firm in pursuance of the agreement which was entered into between the parties on 15th December 1922. We accordingly send down the above issue to the Court below for a finding and report, and direct that the accoount books of the Bombay firm, of the plaintiffs' firm at Hapur, and of the defendants' firm should be called for and formal evidence to prove the entries, if neccssary, be taken. The parties will also be at liberty to produce Dal Chand, Kundan Lal and Suraj Bhan who were principally concerned in negotiating the contract. The finding should be returned within three months from this date.

S.N./R.K. *Case remanded.*

A. I. R. 1929 Allahabad 258

DALAL, J.

Niadar and *others*—Appellants.

v.

M. Mohammad Ahmad—Respondent.

Second Appeal No. 1725 of 1926, Decided on 10th January 1928, against decree of Additional Dist. Judge, Moradabad.

Landlord aud Tenant — Merger — Tenant purchasing share in Zamindari — He does not become khudkast holder but remains only tenant.

A tenant who purchases a share in the zamindari property does not thereby become Khudkast holder and so does not cease to be tenant of his holding even to the extent of the share purchased by him : (1906) *A. W. N.* 226, and (1901) *A. W. N.* 53, *Foll.* [P 259 C 1]

Baleshwari Prasad—for Appellants.

M. L. Agarwala—for Respondent.

Judgment.— In this second appeal findings of fact are attacked and there is only one point of law. The learned Judge of the lower appellate Court held in a suit for declaration by the plaintiff that the plaintiff was the zemindar of the plots in suit and the defendants were his tenants. The point of law is whether a tenant of a certain holding after purchase of a fractional share in the proprietorship of the village can become khudkast holder of the holding or must he remain tenant as before. This point has been decided against the tenant in *Abdul Hasan Khan* v. *Bhura* (1). A previous Bench ruling of 1901 in the case of *Mahabir Singh* v. *Ahsanullah* (2) was not so definite. There have, however, been previous rulings of a Bench of two Judges in this Court referred to in the 1906 ruling which definitely held

(1) [1906] A. W. N. 226.
(2) [1901] A. W. N. 53.

that the tenant who purchased a share in the zamindari property did not thereby cease to be tenant of his holding even to the extent of the share purchased by him The point of law is therefore settled.

As to facts the lower appellate Court has held that the defendants were tenants at the time of purchase. The reason given is that in 1331 Fasli which commenced in July they were entered in the village records as tenants while the purchase was not made till 29th August 1923. I do not see any flaw in this reasoning. The defendants themselves do not allege in their grounds of appeal that they were not tenants prior to their purchase. In the first three grounds what they have alleged is that the question of the cultivation prior to the purchase was immaterial and that the inference drawn by the lower appellate Court from the entry in the record of 1331 Fasli was not logical. This is an evasion of the main issue of fact.

In ground 4 it is submitted that the suit ought to have failed because of an undertaking given by the plaintiff. There was a distraint suit brought by the defendants with respect to other plots and that suit was decreed. During the pendency of this suit the plaintiff of this suit put in an application for stay under S. 10, Civil P. C., with a further prayer that the present suit may be decided according to the decision of the distraint suit. This application was presented by a mukhtar and there was no undertaking given by the plaintiff himself. There was no connexion between the two suits and the mukhtar obviously made an error of law.

In the grounds of appeal there is no allegation that the defendants have been prejudiced or have been prevented from producing evidence which they otherwise would have produced During arguments such a submission was made but I shall not entertain it as there is no reference about such a matter in the grounds of appeal.

This appeal is dismissed with costs.

S.N./R.K *Appeal dismissed.*

A. I. R. 1929 Allahabad 259

DALAL, J.

Krishna Kishore—Plaintiff — Applicant.

v.

Banwari Lal and *others*—Defendants —Opposite Parties.

Civil Revn. No. 117 of 1928, Decided on 7th November 1928, from an order of Sub-Judge, Muttra, D/- 21st January 1928.

Arbitration—Powers of Court—Arbitration pending—Order of Court to continue proceedings, without giving time to parties, upon non-receipt of award upto a certain date is undesirable.

While the arbitration was pending, the trial Court ordered that if the award was not received back on a certain date the arbitration would be superseded and proceedings continued by Court. The parties were not given time and opportunity to present themselves, and to produce evidence.

Held : that this was an undesirable order : 10 *A. L. J.* 23, *Foll.* [P 259 C 2]

Gopi Nath Kunzru—for Applicant.

Ram Nama Prasad — for Opposite Parties.

Judgment.—This is a case where rehearing ought to have been permitted. Issues in the case were referred to arbitration. While the arbitration was pending the trial Court ordered that if the award was not received back on a certain date the arbitration would be superseded and proceedings continued by Court. As observed by a Bench of two Judges in *Ganesh* v. *Damodar Das* (1), this was an undesirable order. After superseding an award the parties should be given time and opportunity to present themselves in Court and to produce evidence. This was not done in this case. As soon as the arbitration was superseded the Court wanted to proceed with the case. The plaintiff was not present, and the suit was promptly dismissed. He had engaged a counsel, but naturally in the absence of any witnesses the counsel was not in a position to proceed with the case. When it was uncertain whether the suit would be tried on the date fixed for hearing or not it was too much to expect that the plaintiff would go to the expenses of summoning his witnesses and having them ready. It is true that, as usually happens, the plaintiff has told a lie and stated that he was ill on the date of hearing

(1) [1912] 10 A. L. J. 23=16 I. C. 177.

instead of explaining that he was not prepared to undergo expense which may very likely be wasted in having witnesses ready on a date when possibly there may be no hearing. Just as in criminal cases so in civil cases confusion is caused and injustice done by parties firmly believing that only by telling lies redress could be had in Court.

I set aside the orders of the two subordinate Courts and direct the trial Court to re-admit the suit at its original number and try it according to law.

Costs here and heretofore shall abide the result.

W.S./R.K. *Order set aside.*

** A. I. R. 1929 Allahabad 260 (1)

BOYS AND SEN, JJ.

Emperor

v.

Durg and *others*—Opposite Parties.

Criminal Ref. No. 839 of 1928, Decided on 24th January 1929, made by Sess.-Judge, Mainpuri, D/- 27th October 1928.

**** Penal Code, S. 420—Sentence—Penal Code. S. 53.**

The offender convicted under S. 420 "shall be punished with imprisonment and shall also be liable to fine." This means that some sentence of imprisonment must be given and the Court has a discretion to add or refrain from adding a fine, for, to the latter an offender is only "liable." [P 260 C 2]

M. Waliullah—for the Crown.

S. N. Mukerji—for Opposite Parties.

Judgment.—This is a case in which four persons were convicted by a Magistrate of cheating, an offence under S. 420, I. P. C. That offence is not considered by the law to be one of a minor description and Courts are directed if they arrive at a finding of guilty under that section to inflict some sentence of imprisonment with or without an additional sentence of fine. The Magistrate in this case has found the four accused guilty of inducing the complainant to part with the sum of Rs. 90 in return for their promise to secure the restoration of two bullocks which he had lost, but he has only inflicted a sentence of Rs. 50 fine in the case of each of the accused persons, or in default. six months rigorous imprisonment. This is not a sentence in accordance with law and on the matter being brought to his attention by the Sessions Judge the Magistrate has admitted that he made an error and that that error was due to an oversight. The offender convicted under S. 420, I. P. C.

"shall be punished with imprisonment and shall also be liable to fine."

This means that some sentence of imprisonment must be given and the Court has a discretion to add or refrain from adding a fine, for to the latter an offender is only "liable." We do not think it necessary to direct a retrial.

We set aside the proceedings of the Magistrate of the 13th September 1928, that is to say, we set aside the conviction and sentence and direct the Magistrate to proceed to pass a sentence which, in his opinion, is called for in the circumstances of the case and which is in accordance with law. Let the reference be returned to the Sessions Judge.

R.K. *Order accordingly.*

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* A. I. R. 1929 Allahabad 260 (2)

SULAIMAN, Ag. C. J. AND WEIR, J.

Mt. Ratan Dei Kunwar—Plaintiff—Appellant.

v.

Sher Singh and *others*—Defendants—Respondents.

First Appeal No. 281 of 1924, Decided on 22nd May 1928, from decree of Sub-Judge, Bijnor, D/- 29th March 1924.

(a) Transfer of Property Act, S. 60—Decree for redemption of portions—Mortgagors to pay proportionate amount—Integrity of mortgage is broken.

If the decrees for redemption of portions of property have to be maintained and cannot be touched, and the mortgagors have to be called upon to pay only the proportionate amount of the mortgage money due on the portions, the case must be treated as if redemption is sought on the footing of the integrity of the mortgage being broken. [P 262 C 2]

*** (b) Transfer of Property Act, S. 67—Rights of mortgagee—Profits in lieu of interest—Deficiency to be supplied by mortgagor—Deficiency due to mortgagee's default need not be paid.**

The stipulation in a mortgage-deed that if the profits of the property mortgaged be found to be insufficient, the mortgagor shall pay the deficiency in interest from year to year cannot apply to a case where the profits have not in fact decreased, but the mortgagees have, owing to their own default, failed to recover them. [P 263 C 2]

P. L. Banerji and *Shabd Saran*—for Appellant.

Iqbal Ahmad, K. C. Mital and *Ajudhia Nath*—for Respondents.

Judgment.—*F. A. No.* 281 *of* 1924 and *F.A. No.* 232 *of* 1925 arise out of two separate suits Nos. 156 and 153 of 1922 respectively. These were suits brought by Ratan Dei Kunwar and by Kishan Kunwar and Bishun Kunwar for redemption of two separate villages, Lodhipur and Niamatullah Nagar. It is necessary to bear in mind that the suits were brought for redemption of single villages, although altogether 14 villages had been mortgaged under a deed dated 16th No vember 1869 by the plaintiffs predecessor, Sheo Raj Singh, to the defendants predecessor, Usman Khan, for a sum of Rs. 1,00,000. The mortgagee rights were transferred by the heirs of Usman Khan on 27th October 1889 to Darbari Mal and Nath Mal Das in this way that Darbari Mal was given 2/3rls share in the mortgagee rights and Sher Singh and his colleague were given 1/3rd share. Sher Singh and this man are defendants 1 and 2 in the suit, who are the principal contesting respondents in both the appeals before us. They will hereinafter be described as the contesting mortgagees.

By various transfers the equities of redemption of the various villages were transferred to a number of people. Briefly speaking it may be stated that by the year 1890 property No. 1 came to Badri Prasad, the grandson of the mortgagee Darbari Mal, Nos. 2-8 went to Nath Mal Das, who is now stated to have been a benamidar for Darbari Mal, No. 9 went to Sher Singh and another, the contesting mortgagees, and Nos. 10-14 were acquired by one Sher Singh of Kant.

It is an admitted fact that Sher Singh of Kant on 2nd July 1898 was allowed to pay off Darbari Mal and redeem the 2/3rds share of the mortgage from him. In his finding on issue No. 6 the learned Subordinate Judge at page 18 (F. A. 232 of 1925) has said that

"there is no dispute about the redemption of 2/3rds share held by Nath Mal Das and Lakhpat Rai, that portion of the mortgage is redeemed."

So far as item No. 9 is concerned, Darbari's share of the charge undoubtedly subsists. The 1/3rd of the mortgagee rights vest in Sher Singh and his colleague, the contesting mortgagees, in all the 14 villages. On 30th June 1914 item No. 14, namely Niamatullah Nagar, was transferred to Kishun Kunwar and Bishun Kunwar by Sher Singh of Kant, and on 19th July 1914 item No. 12, Lodhipur, was transferred to Ratan Dei Kunwar by the heirs of Sher Singh of Kant.

A circumstance which has caused considerable complexilty and difficulty in the making up of the accounts is the fact that Darbari Mal became lambardar in 6 villages, Sher Singh of Kant became lambardar of 5 villages and Sher Singh and his colleague, the contesting mortgagees, became lambardars of three villages. Account books have not been filed to show how these lambardars adjusted their accounts. We have. however, a suspicion that amounts due by these lambardars to each other might not have been paid in full and might have been set off against each other.

In the Court below there were altogether four suits, two of which have now come up in appeal before us. Those other suits were also suits for redemption of particular villages. The contesting mortgagees did no doubt plead that the plaintiffs in the various suits were not entitled to redeem their respective villages only, but they never in so many words put forward the plea that the integrity of the mortgage of 1869 has remained intact and the plaintiffs must offer to pay the whole amount of the mortgage money due, and redeem all the mortgaged properties at one and the same time. But an issue was framed by the Court below which was numbered as issue No. (2) and was to the effect whether the plaintiffs were entitled to redeem part of the disputed mortgaged property. The learned Subordinate Judge in his finding on this issue held that the plaintiffs were entitled to redeem different properties individually. He in so many words held that the integrity of the mortgage was broken and that the mortgaged property was held by different persons and by the mortgagees, so that different owners could redeem their property in part. He found the issue in favour of the plaintiffs. We have already referred to his remarks in his finding on issue No. 6 that there is no dispute about the redemption of the 2/3rds share in the mortgagee rights. In disposing of certain objections on page 190 (F. A. 281 of 1924) the learned Subordinate Judge again repeated his finding that the identity of the mortgage was no doubt broken.

In the Court below a commissioner was appointed twice to prepare accounts on the lines suggested by the learned Sub-

ordinate Judge. Although the learned Subordinate Judge held that different villages could be redeemed separately and that only proportionate amounts of the mortgage money were payable, he directed that the profits of all the 14 villages should be taken as a lump sum and from those profits the total amount of expenses should be deducted and interest charged on the whole amount, and after the total was arrived at there should be a proportionate distribution. A preliminary decree was prepared in the terms of the second report of the commissioner.

It is conceded now even by the learned advocate for the respondents that the decree on the basis of this report is to some extent unjust inasmuch as about six villages are shown in the account to have yielded no income whatsoever for a long number of years. This will be apparent from a perusal of pages 140 onwards. This result has been arrived at by the commissioner on the supposition that Sher Singh of Kant and Darbari Mal were lambardars of these villages and they did not pay the due share of the profits of these villages to the contesting mortgagees.

The two sets of plaintiffs Ratan Dei Kunwar and Kishun Kunwar and Bishun Kunwar preferred appeals from the preliminary decrees to this Court. The contesting mortgagees have filed cross-objections, but in their cross-objections they did not raise the point that the suit for redemption of separate villages should stand dismissed. Their complaint is that the amount awarded by the Court below, is inadequate. The position before us, therefore, is that out of four separate suits for redemption which were brought in the Court below two decrees for separate redemption of two sets of villages have become absolutely final and no appeal has been preferred from those decreees. In the two appeals which are before us the contesting mortgagees do not urge that the plaintiffs are not entitled to redeem their villages separately. As a result of the decrees in the other two suits having become final the present contesting mortgagees are not now in a position to submit themselves to a redemption of all the villages, having themselves allowed some villages to be redeemed by the other plaintiffs piecemeal. Having regard to all these circumstances, we are of opinion that it must be assumed for the purposes of these two appeals that the integrity of the mortgage has been broken and that piecemeal redemption should be allowed. The learned advocate for the respondents has contended before us that although he is not in a position to attack the decree for the redemption of different villages separately, he is still entitled to ask this Court to allow him the amount which would be found due on the basis of the integrity of the mortgage not having been broken. He has advanced this argument on the ground that he is entitled under O. 41, R 22, Civil P. C., to support the decree of the Court below on a finding different from that on which it is based. We are, however, of opinion that this contention cannot be accepted. If the decrees for redemption of individual villages have to be maintained and cannot be touched, and we must call upon the plaintiffs to pay only the proportionate amount of the mortgage money due on these villages, we must treat the case as if redemption is sought on the footing of the integrity of the mortgage being broken. We have, therefore, to determine the individual liabilities of the villages which are sought to be redeemed in these two appeals.

The method adopted by the Court below is complex and difficult. We, however, think that in the view which we have taken of the legal position of the parties the making of accounts can be considerably simplified, and it is now necessary to direct an enquiry into the total amount of income and expenses in respect of the entire mortgaged property.

Before we proceed to consider what would be the just basis for directing accounts to be taken we must dispose of one objection which has been strongly urged on behalf of the contesting mortgagees. Their contention is that Sher Singh of Kant having been the lambardar of five villages has in fact not made any payments of the contesting mortgagees' share of the profits for certain specific years and that only a small share of the profits was paid to the contesting mortgagees in certain years. The contention of the contesting mortgagees is that they should be debited only to the extent of the amount which they received from Sher Singh of Kant or his heirs. The contention is that Sher Singh of

Kant became one of the mortgagors through whom the present plaintiffs are claiming and that if Sher Singh of Kant had appropriated some amounts as lambardar, it must be assumed that there was a deficit in the income of the mortgaged property.

We think that we cannot accept this contention. Sher Singh of Kant had no right in law to obtain possession of the mortgaged properties or retain possession of them. Having acquired the equity of redemption, which merely gave him the right to redeem the mortgage on payment of the mortgage money, he acquired no more than a mere interest of a mortgagor. It did, however, happen that the Board of Revenne appointed him lambardar in preference to those who were in possession. But the position of a lambardar is that of an agent for the cosharers who are entitled to make realizations and collect rents. The amount which was appropriated by Sher Singh of Kant was not appropriated by him in the capacity of a mortgagor, but was appropriated or realized in the capacity of an agent of the persons entitled to possession. If the mortgagees have for all these years remained quiet and never claimed their shares from their agent, the lambardar, it seems to us unjust and unfair that they should now make the plaintiffs suffer for their own negligence and default. It has been pointed out to us that in some years decrees have been actually obtained against the lambardars. If the mortgagees did not recover the balance of their share of the profits that was due to their own negligence and carelessness, and it seems to us that in a suit for redemption of the separate villages we should not go into the question why the mortgagees did or did not sue the lambardar for the recovery of their share of the profits. The mortgagor had put the mortgagees in effective possession of the mortgaged property, and it cannot be asserted for a moment that if the mortgagees had bestirred themselves they would have been entitled through the revenue Court to recover their profits from year to year. If there was some sort of private adjustment on account of the fact that three sets of persons were lambardars of three groups of villages, or if it was due to negligence and carelessness on the part of the mortgagees that they did not recover any share of the profits which they were legally entitled to recover from their agent and lambardar, we think that the present plaintiffs cannot be made to suffer for that. The stipulation in the mortgage-deed that if the profits of the property mortgaged be found to be insufficient, the mortgagor shall pay the deficiency in interest from year to year cannot apply to a case where the profits have not in fact decreased, but the mortgagees have, owing to their own default, failed to recover them from the lambardar. We are, therefore, of opinion that in these appeals we should not go into the question whether or not the contesting mortgagees were able to recover the amounts of the profits from their agent, the lambardar.

Under S. 76 (g), T. P. Act, the contesting mortgagees were bound to keep clear, full and accurate accounts of all sums received and spent by them as mortgagees together with vouchers by which the accounts were supported. Admittedly no attempt has been made to produce any such accounts. The learned Subordinate Judge has commented strongly on the non-production of such accounts and has in fact in his finding on issue 6 concluded that, having got accounts, the contesting mortgagees have not produced them although the Court demanded their production. Thus, they have deliberately withheld the accounts. Prima facie, therefore, they would be liable to be debited with the total amount which ought to have been recovered on the basis of the gross rental after deducting the necessary expenses and land revenue, etc. But inasmuch as the contesting mortgagees were not themselves the lambardars of villages Lodhipur and Niamatullah Nagar and had not the right to make direct collections from the tenants, these villages being under the lambardarship of Sher Singh of Kant, we think that it would be equitable and just to make the defendants liable for the proportionate share of profits which they would have got on the basis of actual collections made by the lambardar, provided that can be established. The true position, in our opinion, is that on account of the non-production of complete accounts the presumption would be against the contesting mortgagees that they had realized their due share of the gross rental after making the necessary deductions. In particular years, however, if they succeed in establishing

that the total amount collected by the lambardar from the tenants was smaller, we think that it will be just and equitable to make them liable for the proportionate share of the amounts so collected and realized, and not hold them liable for the amounts which remain unrealized by the lambardar. In our opinion, this is the only correct basis of accounting as the position now stands. Fortunately the proportionate liability on the villages before us on account of the principal mortgage-money is not now disputed. The table at p. 26 (F. A. 281 of 1924) shows the proportionate liability on Lodhipur and Salimpur, which is now admitted.

In the absence of any accounts or documentary evidence the Court below has assumed that up to 27th October 1889 the profits of the mortgaged property were just sufficient to pay the amount of the interest, and that on that date the whole sum of Rs. 1,00,000, neither more nor less, was due. This position has not been challenged by either party before us. It has to be noted that the proportionate liability on the villages shown at p. 26 represents the entire share of the mortgagees. The contesting mortgagees are entitled only to one-third of this mortgage-money.

The mortgage-deed of 1869 does not contain any clear stipulation that the mortgagee is to take the entire profits in lieu of interest. It is entirely silent as regards the surplus. On the other hand, it does contain a covenant that if the profits are short, the deficiency will be paid by the mortgagor together with interest. Mr. Piare Lal Banerji, on behalf of the two plaintiffs, offered to pay the proportionate amount of the mortgage money without any deductions if the respondents would accept his offer. That offer was not accepted. The contesting mortgagees insist on an account being taken and on their being credited with the shortage in the amount of profits as compared with the amount of interest. When accounts have to be gone into, we think it just and equitable that if in any particular year there was a surplus that should be credited to the account of the mortgagor.

The mortgage-deed mentioned the various villages by name and did not exclude any interest in those villages. It must, therefore, be taken that the entire proprietary interest of Sheoraj Singh in those villages was mortgaged. Of course if there were any proprietary interests belonging to other persons they would not be deemed to have been mortgaged and in calculating the amount of profits the share of profits in respect of such proprietary interest would have to be excluded.

We, therefore, think that it is necessary to call upon the Court below to get a fresh account prepared on the following lines :

(1) The account of villages Lodhipur and Niamatullah Nagar should be prepared separately.

(2) The proportionate liability of the mortgage money on 27th October 1889 should be taken as given on p. 26 (F. A. No. 281 of 1924).

(3) In all years the presumption should be that the amount of the profits on the basis of gross rental were realized as shown by the khatauni for those years.

(4) If in any one year the contesting mortgagees prove that the amount actually collected by the lambardar was less than the gross rental, the actual collections should be taken to represent the profits for those years. These figures will of course include any decretal amount that might have been realized subsequently.

(5) If no other convincing documentary evidence is produced by the contesting respondents, the learned advocate for the appellants concedes that the amounts shown in the khataunis as having been realized during particular years should be accepted as representing the total collections made by the lambardar. In the absence of any more satisfactory evidence the figures in the khataunis for those years may be accepted as showing the actual collections.

(6) The account should start with the proportionate amount of the principal sum as the amount due on 27th October 1889 to which should be added the interest from year to year and from which should be deducted the proportionate amount received as profits from year to year. If in any one year the proportionate amount of the profits is less than the proportionate amount of the interest at the contractual rate the interest on the deficiency is to be calculated at one per cent per mensem simple interest, and the amount of the deficiency is to be debited to the mortgagors. If, on the other hand, there is a surplus, that should be credited to the account of the mortgagor and would

go to reduce the amount due for the next year.

(7) The amounts to be deducted from the profits will be those mentioned in para. (1) of the mortgage-deed of 1869.

This, in our opinion, disposes of the whole appeal and the cross-objections except with regard to the exclusion of certain milak land. Neither party is entitled as of right to produce any fresh evidence in this case. We, however, direct that they be allowed to produce documentary evidence only and such formal oral evidence as may be required for the purpose of proving documentary evidence.

Lakhpat Rai, one of the respondents, is dead, but two brothers, who are admitted by Mr. Mital to be members of a joint Hindu family, are on the record. Under the circumstances the appeal has not technically abated. Mr. Mital claims that he should be awarded separate costs for Badri Prasad and others. They were only pro forma respondents and were not interested in the redemption of one-third of the mortgaged properties. We do not think that they are entitled to any costs. They need not appear in the enquiry that is to be made in the Court below. The usual ten days will be allowed for filing objections, if any.

M.N./R.K. *Order accordingly.*

A. I. R. 1929 Allahabad 265

DALAL, J.

Mohammad Daud Khan—Plaintiff—Appellant.

v.

Jai Lal and *another*—Defendants—Respondents.

Second Appeal No. 856 of 1927, Decided on 23rd January 1929, against decree of First Sub-Judge, Saharanpur, D/- 15th February 1927.

Malicious Prosecution—No positive proof of innocence is necessary—Case not of surmise but of actual seeing by complainant—Acquittal raises presumption of reasonable and probably cause.

When a person comes to Court after acquittal in the criminal Court, he has not positively to prove his innocence but only want of reasonable and probable cause before he would be entitled to claim damages. The proof of a want of reasonable and probable cause is not tantamount to proof of innocence. When a person has been acquitted, there would be a presumption of want of reasonable and probable cause in an occurrence when there was no scope for surmise and the evidence was given by the defendant of what he actually saw : *A. I. R.* 1926 *P. C.* 46 *Appl.* [P 265 C 2]

Akhtar Husain Khan—for Appellant.

Rudra Narain Srivastava for *K. K. Verma*—for Respondents.

Judgment.—The view of civil Courts as to the examination of evidence in cases where damages are wanted for malicious prosecutions will have to be revised after the judgment of their Lordships in the case of *Balbhaddar Singh* v. *Budri Sah* (1). The common impression was that when a plaintiff came to Court after acquittal in the criminal Court, he had to prove his innocence positively before he would be entitled to claim damages. The proof of a want of reasonable and probable cause, was held to be tantamount to proof of innocence. Their Lordships pointed out that what the plaintiff was called upon to prove was that he was prosecuted by the defendant and that the prosecution ended in his acquittal. He was not called upon to prove that he was innocent of the charge. He had to prove that the prosecution was instituted against him without any reasonable and probable cause. The evidence will have to be examined from a different point of view when the burden is removed from the plaintiff of proving his innocence positively. When the plaintiff has been acquitted, there would be a presumption of want of reasonable and probable cause in an occurrence when there was no scope for surmise and the evidence was given by the defendant of what he actually saw. For what the defendant did not see himself, there may be a reasonable and probable cause of suspecting the plaintiff's complicity. Such reasonable and probable cause may not have been thought by the criminal Court sufficient to convict the plaintiff but if such existed, the plaintiff would not be permitted to recover damages in the civil Court. Unless the plaintiff is called upon to prove his innocence, the only way he can prove want of reasonable and probable cause would be by pointing out that the defendant alleged that he actually saw the plaintiff committing the offence and yet this was not believed by the criminal Court. It is true that the defendant may be able to prove miscarriage of justice by the criminal Court and produce evidence

(1) A. I. R. 1926 P. C. 46=1 Luck. 215=29 O. C. 163.

so strong as to make it certain that the plaintiff was really guilty. In the present case no such evidence exists on behalf of the defendant. The witnesses are not of such a nature that they should be believed when they were not believed by the criminal Court. Malice must have existed when Mangat Ram falsely implicated the plaintiff, Mohammad Daud Khan, along with others who had cut the crops. It may be repeated that Mangat Ram did not merely allege that Mohammad Daud Khan must have instigated the tenants to cut the crops but he actually deposed that Mohammad Daud Khan was present at the spot. Under the circumstances I am of opinion that the plaintiff is entitled to recover damages from Mangat Ram. As against Jai Lal, there is no evidence that he instigated Mangat Ram to prosecute the plaintiff falsely

In the result the appeal is dismissed against Jai Lal with costs to Jai Lal. As against Mangat Ram, the appeal is decreed for a sum of Rs. 120. It is stated that three persons in making the defence spent about Rs. 150. He says in this plaint, para. 8 that he had to defray all the expenses for all the three men, who were prosecuted and acquitted. There is no evidence to the contrary. A sum of Rs. 150, however, seems to be too high. I reduce it to Rs. 120. As to other special damages, there is no evidence. I decree the appeal against Mangat Ram for Rs. 120 with proportionate costs of all the Courts.

R.K. *Claim partially decreed.*

A. I. R. 1929 Allahabad 266 (1)

MEARS, C. J., AND MUKERJI, J.

Mt. Purnama Devi—Appellant.

v.

Ram Prasad and *another*—Respondents.

First Appeal No. 313 of 1928, Decided on 3rd December 1928, from decree of Sub-Judge, Shahjahanpur, D/- 14th April 1928.

Civil P. C., O. 21, R. 72—Decree-holder, allowed to purchase in full satisfaction of decree, must pay poundage.

When a decree-holder is allowed to purchase the property ordered to be sold on condition that he would purchase it in full satisfaction of the decree, the decree-holder must pay poundage as part of the costs of the execution of the decree: *All. E. F. A. No.* 332 *of* 1926, *Rel.on.* [P 266 C 2]

K. N. Katju—for Appellant.

Judgment.—This appeal raises a question which has very recently been decided by one of us sitting with another Judge of this Court (E. F. A. No. 332 of of 1926, decided on 15th November 1928). The question is, when a decree-holder is allowed to purchase the property ordered to be sold on condition that he would purchase it in full satisfaction of the decree, whether he is entitled to recover from the judgment-debtor any money that he has to pay by way of poundage. It was held in the case mentioned above that the decree-holder must pay poundage as part of the costs of the execution of the decree. We think that this view is correct, and we accordingly dismiss the appeal.

R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 266 (2)

DALAL, J.

Pearey Lal—Plaintiff—Applicant.

v.

Sita Ram — Defendant—Non-Applicant.

Civil Revn. No. 183 of 1928, Decided on 2nd August 1928, against order of Small Cause Court Judge, Chandausi.

Civil P. C., S. 47—Suit against a supratdar on ground of damages due to his misappropriating the property is barred—Civil P. C., S. 145.

A suit by a decree-holder against a supratdar on the ground that the plaintiff had suffered loss by the supratdar misappropriating the property is barred by Ss. 145 and 47. [P 266 C 2]

Shabd Saran—for Applicant.

Order.—The respondent is not represented. Mr. Shabd Saran, on behalf of the appellant, has placed all the law available on the subject. The defendant was put in charge of attached property which it is said he misappropriated. The plaintiff thereupon brought the present suit on the ground that he was a decree-holder and had suffered loss by the defendant misappropriating the property. In my opinion the provisions of S. 145, Civil P. C., will bar such a suit. When any person has become liable as surety for the restitution of any property taken in execution of a decree, the decree may be

executed against him in the manner herein provided for the execution of decrees, and such person sball for the purposes of appeal be deemed a party within the meaning of S. 47. The plaintiff, therefore, ought to have take action against the defendant in the execution department of the Court where he had obtained the decree and not brought a separate suit.

It was argued that the plaintiff had suffered damage and, therefore, he can bring the suit in tort. If this were granted, the plaintiff's plaint is not sufficient. The plaint bases the cause of action on the misappropriation. It is not alleged therein that the decree has been incapable of execution or that the plaintiff would not be able to recover the balance of the decree from the judgment-debtor. If the plaintiff sued independently of the liability of the defendant as a suparddar in a civil Court, he ought to have made out a case of his suffering loss by the action of the defendant. He has not done so. I dismiss this application.

R.K. *Application dismissed.*

A. I. R. 1929 Allahabad 267(1)

SULAIMAN, AG. C. J. AND WEIR, J.

Chiranji Lal—Judgment-debtor—Appellant.

v.

Ram Sarup—Decree-holder—Respondent.

Letters Patent Appeal No. 74 of 1926, Decided on 25th May 1928, against judgment of Banerji, J.

Limitation Act, S. 7—Joint decree for possession and demolishing construction, in favour of a major and minor—Interests distinct and separate—Execution application by minor within three years of majority is not barred.

Where a joint decree for possession of land and demolition of a construction is passed in favour of a major and a minor although their interests were distinct and separate, the major cannot give a valid discharge for the minor and, therefore, an execution application by the minor within three years from attaining majority is not barred. [P 267 P 2]

A. M. Khwaja and *Narain Prasad Asthana*—for Appellant.

N. C. Vaish and *Panna Lal*—for Respondent.

Judgment. — This execution appeal arises out of a suit for possession of land, demolition of certain constructions and costs. The suit was instituted by the widow of a deceased brother and a minor brother. It is admitted that the interests of the two plaintiffs were distinct and separate, but they were cosharers in the land. A joint decree was passed in favour of the plaintiffs. The defendant did not carry out the order of the Court for the removal of the constructions. The minor plaintiff filed an application for execution of the decree within three years of his attaining majority. The defendant contested the application on the ground that in view of the provisions of S. 7, Lim. Act, the application was barred by time. We are of opinion that in this particulur case it is impossible to hold that the widow of the deceased brother could have, without the concurrence of her brother-in-law, given a valid discharge to the judgment-debtor. In these circumstances, limitation did not begin to run against the minor decree-holder till he attained majority. The appeal has no force and is dismissed with costs.

R.K. *Appeal dismissed.*

** A. I. R. 1929 Allahabad 267(2)

BOYS AND SEN, JJ.

Emperor

v.

Bashir—Opposite Party.

Criminal Ref. No. 883 of 1928, Decided on 31st January 1929, made by Dist. Magistrate, Saharanpur, D/- 9-11-1928.

*** (a) Criminal P. C., S. 438 — Prosecution negligent in bringing facts justifying enhanced sentence to Court's notice—High Court should not enhance.**

In a case where material justifying enhanced sentence was within the knowledge of the prosecution before the conclusion of the trial and was not brought, by the negligence of the prosecution, to the notice of the trial Court High Court would not interfere, on reference, for enhancing the sentence. To permit the prosecution to plead their own negligence and to harass the accused with further proceedings directed towards the enhancement of the sentence would simply be to put a premium on the negligence of the prosecution. [P 268 C 1]

**** (b) Criminal P. C., S. 260—Summary trial in some case may be legal but not desirable.**

It is manifest that a summary trial is intended to be directed towards offences which are appropriate for such form of trial. While it may be legal to use that procedure in a particuar case, it does not follow that it is desirable. An offence which may seem very grave when regarded only from the point of view of the section applicable may really be, in the light of its particular circumstances, of a trivial nature. On the other hand the consequences following upon conviction of what is in itself a trivial offence may be so grave as to render a summary trial unsuitable. [P 268 C 2]

In a case under S. 411, I. P. C. tried summarily, the accused had already been bound down under S. 109, Criminal P. C., in a personal bond with one surety. He was also a previous convict. At the time when the case, tried summarily, was sent up by the police they knew that they were not only making a charge of theft, but that the sentence should be very seriously enhanced owing to the previous convictions, and they knew that the consequences of the accused being under a bond were certain to follow.

Held: that it was clearly a case that required a full hearing and record. [P 268 C 2]

M. Waliullah—for the Crown.

Judgment.—This is a reference made through the Sessions Judge of Saharanpur at the request of the District Magistrate of Saharanpur asking this Court to enhance the sentence of a fine of Rs. 50 or three months' rigorous imprisonment in default passed on Bashir, accused, on 10th October 1928, under S. 411, I.P.C. The accused was tried summarily. It is said to have transpired since, that the accused had been convicted on 21st May 1923, under S. 379, I. P. C., and bound over for six months under S. 562, Criminal P. C., and further convicted on 22nd December 1924, under S. 457/75, I P. C. and sentenced to 18 months' rigorous imprisonment and Rs. 50 fine or two months rigorous imprisonment in default.

Admittedly these two previous convictions were not brought to the notice of the trial Magistrate in any way whatever. It is admitted on behalf of the Crown that "the investigating officer failed to mention them in his charge-sheet," and further that "no blame appears to attach to the Magistrate as he was unaware of the previous convictions." It is no doubt in view of this last statement that, so far as our record shows, the trial Magistrate was not asked to offer any explanation.

We have no hesitation whatever in saying that in a case where material was within the knowledge of the prosecution before the conclusion of the trial and was not brought, by the negligence of the prosecution, to the notice of the trial Court, we ought to refuse to interfere, and in this case we do refuse. To permit the prosecution to plead their own negligence and to harass the accused with further proceedings directed towards the enhancement of the sentence would simply be to put a premium on the exercise of negligence by the prosecution themselves.

But the matter does not end here. It is due to this application for enhancement that we have had to examine the record, and we are wholly dissatisfied with the manner in which the case has been conducted. In the first place it is manifest that a summary trial is intended to be directed towards offences which are appropriate for such form of trial. While it may be legal to use that procedure in a particular case, it does not follow that it is desirable. An offence which may seem very grave when regarded only from the point of view of the section applicable may really be, in the light of its particular circumstances, of a trivial nature On the other hand the consequences following upon conviction of what is in itself a trivial offence may be so grave as to render a summary trial unsuitable. From a conviction in this case another serious consequence was going to follow. The accused had been bound down on 3rd August 1928, under S. 109, Criminal P. C., in a personal bond of Rs. 100 with one surety of the like amount. We have no information in the brief record before us as to whether he had been bound down for one year or for three years. But the result is that if a conviction was arrived at in the present case the accused would not only have to suffer the sentence he might get in this particular case. Application would be made, as it has been made, to the trial Magistrate to take steps to see that the security bond was cancelled and the security forfeited. It appears, then, that at the time when this case was sent up by the police they knew that they were not only making a charge of theft, but they knew that the sentence should be very seriously enhanced owing to the previous convictions, and they knew that the consequences, which we have named, of the accused being under a bond were certain to follow. If these facts had all been brought to the attention of the Magistrate when he first took up the case, we think that he would probably have exercised his discretion not to hear the case summarily, and we think that he should have so exercised it. It was clearly a case that required a full hearing and record.

Further the record, such record as we have of the case, shows that the accused may have been gravely prejudiced by the summary way in which his case was

dealt with. If the case as it is now made for the Crown be accepted, this accused must have been released from jail some time in the middle of 1926. Two years later he is bound down on 3rd August 1928, under S. 109. He is then said to have been caught in the possession of stolen property, presumably some time shortly after 28th August 1928, that is to say, at any rate within a month of having been bound over. We cannot specify the date because while the judgment shows that the property was stolen on 28th August 1928, there is nothing on the record to show us on what date the search took place as a result of which the stolen property is said to have been found with the accused. The trial did not take place till 10th October 1928, i. e., some seven weeks later. The property stolen is said to have consisted of a large number of articles amounting in value to Rs. 122 and consisting of a number of coats, cloth, ornaments, etc. The complainant in his report of the theft said that he suspected three persons, Khedu, Mangalwa, and Bashir, presumably the present accused. His only reason for suspecting them was that he was on bad terms with them. We have no information whether the houses of the other two men were searched or not. The only article found in this man's house was one coat valued at Rs. 2. Owing to the fact that the trial was held in this summary way there is no evidence as to the search or the date on which it was held, or as to the place in which the coat was found.

In one sense this may be regarded as immaterial because the accused claimed the coat to be his own property. The coat is said to be identified as the property of the complainant by the complainant himself, a darzi, who swears that he made it and that it was the coat of the complainant, and a railway store-keeper, who says, according to the summary judgment, that this particular coat was given to the complainant by the railway, and that there was a railway identification mark on the coat, and that it was given to the complainant as part of his uniform. It is reasonable that such a store-keeper should be able to identify a coat as being of the railway pattern and to identify the railway mark, but it is difficult to suppose (at any rate there is nothing on the record to support such a belief) that he could really identify the particular coat as having been issued to the particular man. However, that may be, that is all the evidence according to the Magistrate's summary that there was on behalf of the prosecution, and the Magistrate was possibly entitled to take it that the identity of the coat as the property of the complainant was established. The Magistrate remarks: "The defence is too weak to rebut the evidence adduced by the prosecution." We are unable to appreciate what he meant by this observation in view of the nature of the defence. The Magistrate says (we have his original judgment before us): "Accused pleads guilty" (sic. He pleaded not guilty) "and says he purchased it from one Bashir" (as Bashir is the name of the accused this is probably another mistake) "for Rs. 2 and that the accused was annoyed with him in connexion of certain woman. This was the reason for his being implicated in the case. He produced one witness who

> "in a vague way says that the accused purchased a coat for Rs. 2 resembling that one shown to him in the Court. He does not know the name of person from whom the coat was purchased."

It is clear that unless some dates are quoted to show that the accused was claiming to have purchased this coat at a date prior to the date on which it is alleged to have been stolen from the complainant, there is nothing whatever in the prosecution case to rebut the case for the accused. On the other hand, there is something actually to support the case for the accused. The accused says that he has been selected to be charged in this case because there is some trouble between him and the complainant about a woman. It is striking that the only reason given by the complainant for suspecting the accused is that he was on bad terms with him and two others.

Taking into consideration all these facts, and in a case where application is made for an enhancement we are called upon to look into the facts, we are satisfied that an enhancement should not be ordered by us, and we are not satisfied at all with the way the accused was tried or that he was rightly convicted. We, therefore, set aside the conviction and sentence and direct that the accused be released, unless he is wanted upon

any other charge. We frame our order in this way on the supposition that he may still be in jail. But even if he has unfortunately already had to serve his sentence under this conviction, he is still interested in having this right order in his case passed, for if the conviction be maintained and not set aside merely on the ground that the sentence has been served, it would not only be an improper order to pass, but it would justify possibly the cancellation of the bond taken from the accused on 3rd Agust 1928. If any proceedings have been taken to cancel that bond and to send the accused to jail on the ground that he has committed a breach of that bond as evidenced by the conviction we have just set aside, those proceedings for the cancellation of the bond will be set aside, and if the accused is in jail in consequence thereof he will be released and the bond will be restored to the operation which it had prior to this conviction.

D.D. *Conviction set aside.*

A. I. R. 1929 Allahabad 270

BOYS, AND SEN, JJ.

Emperor

v.

Prem—Opposite Party.

Criminal Ref. No. 884 of 1928, Decided on 31st January 1929, made by Dist. Magistrate, Saharanpur, D/- 27th September 1928.

(a) Criminal trial—Duty of prosecution—Previous conviction should be brought to notice at proper time.

Although there is a general duty cast on the trial Magistrate to see that all the material evidence is before the Court, still that duty cannot relieve the prosecution from what is primarily their duty to see that matters, such as previous convictions are brought definitely to the notice of the Court at the proper time. [P 270 C 2, P 271 C 1]

(b) Criminal P. C., S. 438—Magistrate sentencing accused to six months' rigorous imprisonment without considering previous convictions—Previous conviction being prior to two years and half—Sentence was not enhanced.

The trial Magistrate sentenced the accused to six months' rigorous imprisonment under S. 457, I. P. C., without giving due consideration to the previous convictions. But the last conviction against the accused was prior to two years and a half from the date of the present offence.

Held: that the sentence need not be enhanced: *A.I.R.* 1929 *All.* 267 (2), *Dist.* [P 271 C 1]

M. Waliullah—for the Crown.

Judgment.—This is a reference made to us through the Sessions Judge of Saharanpur by the District Magistrate of Saharanpur asking for an enhancement of the sentence of six months' rigorous imprisonment passed upon Prem under S. 457, I. P. C. The facts of this case are somewhat different to *Emperor* v. *Bashir* (1), from the same district of which we have just disposed. In that case there was no question but that the negligence which led to the omission to take into consideration the previous convictions was due solely to the negligence of the investigating or prosecuting officers. The Magistrate was not in the remotest degree to blame. In this case we have read the various explanations and orders dealing with the fact that three previous convictions were not given, at any rate, full weight in awarding the sentence. It is unnecessary to examine the case in detail.

It appears that the convictions were set out in detail in the charge sheet sent up by the police. They were drawn to the attention of the Magistrate at the very commencement. The existence of some convictions of some sort came to the attention of the Magistrate in a statement volunteered by the accused in answer to a question but not to a question directed towards the existence of the convictions, and the answer of the accused did not suggest the dates of the convictions, or the offences for which he was convicted, or the sentences which he received. After that there is nothing to show that anything was brought to the attention of the Magistrate.

The trial Magistrate has stated the case very frankly and says that he has not possibly time when trying his various cases to be examining the record to look for such matters as the possible existence of previous convictions, and says that the primary duty in this respect lies upon the prosecution. There is a duty cast upon the trial Magistrate to see that all the material evidence is, if possible, before the Court, and it is a duty which sometimes Magistrates do not fully discharge. But on the other hand it is a general duty, and that duty cannot possibly be held to relieve the prosecution from what is clearly primarily their duty to see that matters, such as the existence of previous convictions are brought defi-

(1) A. I. R. 1929 All. 267 (2).

nitely to the notice of the Court at the proper time. In this particular case it would appear that the accused would not have denied the existence of the particular convictions if they had been put to him, and did in fact voluntarily admit that there were previous convictions of some sort against him. As it cannot be said that the Magistrate did not have these previous convictions brought to his notice at all and was not to some, though a very slight, extent responsible for not taking steps in regard to them, we might have been disposed, if the circumstances were otherwise, to set aside the conviction and sentences and to direct the Court to proceed as from the date immediately preceding the judgment, and to question the accused about the previous convictions, and if necessary to take evidence in regard thereto, but we do not think in the present case that the interests of justice call for this further expenditure of public time and money. The last conviction of the accused is said to have been on 18th February 1925, to one years's rigorous imprisonment, and he presumably was released from jail somewhere in the beginning of February 1926. The offence with which he has now been charged was committed on 25th August 1928. There is, therefore, so far as the record goes, nothing against this man during a period of two and a half years, and he has actually received a sentence of six months' rigorous imprisonment. Under the circumstances we do not think it necessary to interfere, and with this expression of our opinion let the record be returned.

S.N./R.K. *Sentence not interfered with.*

A. I. R. 1929 Allahabad 271

DALAL, J.

Ganga Sahai and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 885 of 1928, Decided on 28th January 1929, against order of First Class, Magistrate, Meerut, D/- 17th October 1928.

Northern India Canals and Drainage Act (8 of 1873), Ss. 20 and 21—Water-course 30 years old—Presumption of agreement or action under the Act arises.

Where a water-course is thirty years old a Court will be entitled to draw a presumption that it was started by agreement or action was taken under S. 20 or S. 21.

[P 271 C 2]

Sagar Chand Goyel—for Applicants.

M. Waliullah and *L. M. Roy*—for the Crown.

Judgment.—The three applicants have been convicted of an offence under S. 70, Canal and Drainage Act (Northern India), No. 8 of 1873. It applies to these provinces and to the Punjab. The applicants are much concerned at not knowing the exact clause of S. 70 under which they have been convicted. The learned Assistant Government Advocate has been pleased to satisfy their curiosity by stating that the clause is No (2) of S. 70 in so far that they interfered with the supply of water through a canal passing through their field. It is hoped that this explanation will now satisfy them.

The argument of learned counsel was that the water-course was private and not the property of the Canal Department, and that, therefore, the complainant had no right to flow water through it. The lower appellate Court has rightly pointed out that there being evidence of the supply of water through this water-course for thirty years it must be presumed that either there was an agreement between the parties, or action had been taken under S. 20 or 21 of the Act. A canal is a water-course according to S. 3 (1) (c) and a water-course is defined in Cl. (2) of that section

"as any channel which is supplied with water from a canal, but whieh is not maintained at the cost of Government, and all subsidiary works belonging to any such channel."

There cannot be the slightest doubt that what was stopped by the applicants was a water-course. The question then remains whether this water-course was started through agreement or under the provisions of S. 20 or S. 21, Canal Act. The learned counsel on behalf of the applicants argued that in every case the burden should be thrown on the complainant to prove either an agreement or action under the sections mentioned above. Any such specific proof is not necessary. If the water-course were recent say, of a year or two ago, such proof may be required. In the present case when this water-course is thirty years old a Court will be entitled to draw a presumption that it was started by agreement or under the provisions of the Act. Even the defence witnesses speak of a water-course by agreement. Their allegation, however, was that it

was started only seven or eight years earlier, and that the water was not stopped by the applicants but by some other person. In the trial Court the refinement as to water-course was the defence of the learned counsel of that Court and not the defence of the applicants, whose real defence was that they were not the culprits, but that someone else was. Reference was made to a ruling of the Punjab High Court that such a water-course should be established either by agreement or under the provisions of Ss. 20 and 21 of the Act in order to make a person interfering with such water-course liable under the penal provisions of the Act. The law applicable will vary with the circumstances of every case. Where a water-course is flowing for thirty years it would be impossible to discover papers relating thereto and the presumption would in the absence of rebutting evidence amount in such a case to proof that there had been an agreement between the parties, or action had been taken under the Act. It is certain, therefore, that the water-course was one which could not be interfered with by any person without rendering himself liable to the penal clauses of the statute. The lower appellate Court recorded some further evidence, but did not comment on it. The case, however, is proved by the evidence in the trial Court, and no further evidence was necessary.

My attention was drawn to the large amount of fine imposed on every one of the applicants. It appears, however, that a very large portion thereof has been paid to the complainant by way of compensation. Under the circumstances the fine was justified. I dismiss this application.

P.D./R.K. *Application dismissed.*

A. I. R. 1929 Allahabad 272

DALAL, J.

Jadunandan Misra and *others*—Applicants.

v.

Sheopahal—Opposite Party.

Criminal Revn No. 5 of 1929, Decided on 11th February 1929, against order of Magistrate, First Class, Ballia, D/- 21st December 1928.

Criminal P. C, S. 439—Revision filed without approaching District Magistrate or Sessions Court—Allahabad High Court refuses to hear it even after ex-parte admission of it.

It has been the settled practice of the Allahabad High Court to refuse to hear an application for revision even after an ex-parte admission of the application, when the applicant has not first applied to the District Magistrase or to the Sessions Judge for revision and it is not advisable to vary the practice though there may not be any rule of statute law on the subject: *A. I. R.* 1921 *All.* 30; *A. I. R.* 1927 *All.* 829; and *A. I. R.* 1921 *Cal.* 76, *Rel. on.* [P 272 C 2]

Sagar Chand Goyel—for Applicants.

A. P. Pandey—for Opposite Party.

Judgment.—I am sorry to disappoint Mr. Goyel who I see has come prepared with a large number of law reports. When I admitted this revision, I overlooked the omission of the applicants to approach the Sessions Judge first. In future the trial clerk is directed to note when an application for revision is made direct to this Court without first approaching the District Magistrate or the Court of Sessions. As a rule there is a practice at the Bar to certify in the grounds of revision that application was made to the District Judge or to the Sessions Judge and had not proved successful. If the trial clerk makes a note, the attention of the Judge would at once be drawn to the omission.

It has been the settled practice of this Court to refuse to hear an application for revision, even after an ex-parte admission of the application, when the applicant has not first applied to the District Magistrate or to the Sessions Judge for revision. The practice was laid down by a Bench Judgment of this Court in *Sharif Ahmad* v. *Qabal Singh* (*A. I. R.* 1921 *All.* 30). This practice was followed by Kendall, J., in *Nathe Singh* v. *Emperor* (*A. I. R.* 1927 *All.* 829). When a settled practice has been observed in this Court for at least eight years, it is not advisable to vary it though there may not be any rule of statute law on the subject. It appears that in the Calcutta High Court also such a rule is observed: see *Rash Behari Saha* v. *Phani Bhusan Haldar* (1). This application is dismissed, but the dismissal will not prevent the applicants if they so desire from approaching the District Magistrate or the Sessions Judge.

S.N./R.K. *Revision dismissed.*

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(1) **A. I. R. 1921 Cal. 76=48 Cal. 534.**

* A. I. R. 1929 Allahabad 273

BOYS AND SEN, JJ.

Emperor

v.

Ram Lal and *another*—Opposite Parties.

Criminal Ref. No. 837 of 1928, Decided on 28th January 1929, made by Dist. Magistrate, Shahjahanpur, D/- 5th November 1928.

(a) Criminal P. C., S. 110—Joint notice.

A joint notice to show cause to more than one persons is undesirable. [P 274 C 2]

(b) Criminal P. C., S. 438—High Court would not go into merits unless there is material departure from legal principles.

The High Court would decline to go into the merits of a case on the revisional side unless there is something to show that there has been a material departure from the legal principles according to which the case ought to have been dealt with and it would go into facts only if something is shown which particularly indicates that it is desirable to enter into those facts. [P 275 C 1]

*** (c) Criminal P. C., S. 110—Previous convictions are relevant to show character.**

The existence of a number of previous convictions of offences such as theft is a matter which may and should be taken into consideration as indicating the character and disposition of the accused, but the existence of such convictions is not by itself sufficient to justify ordering the accused to furnish security. Weight must be given to a consideration of the period that has elapsed subsequent to the last of the convictions in order to see whether during that period the accused has apparently shown a disposition to conduct himself properly or whether there are indications that he has during that period continued in his previous course, though he may not have actually brought himself within the clutches of the law. [P 275 C 1]

*** (d) Criminal P. C., S. 110—Suspicions of theft are inadmissible though by police officer.**

The suspicions of a witness that a particular man committed, either singly or with others, a theft in his house is wholly inadmissible in a proceeding under S. 110. In this respect a police officer stands in no stronger position than any other witness. There are only two kinds of evidence which are properly admissible. Ordinarily speaking the case will be governed by exactly the same rules of evidence as govern any other cases. A witness cannot say what he suspects. If the prosecution know that the witness does suspect the accused of having taken part in a theft, the prosecution can question that witness before he is put into the witness-box and ask him what are his reasons for suspecting the accused. They can themselves ascertain from the witness that facts are within his knowledge, and then put him into the witness-box to give evidence as to those facts, and it will be for the Magistrate to determine whether those facts alone or supported by other evidence create such a conviction in his mind as to justify calling for security. But a witness's "suspicions" and his "allegations" that the accused is a thief, etc. are worth nothing and should not be admitted. [P 275 C 2, P 276 C 1]

*** (e) Criminal P. C., S. 110—Evidence of general repute must be tested.**

The mere production of a string of witnesses who say that an accused person's general repute is so and so can carry very little weight unless some attempt has been made to show that he is a person in a position to know the general repute, and there has been some reasonable attempt by the counsel for the accused or by the Court to check the value of the evidence. [P 276 C 2]

(f) Criminal P. C., S. 438—District Magistrate should not merely forward the Prosecuting Inspector's notes en bloc to the High Court.

Where a Prosecuting Inspector being dissatisfied with the trial Court's order moves the District Magistrate for referring the case to High Court, the District Magistrate should examine the notes of the Prosecuting Inspector for himself, and if there is any portion of them that contains material which he thinks to be of value he should embody that material in his own order. It is improper to accept en bloc the Prosecuting Inspector's criticizms and simply attach them to his letter. [P 276 C 2]

M. Waliullah—for the Crown.

Judgment.—This is described as a reference by the Sessions Judge of Shahjahanpur. It appears that the police secured the institution of proceedings under S. 110, Criminal P. C. against two persons Roshan and Ramlal. The police desired that these two men should be bound down for a period of three years each. The case was heard at the usual great length which is one of the unfortunate characteristics of this type of case, and the Magistrate eventually discharged Ramlal and bound down Roshan for a period of only one year. This did not satisfy the police, and the Prosecuting Inspector approached the District Magistrate with a number of written criticizms of the order of the trial Magistrate and concluded his notes as follows

"It is therefore requested that the High Court may kindly be moved to enhance the term of one year's notice of Roshan to three years and to order the retrial of Ramlal under S. 437, Criminal P. C."

The type-written copy, which is all that can be traced in this Court, is undated and shows that the signature to the document is illegible.

Whether this document was ever perused by the District Magistrate or not we are unable to say. The next proceed-

ing that we have before us is a letter purporting to be from the District Magistrate to the Registrar of this Court, through the Sessions Judge of Shahjahanpur, which purports to be signed on behalf of the District Magistrate by a Deputy Magistrate, apparently Pt. Anirudh Kishan Sharma, and to it was attached the note of the Prosecuting Inspector.

This letter together with the note reached the Sessions Judge, Mr. Ardagh. Whether there was any hearing of the case before Mr. Ardagh we cannot say; but he passed an order on 1st November, 1928, which begins:

"In this case the District Magistrate recommends that the period for which security is demanded from Roshan be increased to three years and that security be demanded from Ramlal for one year. I have been through the file."

This suggests that the learned Judge examined the file for himself but did not have it argued before him. His order, which is a very brief one, concludes:

"As regards the case of Roshan from whom security was demanded for a year there appears to be no necessity to approach the Hon'ble High Court through the Local Government. No appeal has been presented on behalf of Roshan and the period of appeal has expired."

In an earlier portion of the judgment he had said:

"I consider that the prosecution evidence against both the accused is unrebutted and that security should have been demanded from both."

and as to Roshan

"security should have been demanded for a longer period."

In another place on the back of the letter from the District Magistrate to the Registrar of this Court, which has been signed on behalf of the District Magistrate by Mr. Sharma, Deputy Magistrate, the learned Judge endorsed:

"Forwarded to the Registrar, High Court of Judicature at Allahabad, for orders of the Hon'ble Court."

In fact this last action is all that was called for on the part of the Sessions Judge in the case of a reference by the District Magistrate. In this manner the case has come before us. It would seem that neither the District Magistrate nor the Deputy Magistrate nor the Sessions Judge has appreciated the proper course to adopt. We will deal with these documents seriatim in order to facilitate an appreciation of what we have to say.

First, as to the order of Mr. Abdul Jalil, the Sub-Divisional Magistrate of Pawaja dated 4th September 1928, the order which we are asked to consider and to hold to have been mistaken, we would commence by expressing our high appreciation of the obvious care and patience which he gave to a mass of confused evidence, and anything that we may say in reference to mistakes made by him must not be understood to detract from that appreciation. The notice that was issued to the two men was a notice to them jointly, and this we consider was undesirable. Each man is entitled to a separate notice and not to have the charges which are going to be made against him confused with the charges that are being made against somebody else. There are no less than ten paragraphs in this notice which is the order under S. 112, Criminal P. C. We think that the Magistrate has correctly described it as in substance an order directed to Ramlal to show cause why he should not be called upon to give security in the sum of Rs. 100 with two sureties of Rs. 100 each for a period of three years on the ground that he was "by habit a house-breaker and thief," and this charge is one which comes under Cl. (a), S. 110. Roshan was directed similarly to show cause why he should not furnish security on similar terms in respect of the charge that he was by habit a housebreaker and thief. But in his case there was also a further charge under Cl. (f), S. 110, that he was so desperate and dangerous as to render his being at large without security hazardous to the community.

These were the charges which the two men had to meet and nothing that was not relevant to those charges was relevant to the case at all. We have read and analyzed with care the judgment of the Magistrate, the note of the Prosecuting Inspector, the forwarding note of the Deputy Magistrate on behalf of the District Magistrate, and the remarks of the Judge, and we do not propose to deal in detail with the various comments. A case of this description can, so far as it comes before us owing to the dissatisfaction of the District Magistrate, only come before us on the revisional side. It is not an appeal, and in accordance with the usual practice of this Court, which has been frequently stated, we de-

cline to go into the merits of a case on the revisional side unless there is something to show us that there has been a material departure from the legal principles according to which the case ought to have been dealt with; or, if we are asked to go into the facts, we will only do so if something is shown to us which particularly indicates that it is desirable to enter into those facts. The principles on which the Court acts has so often been enunciated that it is not necessary and should not be necessary to repeat them further than this. These remarks apply in their entirety to the case of Roshan, though possibly with a little less force to the case of Ramlal, where we have been asked to set aside the order of discharge and to direct a further inquiry. We have, then, examined the evidence so far as was necessary to enable us to see whether the trial Magistrate had approached the case in the proper way and had exercised a judicial discretion in reference to the weight of the evidence.

There are only two points in regard to which we think the Magistrate was in error. He had before him in the case of Roshan a number of previous convictions. His view of the value as evidence of those previous convictions is possibly sound, but it has not been expressed quite as clearly as it might have been, and has therefore given the prosecution an opportunity of taking exception. We have no hesitation in saying that the existence of a number of previous convictions of offences such as theft is a matter which may and should be taken into consideration as indicating the character and disposition of the accused. But the Magistrate is quite right in saying that the existence of such convictions is not by itself sufficient to justify ordering the accused to furnish security. Weight must be given to a consideration of the period that has elapsed subsequent to the last of the convictions in order to see whether during that period the accused has apparently shown a disposition to conduct himself properly or whether there are indications that he has during that period continued in his previous course, though he may not have actually brought himself within the clutches of the law. It is from this aspect that we have ourselves considered the nature of the convictions and the evidence as to the conduct and reputation of the accused subsequent to the last conviction.

The only other point which we find open to criticizm is one in which the Magistrate, in our view, erred in favour of the prosecution. A mass of evidence was led to show that this person or the other had "suspected" the accused to be guilty of this or that theft. The Magistrate has weighed the value of this evidence. He need not have done so far it has no value whatever. Time after time this Court has pointed out that the suspicions of a witness that a particular man committed, either single or with others, a theft in his house is wholly inadmissible. In this respect it should be clearly realized that a police officer stands in no stronger position than any other witness. Having considered the whole case at considerable length we have no hesitation in declining to interfere with the order of the Magistrate.

But we cannot leave the case here. The amount of time of the Court that is wasted in cases of this nature by the admission of a mass of inadmissible evidence, and the amount of time that is consequently also wasted in efforts by the superior Courts to eliminate that evidence approaches to a scandal. In most cases if one were to go through the whole record scoring out the passages that should never have found a place there, it is probable that not ten per cent of the evidence would remain. It does not, of course, follow that that remaining ten per cent is not good and sufficient evidence. We do not suggest that it is wholly the fault of Magistrates. It is very difficult for them in the press of their work to check each statement as it is made by a witness. But it is part of the duty of the Magistrate to see that inadmissible evidence is not admitted on to the record. We think that the Magistrate in cases of this description where inadmissible evidence may so easily find entry might well ask the prosecution, as each witness is put into the witness-box, to what point the witness' evidence is to be directed. He will then know exactly what to expect and be in a position to refuse promptly to record statements that are not admissible.

There are only two kinds of evidence which are properly admissible. Ordinarily speaking the case will be governed by exactly the same rules of evidence as

govern any other cases. A witness cannot say what he suspects. If the prosecution know that the witness does suspect the accused of having taken part in a theft, the prosecution can question that witness before he is put into the witness-box and ask him what are his reasons for suspecting the accused. They can themselves ascertain from the witness what facts are within his knowledge, and then put him into the witness-box to give evidence as to those facts, and it will be for the Magistrate to determine whether those facts alone or supported by other evidence create such a conviction in his mind as to justify calling for security. But a witness' "suspicions" and his "allegations" that the accused is a thief, etc., are worth nothing and should not be admitted. The legislature has further provided that evidence may be given of the general repute of the accused. This does not mean that the prosecution may place before the Magistrate a heterogeneous mass of more or less vague and general statements by any witness who can be produced to say something on hearsay or otherwise, label it "general repute" and ask the Magistrate to call for security on the strength of it. Yet this is undoubtedly a very general practice. A man's general repute, whether deserved or not, is just as much a fact as any other fact which can be proved by a witness. If the witness is a witness to "general repute" he may say:

"The accused has the general reputation of being a man who habitually commits such and such offences."

In addition to this the witness may properly be put a few questions by the prosecution to show that he himself is in a position to know what the general reputation of the accused is. Further than this, on the mere question of "general repute." it is unnecessary and generally undesirable to go in examination-in-chief. If the accused is defended his counsel, if he sees fit, can ask any questions that may go to show whether the witness is really telling the truth when he says that the accused's "general repute" is so and so. He may question him if he thinks fit as to when and under what circumstances he has heard the character of the accused discussed. He may in fact test the credibility of the witness as to the real existence of the alleged general reputation in any such legitimate way. The Magistrate is, of course, at liberty to ask similar questions; and where the accused is not defended, or the Magistaate is not himself satisfied with the cross-examination, he should satisfy himself by asking such questions as may seem desirable. It is impossible and we do not desire to lay down the exact course which such examination may take, but we do desire to make it clear that the mere production of a string of witnesses who say that an accused person's general repute is so and so, can carry very little weight unless some attempt has been made to show that he is a person in a position to know the general repute, and there has been some reasonable attempt by the counsel for the accused or by the Court to check the value of the evidence.

Before concluding we must draw attention to the impropriety of the District Magistrate, or the Deputy Magistrate, Mr. Anirudh Kishun Sharma, acting on his behalf, in forwarding to the Sessions Judge or to this Court the notes of the Prosecuting Inspector. Those notes may be of some value or of little value, as the case may be, for the purpose of instructing the Government Pleader who may have to support the views of the District Magistrate at a later stage, but they are not material which ought to be placed before the Court. The District Magistrate should have examined those notes for himself, and if there was any portion of them that contained material which he thought to be of value he should have embodied that material in his own order. In the present case he appears to have accepted en bloc the Prosecuting Inspector's criticizms and has simply attached them to his letter. Apart from the general impropriety of this course in this particular case it was still more gravely improper. The Prosecuting Inspector had used language about the trial Magistrate which was most unbecoming and improper. If the District Magistrate did not consider it part of his duty to reprove the Prosecuting Inspector for that language and saw nothing unfitting in a Prosecuting Inspector using such language about a Magistrate that is possibly his concern. But he was very seriously wanting in a sense of what is proper in permitting a document containing that language to be forwarded to the Sessions Court or to this

Court. We have no hesitation in recording our opinion that the Prosecuting Inspector ought not to have been guilty of the use of such language in regard to any Magistrate. The result of our examination of the record is that we see no reason to interfere and reject the reference.

D.D. *Reference rejected.*

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* * A. I. R. 1929 Allahabad 277

SULAIMAN AND KENDALL, JJ.

Ahmad Husain—Plaintiff—Appellant.

v.

Kallu Mian Sajhi firm—Defendant—Respondent.

First Appeal No. 108 of 1926, Decided on 29th January 1929, from decree of Sub-Judge, Allahabad D/- 2nd December 1925.

**** Transfer of Property Act, S. 53—S. 53 does not infringe rule of substantive Mahomedan law—Waqf executed as device to defeat creditors is therefore invalid—Transfer of Property Act, S. 2—Mahomedan law—Waqf.**

Although a waqf may be dedication in favour of God it is still a transfer governed by the Transfer of Property Act as God is a juristic person, and as under the Mahomedan law itself no person can make a waqf of his entire property without making arrangement for the payment of his debts a waqf executed as a device for defeating creditors is governed by S. 53. The provisions of S. 53 do not in any way infringe any rule of the substantive Mahomedan law. [P 278 C 1]

Mahmud Ullah—for Appellant.

P. L. Banerji, I. B. Banerji and *S. H. Mehdi*—for Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit for a declaration that the property mentioned in the plaint is waqf alalaulad (waqf in favour of the descendants) which is in possession of the plaintiff as mutawalli, and that it is not fit to be attached or sold in execution of a decree in favour of the defendant. The dates of the causes of action for the two declarations claimed were stated in the plaint to be the date of the execution of the deed of waqf and the date when the plaintiff's objection in the execution department to the attachment was disallowed. The plaintiff valued the suit at Rs. 1,489-10-3 for the purposes of jurisdiction and later on amended the valuation to Rs. 12,000. No objection was taken in the written statement as regards the over-valuation. It is possible that this was due to a mistake, as suggested in argument on behalf of the respondent, in not seeing that the copy of the plaint supplied to the defendant was also amended. That copy, however, has not been produced and it is impossible to say this definitely. The fact remains that the question of valuation was not raised or disputed at the trial. The main defence was that the dedication was fraudulent with a view to defeat the creditors of the plaintiff and was invalid under S. 53, T. P. Act. The learned Subordinate Judge has accepted the plea and dismissed the suit. The plaintiff has appealed to this Court and not to the District Judge. A preliminary objection is taken on behalf of the defendant that the appeal should have been filed in the Court of the District Judge and that this Court had no jurisdiction to hear this appeal. Reliance is placed on the cases of *Khetra Pal* v. *Mumtaz Begam* (1) and *Anandi Kunwar* v. *Ram Niranjan Das* (2). There is one circumstance which may possibly distinguish this case from the reported cases. The plaintiff here in his plaint expressly claimed two distinct declarations, one with regard to the validity of the waqf and his possession as mutawalli, and the other as regards the property not being attachable or saleable in execution of the defendant's decree. He also professed that the causes of action in his favour in respect of these two declarations arose separately on distinct dates. The valuation in the plaint was not contested at the trial.

As, however, the plaintiff has himself chosen his forum for the purposes of this appeal and we are of opinion that his appeal should fail on the merits it is not necessary for us to go into the question in any greater detail.

The facts found against the plaintiff cannot be seriously challenged. In at least two previous litigations the present plaintiff had been found to be a partner of the firm Din Muhammad Chotu and liable for the debts of the firm, and decrees had been passed against him as a judgment-debtor. Ex. A also contains an admission of the plaintiff that he was liable for the debts of the firm styled

(1) [1916] 38 All. 72=31 I. C. 879=13 A. L. J. 1104.

(2) [1918] 40 All. 505=45 I. C. 494=16 A. L. J. 374.

Rashid Mian Pheku Mian of which he admits to be a partner. The Court below has found that the total liability of these two firms is about Rs. 6,000. It is in evidence that part of the property of the plaintiff was attached in execution of the decrees on 18th July 1923, and while those decretal amounts remained unpaid the plaintiff made the waqf on 1st October 1923 dedicating the property for the benefit of himself and his descendants and constituted himself as mutwalli for his lifetime. The object of the waqf mentioned in the document was that the plaintiff was anxious to leave this country and go to Arabia for the purpose of a haj. It is an admitted fact that he has not gone on pilgrimage so far. Another significant fact against the plaintiff is that although the waqf was made in October 1923 mutation of names was not effected till 1925. We may also mention that before the suit the plaintiff made two attempts to get himself declared an insolvent but ultimately abandoned his application. Having regard to these facts and the circumstances, the Court below was quite right in holding that the deed of waqf dated 1st October 1923 was not a bona fide transaction and was executed as a device for defeating the claims of the creditors. It is accordingly invalid as against the defendant.

The learned advocate for the appellant has argued before us that S. 53 has no application and that such a dedication under the Mahomedan law is protected by S. 2, T. P. Act. We are unable to accept this contention. Assuming that the dedication is in favour of God it would still be a transfer governed by the Transfer of Property Act as God is a juristic person. Under the Mahomedan law itself no person can make a waqf of his entire property without making arrangement for the payment of his debts. The provisions of S. 53 do not in any way infringe any rule of the substantive Mohamedan law.

The last contention is that instead of setting aside this transfer a receiver may be appointed with direction to pay off these debts out of the income of the property. Such a request cannot be accepted. In many cases the income of the property dedicated may not be sufficient to pay even the interest on the outstanding debts. It is impossible therefore to uphold the waqf and direct that the debts should be discharged from the income.

The appeal in our opinion has no force. It is dismissed with costs.

P.D./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 278

DALAL, J.

Surjan Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 821 of 1928, Decided on 30th January 1929, against order of Sess. Judge, Jhansi, D/- 23rd July 1928.

U. P. Municipal Account Code, S. 132 (14) and (16) — Machine of motor car and its component parts, such as cylinder head, will be exempted from octroi duty.

The machine of a motor car and the component parts of such a machine (e. g., a cylinder-head) being included in 'machinery' will be exempted from the payment of octroi under sub-S. 14, and the specific mention of motor car in sub-S. 16 will not prevent such exemption being claimed under sub-S. 14, because persons subject to taxation are entitled to exemption under any head under which such exemption may be claimed.

[P 279 C 1]

Iqbal Ahmad and *Man Mohan Banerji*—for Applicant.

M. Waliullah—for the Crown.

Judgment.—I do not agree with the opinion of the learned Sessions Judge. The applicant has been convicted of bringing out of the limits of the Jhansi Municipal Board certain parts of a motor car, without paying octroi duty. The learned Judge held that these parts were chargeable with duty, because under sub-S. 16, S. 132, Municipal Account Code, motor cars complete are exempted from payment of octroi but not parts and accessories of motor cars. This means that the Municipality is prepared to admit a camel but will strain at a gnat. On behalf of the accused it is argued that he can obtain exemption under sub-S. 14, which exempts from octroi duty machinery and its component parts. Machinery is defined as a machine or a set of machines to be worked by electric, steam, water, fire or other power not being manual or animal labour. The machine of a motor car will certainly be included under this head together with its component parts. The argument of the learned Judge, however, was and it

has been put before this Court in greater detail by the learned Assistant Government Advocate that as motor car has been specifically mentioned, we must not look at the other heading of machinery. This method of looking only at one portion of the Municipal Code and closing one's eyes at any other portion is a fanciful method of interpreting rules. A water tight compartment rule cannot be a correct one for interpretation. Persons subject to taxation are entitled to exemption under any head under which such exemption may be claimed. It is true that as the parts of motor cars are not exempted from duty, the curious result will follow that parts of the body of a motor car will be liable to duty but parts of the machine of a motor car being exempted under sub-S. 14, will not be. I hold that such parts are not liable to duty.

All the revision applications shall be considered in accordance with this rule. In this revision No. 821 a cylinder head was imported. This is clearly part of a machine and exempted under sub-S. 14. I set aside the conviction and sentence and order the fine if any recovered to be refunded.

S.N./R.K. *Conviction set aside.*

** A. I. R. 1929 Allahabad 279

DALAL, J.

Mt. Fahiman and *others*—Applicants.

v.

Awadh Behari Lal and *another*—Opposite Parties.

Civil Revn. No. 320 of 1928, Decided on 29th January 1929, against order of Munsif, Cawnpore, D/- 18th September 1928.

**** Civil P. C., O. 34, R. 3—Defendant absent at the passing of final decree—Decree is ex parte and O. 9, R. 13 applies and defendant has right in asking it to be set aside and to show sufficient cause for his non-appearance—Civil P. C., O. 9, R. 13.**

Although no notice to the defendant has been prescribed under R. 3, O. 34, and thus no notice is necessary, the proceedings between the preliminary and the final decree in a suit for foreclosure, that is, between the decree prescribed by R. 2 and the decree prescribed by R. 3, are proceedings in suit and for that reason the provisions of O. 9 will attach to those proceedings. A decree passed in the absence of the defendant must be considered an ex-parte decree and the provisions of R. 13, O. 9, apply to have it set aside : *A. I. R.* 1926 *All.* 757 ; 39 *All.* 532 ; *A. I. R.* 1922 *All.* 383; 32 *Cal.* 253, *Appl.* [P 280 C 1, 2]

The Court has therefore jurisdiction to set it aside under R. 13 and the defendant has a right to show that he was prevented by a sufficient cause from appearing at the passing of the final decree. [P 280 C 2]

Shiva Prasad Sinha—for Applicants.

Misri Lal Chaturvedi—for Opposite Parties.

Judgment.—This Court had the advantage of having all the law on the subject placed before him with great care by Mr. Sinha and by Mr. Pande. The applicants are decree-holders and they complained that the final foreclosure decree passed under O. 34, R. 3, Civil P. C., for foreclosure in favour of the plaintiff has been set aside by the trial Court without jurisdiction. This was their main ground of attack. Mr. Sinha, however, developed his argument and submitted that even if the trial Court had jurisdiction it was not properly exercised. The suit on the mortgage resulted in a preliminary decree for foreclosure in pursuance of a compromise between the parties according to which the plaintiff was held entitled to recover a certain amount of money from the defendant. The conditions were that the amount should be paid within nine months ; that on such payment the property would be held to have been redeemed, and on non-payment the property was to be foreclosed. There could not be any foreclosure without a final decree of the Court under R. 3. As required by law the plaintiff applied under Cl. (2) of that rule. That rule is to the effect that where such payment is not so made the Court shall on application made in that behalf by the plaintiff pass a decree that the defendant and all persons claiming through or under him be debarred from all rights to redeem the mortgaged property, and also, if necessary, ordering the defendant to put the plaintiff in possession of the property. There is, however, a proviso modifying the mandatory nature of the injunction to the effect that the Court may upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the date fixed for such payment. I have quoted the rule fully in order to show that the defendant had an interest in making the payment when the plaintiff applied for the passing

of the final decree, even though he was not prepared at that very time to pay the money decreed in the preliminary decree at once.

On application by the plaintiff the Court ordered a notice to issue to the defendant. It was not served on the defendant personally. On the date fixed for hearing the defendant did not appear, and a final decree for foreclosure was passed. In terms of that decree the property was foreclosed, and the plaintiff became owner of the property. Subsequently within the period of limitation the defendant applied to have this ex-parte decree set aside. An order setting aside the ex parte decree was passed by the Munsif of Cawnpore. This is an application in revision from that order.

The first argument on behalf of the plaintiff was that the final decree could not be termed ex parte because no notice to the defendant has been prescribed under R. 3, O. 34, Civil P. C. It has been held by a Bench of two Judges in this Court that no notice is necessary *Mahadeo Pandey* v. *Som Nath Pandey* (1). So it is not necessary to pursue this matter further. It was not held, however, in that case that by reason of no notice being necessary a decree passed in the absence of the defendant would not be termed an ex parte decree. The proceedings between the preliminary and the final decree in a suit for foreclosure, that is, between the decree prescribed by R. 2 and the decree prescribed by R. 3, are held by this Court to be proceeding in suit : *Ramji Lal* v. *Karan Singh* (2) and *Sital Singh* v. *Baijnath Prasad* (3). For that reason my opinion is that the provisions of O. 9 will attach to those proceedings. Under R. 6 when the plaintiff alone appears, and the defendant does not appear the Court passes an ex-parte decree. Such a decree can be set aside by the Court under R 13, O. 9. A Full Bench of the Calcutta High Court held in *Bibi Tasliman* v. *Harihar Mahto* (4), that a Court had inherent jurisdiction to set aside an order passed in ex-parte proceedings. This was a case where the provisions of the Transfer of Property Act applied to proceedings in mortgage suits, and an application was made to set aside an order absolute for sale. It was conceded in that case also that an order absolute for sale may be passed without any notice to the judgment-debtor. Proceedings subsequent to the preliminary decree for sale were treated prior to 1908 as proceedings in execution. No provision was made applicable to such proceedings for a rehearing. Even so, the inherent power of a Court to set aside ex-parte proceedings was recognized. In my opinion, after Act 5 of 1908 the case is much stronger because the proccedings subsequent to a preliminary decree are proceedings in suit and a decree passed in the absence of the defendant must be considered an ex-parte decree, and there does not appear to be anything in the Code to prevent the provisions of R. 13, O. 9 attaching to such a decree. The same view was taken by the Bombay High Court in a case tried by the Presidency Court of Small Causes where the proceedings under Chap. 7 of the Presidency Small Cause Courts Act (No. 15 of 1882) were admittedly not proceedings in a suit. The learned Judges who heard the reference were of opinion that the Court of Small Causes had an inherent power to set aside an ex-parte order. In the Allahabad case already cited of *Mahadeo Pande* v. *Som Nath* (1), the two learned Judges who delivered judgment found nothing in the case of Bibi Tasliman inconsistent with the view they had taken that a sentence was not necessary to be issued to the defendant under R. 3.

It cannot be denied however, that the defendant was entitled to be present at the time of the passing of the decree. The trial Court has rightly drawn attention to the form of the final decree for foreclosure where mention is specifically made of the Court having heard the pleader for the defendant (Civil Procedure Code Appendix D, form No. 10). When the defendant was at liberty to be present I am of opinion that a decree passed in his absence was an ex-parte decree. When the decree was an ex-parte decree, the Court had jurisdiction to set it aside.

The next argument of Mr. Sinha was that the Court exercised its jurisdiction illegally and with material irregularity in setting aside the decree. Under R. 13 the Court has power to set aside a decree if the Court is satisfied that the defendant was not duly served with summons,

(1) A. I. R. 1926 All. 757=48 All. 828.
(2) [1917] 39 All. 532=40 I.C. 424=15 A.L.J. 448.
(3) A. I. R. 1922 All. 383=44 All. 668.
(4) [1905] 32 Cal. 253=9 C. W. N. 81 (F.B.).

or was prevented by any sufficient cause from appearing when the suit was called on for hearing. The argument was that when no notice was necessary there can be no question of his being prevented from appearing when the suit was called on for hearing. What I think important to notice is that though no notice was necessary he had a right to appear and to be heard, and, therefore, he was entitled to show that he was prevented by a sufficient cause from appearing when the suit was called on for hearing. There are two distinct divisions of the rule. One, dealing with summons and the other independent of summons, referring to a sufficient cause preventing appearance. In my opinion the trial Court was right in holding that the defendant had sufficient cause to prevent him from appearing when the suit was called. He had engaged a pleader and in ordinary course would have thought that he would be informed of the date of hearing. There was no particular date of hearing fixed under the preliminary decree. It was open to the plaintiff to apply for the passing of a final decree at any time after nine months from the date of the preliminary decree. Under the circumstances the defendant was prevented from appearing on the date of the hearing of the final decree by want of knowledge of the plaintiff's proceedings. The trial Court had jurisdiction to set aside the ex-parte decree and has not exercised it irregularly. I dismiss this application with costs.

D.D. *Application dismissed.*

** A. I. R. 1929 Allahabad 281

SULAIMAN AND KENDALL, JJ.

Altaf Begam—Plaintiff—Appellant.

v.

Brij Narain— Defendant — Respondent.

First Appeal No. 339 of 1925, Decided on 24th January 1929, from decree of Sub-Judge, Pilibhit, D/- 23rd May 1925.

(a) Contract Act, S. 74—Deed—Construction—Penal clause.

Penal clause in a sale-deed when expressed in ambiguous terms will not be given effect to when the claimant thereunder does not depose as to the true meaning which he understood by it. [P 284 C 1]

(b) Deed — Construction — Forfeiture clause in a deed illegal—Executant pardanashin lady made to sell her property on the strength of the clause—Clause must be enforced— Evidence Act, S. 115 —Pardanashin lady.

Where the executant is a purdanashin and uneducated lady and she is made to agree to sell her property on the understanding that a forfeiture clause will be operative in her favour and it is not explained to her that such a forfeiture was illegal and unenforceable, then if the defendant wishes to stick to the transaction he cannot be allowed to repudiate the forfeiture clause on the strength of which the executant's consent had been obtained. [P 284 C 2]

**** (c) Transfer of Property Act, S. 6 (d) —Right to future maintenance restricted to owner personally cannot be transferred—Intention of parties is the test and not whether a charge is created for the same.**

The question whether the right to recover future maintenance allowance is alienable or not depends not on whether a charge has been created for the same, but on the true intention of the parties. If the intention was that the right should be restricted in its enjoyment to the owner personally, it cannot be transferred under S. 6 (d). Nor can a mere right to sue for the remainder of allowance that may fall due in future be transferred under Cl. (e): *A. I. R.* 1924 *Mad.* 22 (*F. B.*) and 12 *C. L. J.* 146, *Foll.* [P 285 C 2]

(d) Transfer of Property Act, S. 58—Mortgage is transfer of interest in immovable property while a charge is not though it is a security—Transfer of Property Act, S. 100.

There is a clear distinction between a mortgage and a charge, the former being a transfer of an interest in immovable property as a security for the loan whereas the latter is not a transfer, though it is none the less a security for the payment of an amount. [P 285 C 2]

(e) Transfer of Property Act, S. 6 (d)—Kharch-i-pandan is personal allowance—Mahomedan Law—Marriage.

"Kharch-i-pandan" which literally means betel-box expenses is a personal allowance to the wife customary among Mahomedan famiiies of rank, especially in Upper India, fixed either bofore or after the marriage and varying according to the means and position of the parties. Although there is some analogy between this allowauce and the pin money in the English system, it appears to stand on a different legal footing arising from difference in social institutious. Although both kharch i-pandan and pin-money are amounts for the personal expenses of the wife there is a difference inasmuch as no obligation to spend the money during coverture attaches to the kharch-i-pandan: 32 *All.* 410 (*P. C.*) *Rel. on.* [P 286 C 1]

A. M. Khwaja and *Mushtaq Ahmad*—for Appellant.

Uma Shankar Bajpai—for Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit for cancellation of a sale-deed dated 2nd September 1921

executed by the plaintiff in favour of the defendant, and in the alternative for a recovery of the amount of the sale consideration. Under a hypothecation bond dated 21st September 1913 the plaintiff's husband had undertaken to pay her a monthly allowance of Rs. 75 and had hypothecated his village Nagphan Risuya valuing the deed at Rs. 10,800. There were certain misunderstandings between the husband and the wife, and it is an admitted fact that she could not for a long time recover her monthly allowance. Eventually she sued her husband for recovery of the arrears and in execution of her decree put the village for sale at auction. It was purchased by Hakim Zakir Husain Khan for a small amount, as the sale was apparently subject to the continuing charge. Thereafter she brought a second suit against her husband and the purchaser and obtained a decree on 28th February 1920 for about Rs. 5,554. This decree also remained unrealized. On 2nd September 1921 she executed the sale-deed in dispute in favour of the contesting defendant Brij Narain.

The sale-deed as it stands purported to transfer the decretal amount aforementioned, the amount of her maintenance allowance which had fallen due since the decree and the future amounts which would fall due during the rest of her life with all rights to realize the same. The sale was for Rs. 7,500 which were to be paid in certain fixed instalments. There was a special covenant for forfeiture which we will discuss later on. The plaintiff's case was that she being a pardanashin and uneducated lady did not understand the terms of the deed thoroughly, which were not explained to her ; that the defendant and her pairokar colluded with each other and falsely represented to her that only the arrears which had fallen due up to date were being transferred, and that she was never told that her future maintenance allowance for life would also be sold under the deed. She further asserted that there was an express understanding that if the defendant should make any default in the payment of any instalment, he would not be entitled to get back the amount received and the sale-deed would be cancelled, and that accordingly as there were defaults made the sale-deed has becomo void and that it is invalid in law. These allegations were refuted in the written statement in which it was pleaded that the plaintiff executed the document after fully understanding its terms, that the penal clause was unenforceable and that it was never agreed that the sale itself would be cancelled.

The Court below has decided most of the issues against the plaintiff, but upheld her right to claim a forfeiture of Rs. I,500 and has given her decree for the unpaid balance with interest. The plaintiff has appealed and the defendant has filed cross-objections.

The first question to be considered is whether the plaintiff did not understand that her future maintenance allowance was also going to be sold. Connected with this is the further question whether any misrepresentation was made to the plaintiff. The learned Subordinate Judge has disposed of both these points together and has considered that the burden of proving both these matters lay on the plaintiff. He began his findings on issues 1 and 2 with the remark "to prove these issues the plaintiff, basides giving her own statement has examined such and such witnesses."

He has then remarked

"to my mind the plaintiff has miserably failed to establish either of the two assertions"

and has again said that her explanation that her relations and servants failed to explain to her the real nature of the sale was absolutely unbelievable. The learned Subordinate Judge has apparently lost sight of the fact that although the burden of proving any active misrepresentation was on the plaintiff, the onus of satisfying the Court that the deed had been fully explained to and understood by the lady was on the defendant, because the plaintiff is undoubtedly a pardanashin and uneducated lady. In spite of this error in the judgment, we are of opinion that the finding of the Court below that the contents of sale-deed so far as it relates to the transfer of her future maintenance allowance is concerned were fully understood by her. That the document was read over to her is proved by the evidence of the scribe Budh Sen as well as that of the Sub-Registrar Babu Sham Narain. At the time of the registration her husband was present though he declined to identify her. She certainly had

some pairokars by her side, and under these circumstances it is inconceivable that the document should have been written, executed and attested, and then registered, without its having been read over to the lady. We believe that the document was read over to her. The reference to the sale of her future rights in the sale-deed does not appear at only one place. It is repeated at no less than three places, and it is made fully clear that the amounts which would become due to her during the rest of her life with all the rights to realise the same were being sold to the vendee. The language of the document where these passages occur is simple and clear, and when they were read to her there is no reason to suppose that she failed to understand their meaning. The Sub-Registrar has expressly stated that he must have explained to the lady the things which were being sold, namely the decree, the arrears which had become due, and the kharch-i-pandan which would be due in future. Although the lady denies this, we are not prepared to take a different view from that which has been taken by the Court below. We must, therefore, find it proved that the lady understood that her future rights were being transferred, and that there was no misunderstanding on her part as regards this point.

In this connexion we may dispose of an argument which has been pressed before us very strongly, namely that the decretal amount was over Rs. 5,500 the amount which had since fallen due exceeded Rs. 2,000 and the capitalised value of the future allowance was considerable, and all these items could not have been intended to be sold for Rs. 7,500 only. No doubt prima facie the cash consideration appears to be inadequate, but the plaintiff was hard pressed for money, and ever since the agreement in her favour she had not been able to realize a single pice, and had been driven to sue for arrears twice. Furthermore, the recovery of future allowance might involve further litigation. Having regard to these considerations we are unable to hold that the apparent inadequency of consideration is sufficient to show that she did not intend to transfer her future allowance.

The second point for consideration is whether it was covenanted that on failure of the payment of the instalments fixed in the deed of the sale the deed would stand cancelled. The particular expression which has been the subject of considerable argument before us is *mutalaba mobayya ba dastur kaem rahange.* The learned Subordinate Judge has himself conceded that no doubt the penal clause " has been very unhappily and inappropriately worded " and has remarked that the words no doubt literally mean that the " dues sold would remain intact." The learned advocate for the plaintiff urges that the meaning of this is that the sale deed would remain cancelled. There are two further circumstances in favour of the plaintiff. The only persons who read over and explained the document to the lady were the scribe Budh Sen and the Sub-Registrar Babu Sham Narain. Admittedly no one else read it over to her. Budh Sen when asked in cross-examination to explain the meaning of the disputed phrase said that by that phrase it was meant " the dues sold will remain as before " that is " will not be considered as sold." Similarly the Sub-Registrar has said that the words " mutalaba mobayya " mean the various demands which were sold namely the decretal amount, the amounts which have become payable and the amounts which was to become payable in future. He considered that he put this interpretation on those words at the time of registration which he was putting then. He reiterated his opinion and stated that " mutalaba mobayya " included to his mind both, that is, the things sold and the consideration for whieh they were sold. If the language of the document had been clearer or if the plaintiff had sworn that she understcod that the whole deed was to stand cancelled, we would have felt great difficulty in not cancelling this deed.

But no express words stating that the sale was to be cancelled are to be found in the document. Either through an omission on the part of her pleader or through her own wilful silence the plaintiff has omitted to state in her deposition that she was made to understand that the sale would stand cancelled if the instalments were not paid. The statements of the scribe and the Sub-Registrar are obviously based partly on their recollection and partly on what they now under-

Advocate High Court

stand as the meaning of the ambiguous expression. As it is the plaintiff who wishes to enforce this forfeiture clause against the defendant, we cannot interpret an ambiguous expression in the way in which she asks us to interpret it, when the language is not absolutely clear and when she herself has failed to depose as to the true meaning which she understood by it. We also find that subsequsntly to the defaults in payment she went on receiving small sums of money up to June 1923 without asserting any right to cancel the sale. Even if she had any such right she must be deemed to have waived it. We accordingly uphold the view of the Court below, though on different grounds, that there was no covenant directing that the sale itself would stand eancelled if a default were made.

The third question is as regards the amount of which the plaintiff can claim forfeiture. This part of the clause also is ambiguously worded. According to the plaintiff the whole amount which would have been paid up to date would be forfeited if any default was made. According to the defendant only Rs. 1,500 which had been paid before the execution were to be forfeited. The difference of interpretation turns on one word *hai*. If this word had been "*ho*" the plaintiff's interpretation would undoubtedly be the right one. If strict regard were not paid to rules of grammer and idiom, "*hogai-hai*" may be loosely used for "*hogaiho.*" The official translator has interpreted this clause in the way the plaintiff wanted it to be interpreted. He has translated it as follows:

"If the vendee shall fail to pay any one of the instalments detailed below at the time fixed, he shall not be intitled to get back any money out of the sale consideration which I the executant shall have received before that time."

We also think that if the intention of the parties had been that only the sum of Rs. 1,500 which had been paid at the time of the execution would be forfeited, they would have expressly mentioned this known sum and would not have used an indefinite and vague expression like the one worded above. Such an indefinite expression was more likely to be used when the exact amount which was to be forfeited was not known at the time. On this point the evidence of the scribe, a witness for the defendant, is that the penal clause was that in case of default of payment of instalment the vendee "could not claim the refund of the paid up consideration from the vendors." The lady has sworn that it was also said before registration that if Babu Brij Narain should not pay the amounts settled in the time fixed whatever was already paid would be forfeited. But taking the word strictly liberally, the tense used is present perfect tense, which would support the defendant's contention. In such a state of things it is impossible to hold that this ambiguous clause was fully understood by her in the way in which the defendant wants it to be interpreted. We should, therefore, be unable to enforce the deed without accepting the plaintiff's interpretation of it.

The argument on behelf of the defendant, that such a forfeiture clause cannot be accepted. The executant was a purdanashin and uneducated lady. If she is made to agree to sell her property on the understanding that a forfeiture clause will be operative in her favour and it is not explained to her that such a forfeiture was illegal and unenforceable, then if the defendant wishes to stick to the transaction he cannot be allowed to repudiate the forfeiture clause on the strength of which her consent had been obtained. Nor do we think that having regard to the small consideration for which rights of considerable value were being transferred the necessity which the plaintiff felt for timely and regular payment being urged, the terms of such a forfeiture clause were so improper and unreasonable as to demand relief in equity. The last question to consider is whether a transfer of her future right to recover the maintenanee allowance was legally transferable. That there nas been a considerable divergence of opinion on similar questions admits of no doubt. The counsel for the parties have placed before us a number of rulings, all of which are not reconcilable with each other.

So far as this Court is concerned it is now settled that a right to future maintenance cannot be attached and sold in execution of a decree: *Gulab Kunwar* v. *Bansidhar* (1); *Haridas Acharya* v. *Baroda Kishori* (2) and *Sher Singh* v.

(1) [1893] 15 All. 371=(1893) A. W. N. 149.
(2) [1905] 27 Cal. 38=4 C. W. N. 87.

Sri Ram (3). Although these cases may suggest the general policy of this legislature, they are not directly in point because they turn on the meaning of the expression "right to future maintenance" in S. 265, old Civil P. C.

The question before us in whether a private alienation of such a right is valid in law. This will depend mainly on the interpretation of S. 6 (d), T. P Act. No case of our High Court which is directly in point has been cited before us. Opinions in the other High Courts are somewhat conflicting. In *Annapurni* v. *Swaminatha* (4), a Bench of the Madras High Court thought that a right to recover maintenance was not property within the meaning of S. 6 and expressed the view that although attachment and sale were prohibited, there was no prohibition against private alienation. This case was, however, subsequently overruled by a Full Bench of the same Court in *Subraya* v. *Krishna* (5). The Bench which referred the case to a higher Bench thought that *Annapurni's* case (4), was at variance with S. 6 Schwabe, C. J., came to the conclusion that the right to be maintained conferred on a widow under a written document was a purely personal right and therefore clearly alienable. Oldfield, J., differed from the view expressed in *Annapurni's* case (4), and also held that the rights conferred by the deed were clearly personal. Coutts-Trotter, J., concurred. This case is also authority for the view that in order to ascertain whether the right was personal or whether the interest was intended to be restricted in its enjoyment to the owner personally one should ascertain the intention of the parties and such intention is to be gathered from the deed and the attending circumstances.

Opinion in Calcutta also has not been unanimous; but a most exhaustive judgment of Mookerjee, J., reviewing all the leading previous authorities is to be found in *Tara Sundari Debi* v. *Saroda Charan* (6) We propose to quote a passage from the judgment as we agree with the view expressed therein. At p. 153 the learned Judge remarked:

"A distinction appears to have been sought, to be drawn between cases in which the maintenance was made a charge upon a definite property or was made payable out of a specific fund and cases in which the grantee of the right of maintenance was not so protected. This distinction, however, in our opinion, does not furnish a true solution of the question, whether the right is assignable or not, because, if the allowance is regularly paid by the person liable, no question of enforcement of a charge upon any interest in immovable property arises; unless a default has been made, and arrears are due, there is no charge to enforce. The answer to the question, therefore, whether the right to receive the maintenance is, assignable or not, ought not to be made dependent upon the circumstance whether. in the event of failure of the grantor or his representative to make regular payments, the grantee is entitled to enforce a charge upon immovable property.".

At p. 157 the learned Judge examined the circumstances attending the grant of the maintenance allowance in order to ascertain the true intent of the parties, and came to the conclusion that the right from every point of view was essentially a personal one and that there was no room for reasonable doubt that such right was not assignable.

We agree with the view expressed in the Full Bench of the Madras High Court and by Mookerjee, J., that the question whether the right to recover future maintenance allowance is alienable or not depends not on whether a charge has been created for the same, but on the true intention of the parties. If the intention was that the right should be restricted in its enjoyment to the owner personally, it cannot be transferred under S. 6 (d). Nor can a mere right to sue for the remainder of allowance that may fall due in future be transferred under Cl. (e).

There being no advance by way of loan, the agreement in question does not amount to a mortgage deed. It is an agreement to pay the monthly allowance with a charge on a specific immovable property. Now there is a clear distinction between a mortgage and a charge, the former being a transfer of an interest in immovable property as a security for the loan, whereas the latter is not a transfer, though it is nonetheless a security for the payment of an amount. The right to recover such allowance is not itself, immovable property, and indeed no question of enforcing the charge arises so long as the amount has not fallen into arrears.

(3) [1903] 30 All. 246=5 A. L. J. 251=(1908) A. W. N. 101.
(4) [1911] 34 Mad. 7=20 M. L. J. 785=6 I.C. 439=(1910) M. W. N. 505.
(5) A. I. R. 1924 Mad. 22=46 Mad. 659 (F.B.).
(6) [1910] 12 C. L. J. 146=7 I. C. 80.

In this view of the matter, we must now proceed to examine the true nature of the maintenance allowance. The agreement of 21st September 1913 was executed in anticipation of the marriage of the plaintiff and the sum of Rs. 75 per mensem was fixed in an allowance for her kharch-i-pandan which has been translated inaccurately as pin money. The prospective husband agreed in writing to pay the allowance to the lady for her life and if he failed to pay it the lady was entitled to realize the same. The agreement was held good during the lifetime of the lady and the payment was secured by means of a charge on immovable property. The deed nowhere mentions that the amount could be claimed by the lady's representatives. Of course as the allowance was to subsist during her lifetime only, her heirs could not get it, but there is not even a mention that her transferee can recover it. Nowhere it is mentioned that the right would be alienable. From the very nature of the allowance, which was intended to enable her to meet her daily expenses, it was a personal allowance. All doubt on this point is in our opinion set at rest by the observation of their Lordships of the Privy Council in the leading case of *Khwaja Muhammad Khan* v. *Husaini Begum* (7). There too there was an agreement to pay an allowance as kharch-i-pandan charged upon immovable property. At p. 414 their Lordships remarked:

"kharch-i-pandan which literally means betel-box expenses is a personal allowance as their Lordships understand, to the wife customary among Mahomedan families of rank, especially in Upper India fixed either before or after the marriage and varying according to the means and position of tue parties . . . . . Although there is some anology between this allowance and the pin money in the English system it appears to stand on a different legal footing arising from difference in social institutions.

Although both kharch-i-pandan and pin money were regarded by their Lordships as being amounts for the personal expenses of the wife, there was a difference inasmuch as no obligation to spend the money during coverture attached to the karch-i-pandan. In case of *Harris* v. *Brown* (8), which is relied upon by the respondent's counsel the question whether the maintenance allowance was a personal one restricted in its enjoyment or not was never raised before their Lordships nor discussed.

In the present case, it is conceivable that there should have been an intention that the right would be transferable to strangers. At any rate, in the absence of any clear provision in the deed that it is alienable, we are not prepared to hold that it is so. The mere fact that the payment is secured by a charge on immovable property is by itself, as observed by Mookerjee, J., by no means conclusive. We would therefore hold that the right to recover future allowance as they fall due has not been validly transferred.

As it is obvious that the cash consideration offered by the vendee was for the whole contract of transferring her right to maintenance, past and future, and one part of such contract is not enforcible in law, the whole contract on which the transfer is based must fall to the ground. The plaintiff herself claimed the relief to have the transaction set aside. It would also be unfair to the defendant that he should be compelled to pay the whole consideration and yet not get any right to recover the future maintenance allowances. In these circumstances we think it just and equitable that the sale-deed dated 2nd September 1921 should be cancelled and declared to be null and void and the plaintiff given a decree for recovery of the property so transferred on condition of the plaintiff depositing in the Court below within six months from this date the whole of the amounts received by her together with interest at 6 per cent per annum, simple, as set fonth in para. 11 of the plaint, after deducting any amount thas the defendant shall have received by execution of the decree for past arrears or by a separate suit. As on the disputed points both parties have failed partially we direct that they should bear their own costs in both Courts. The amounts realized by the defendant will be credited to the plaintiff on the dates of such realization and interest to that extent would cease to run from such dates. If the amount is not deposited within the time allowed, the suit will stand dismissed in both Courts.

D.D. *Appeal allowed.*

(7) [1910] 32 All. 410=7 I. C. 237=37 I. A. 152 (P.C.).

(8) [1901] 28 Cal. 621=28 I. A. 159=8 Sar. 92 (P.C.).

** A. I. R. 1929 Allahabad 287

MUKERJI, AND NIAMATULLAH, JJ.

Khair-un-nissa Bibi—Plaintiff — Appellant.

v.

Oudh Commercial Bank, Ltd. and *others*—Defendants—Respondents.

First Appeal No. 313 of 1925, Decided on 29th January 1929, against decree of Addl. Sub-Judge, Azamgarh, D/- 18th April 1925.

** **Civil P. C., S. 97—Appeal from preliminary decree pending — Final deeree passed is valid—Civil P. C., S. 11 and O. 34, R. 5.**

A final decree passed in a mortgage suit during the pendency of an appeal from the preliminary decree is not a nullity and is binding on persons who are parties to the final decree and their representatives. Principle of res judicata would also apply to such case : *A. I. R.* 1926 *All.* 291, *Expl.* and *not Foll.* ; 39 *All.* 641 and *A. I. R.* 1927 *P. C.* 25 and *A. I. R.* 1926 *P. C.* 93, *Dist.* [P 289 C 2]

Iqbal Ahmad and *Mukhtar Ahmad*—for Appellant.

K. N. Katju and *Shabd Saran* — for Respondents.

Mukerji, J.—The plaintiff is the appellant in this Court. She instituted the suit out of which this appeal has arisen under the following circumstances : The Oudh Commercial Bank Ltd., Fyzabad, who is the respondent in this appeal, obtained a decree for sale on foot of a mortgage executed by two persons, viz. Saliha Bibi and her husband Riasat Husain. Saliha Bibi was a first paternal cousin of the plaintiff and according to the Shia law to which Saliha Bibi was subject, on her death, the plaintiff became the sole heir of her property. The decree was passed against Saliha Bibi and her husband and was followed by a final decree for sale on 16th December 1915. When the final decree was passed, an appeal against the preliminary decree was pending in the Court of the Judicial Commissioner, Lucknow. That Court dismissed the appeal against the preliminary decree on 26th July 1916. Riasat Husain died in June 1916 and Saliha Bibi died in December 1918. There was a dispute as to who should succeed to the estate of Saliha Bibi. It appears that nobody knew, at the time, not even the plaintiff herself, that the plaintiff Khair-un-nissa was the heir to Saliha Bibi. Khair-un-nissa was married to Riasat Husain as was her cousin, Saliha Bibi. Khair-un-nissa has a son in Marahmat Husain, who is defendant 2 in this suit, by Riasat Husain, her husband. Fearing that collateral relations would take the property of Saliha Bibi, Khair-un-nissa, falsely, set up her own son as the son of Saliha Bibi. There was a litigation, and ultimately it was established that Khair-un-nissa was the sole heir of Saliha Bibi. The respondents, the decree-holders impleaded, for the purpose of the execution of their decree a whole host of persons viz., defendants 2 to 10 of the present suit. Marahmut Husain, being a minor, was impleaded under the guardianship of his mother Khair-un-nissa. The plaintiff brought the suit out of which this appeal has arisen to obtain a declaration that she was not made a party to the execution proceedings and her contention was that she, the only legal heir, not being before the Court, the decree had become barred by time. She sought a declaration that the decree had become timebarred and the property mortgaged was not capable of being sold in execution of that decree. Evidently, this last prayer was meant to follow as a corollary to the main proposition that the decree was time barred.

A number of other and subsidiary questions of fact and law were raised in the suit, but they have all been decided by the learned Subordinate Judge and they have not been re-agitated before us. The learned Subordinate Judge on one of the points raised, held that the suit was not barred by S. 47, Civil P. C. It was conceded before us that the suit, as brought, would be barred by S. 47 and we are of the same opinion. She must raise the question of limitation in the execution proceedings, and not by a separate suit. The learned counsel for the appellant, however, sought to raise a new point and it being a point of law he was allowed to raise it. His argument was that the final decree which is sought to be executed, dated 16th December 1915 was a nullity and was not binding on the plaintiff. If this was so, the present suit was maintainable and the plaintiff could obtain a declaration to that effect. We have therefore to consider how far this contention is correct.

The argument is based on this. As I have already pointed out, when the final decree was made in the mortgage suit on

16th December 1915, an appeal against the preliminary decree was pending before the Court of the Judicial Commissioner of Oudh. The appeal was dismissed on 26th July 1916. It is contended that there could be only one final decree in the case and that decree could be passed only after the appeal from the preliminary decree had been disposed of. It was further urged that as the appeal was not decided till 1916, the final decree passed in 1915 was a nullity. A case decided by two learned Judges of this Court, viz., *Lalman* v. *Shiam Singh* (1) has been cited in support of this proposition. This case goes to the full length of supporting the appellant's case. If the learned Judges had decided the question of res judicata, feebly urged before them, after consideration, we would have thought it necessary to refer the present question before a larger Bench. But I take it that the question of res judicata was not pressed before the learned Judges and the learned Judges did not direct their mind to a full consideration of the same.

The question of res judicata arises in this way, granting for the sake of argument, that the final decree in a mortgage suit could not be passed till the appeal from the preliminary decree had been decided, we find it to be a dead fact that a final decree was passed as between the parties. The Court that did pass the final decree was seized of the case and had the jurisdiction, therefore, to pass it. It may be, if the contention of the plaintiff be right, that the Court acted wrongly in making the final decree and in disregarding the fact that an appeal from the preliminary decree was pending. The decree being there, rightly or wrongly, passed, it binds the parties to it. The plaintiff's predecessor-in-title being bound by the decree, it is not open to the plaintiff to say that the decree is a nullity. This aspect of the case was presented before the learned Judges in *Lalman* v. *Shiam Singh* (1) but it was presented very feebly. The learned Judges brushed aside the argument by pointing out that the decree-holder sought execution not only of the final decree but also sought to realize the costs which had been granted by the appellate Court in dismissing the appeal against the preliminary decree. If this was so, it would have been enough to dismiss that portion of the application for execution as sought to execute, by sale of the property, the decree for costs passed by the appellate Court. If the decree-holder wanted a few rupees more than was warranted by the final decree, that would be no ground for saying that the final decree was a nullity.

I will now consider the argument of the plaintiff's counsel as apart from authority furnished by the case already discussed. The learned counsel relied on the case of *Gajadhar Singh* v. *Kishan Jiwan Lal* (2) and *Fitzholmes* v. *Bank of Upper India Ltd.* (3) decided by their Lordships of the Privy Council, in which a certain statement of the law made by Banerji, J., in the case in *Gajadhar Singh* v. *Kishan Jiwan Lal* (2), was approved. Both the cases were of limitation and the question arose, whether for the purpose of applying for a final decree the decree-holder had three years from the date of the preliminary decree passed by the first Court or from the date of the decision of the appellate Court, where there was an appeal from the preliminary decree. It appears that in an earlier case, Banerji, J., of this Court had held that limitation began to run from the date of the passing of the preliminary decree by the first Court. In the case reported in *Gajadhar Singh* v. *Kisan Jivan Lal* (2), the learned Judge modified his opinion and held that limitation would begin to run from the date of the final decision in appeal. In stating the law the learned Judge said that the law contemplated the passing of only one final decree and that final decree could be made only after the appellate Court had decided the appeal from the preliminary decree. It is this dictum which has been approved of by their Lordships of the Privy Cunncil.

As already pointed out, the point before the Full Bench in the case in *Gajadhar Singh* v. *Kishan Jivan Lal* (2) and the points in the case before their Lordships of the Privy Council in the case in *Fitzholmes* v. *Bank of Upper India Ltd.* (3) were ones of limitation. The question that we have to decide is not one of limitation but is whether a mortgagee who has obtained a decree for sale is not entitled to ask for a final de-

(1) A.I.R. 1926 All. 291.

(2) [1917] 39 All. 641=42 I.C. 93=15 A.L.J. 734 (F.B.).

(3) A.I.R. 1927 P.C. 25=8 Lah. 253=54 I.A. 52 (P.C.).

cree for sale, for the simple reason that an appeal has been preferred against the preliminary decree. Suppose for example, a suit for sale is brought for recovery of Rs. 52,000. The defendant contends that Rs. 4,000 claimed as interest was not recoverable. The contention is disallowed by the Court of first instance and a decree is passed for the entire sum of Rs. 52,000. The defendant appeals only in so far as the decree was for recovery of Rs. 4,000, as interest. If it be the law that till the question of Rs. 4,000 is decided by the appellate Court (it may take three years to decide the point) the decree-holder must wait and cannot realize the balance of the decretal amount as to which there is no dispute and must be content with the reduced rate of interest at 6 per cent per annum, although the stipulated interest might be much larger, that law would surely be very much ungenerous and irksome. Surely, unless there be any express law to the effect, we must not deduce it from the dicta already quoted which fell from eminent Judges on a pure question of limitation.

Order 41, R. 5, Civil P. C., expressly lays down that the fact that an appeal is filed shall not, by itself, operate as a stay of execution. If we are to accept the appellant's contention that by virtue of preferring an appeal, for however small portion of the decree it may be, a judgment-debtor can put off the execution of a mortgage decree, we must surely have an authority for that. No such authority is quoted. The case of a mortgage decree does not stand apart. The same remarks apply to decrees for say, dissolution of partnership and accounts, decrees for partition, a decree against an agent for rendition of account and so on.

No doubt, where a preliminary decree has been interfered with by the appellate Court, the final decree is affected to that extent. It is also clear that where a decree-holder proceeds to obtain a final decree in spite of the fact that an appeal against a preliminary decree is pending, he takes some risks in having to apply for a fresh final decree if the appellate Court modifies the preliminary decree. But that is the case even where a simple money decree is passed. A simple money decree, say for Rs 5,000, is passed. The decree-holder will have an absolute right to execute the decree at once although the defendant may prefer an appeal. If the appeal succeeds and if in the meanwhile the plaintiff has realized the decretal amount, he will have to refund the amount but nobody would certainly argue that simply because the original decree stands the chance of being modified, on appeal, no execution could be taken out. Where a decree is passed by parts, as in the case of a suit on a mortgage, the decree can be executed only after a final decree has been made. There must be some clear authority for holding that the mere fact that an appeal against the preliminary decree is pending, is a sufficient jurisdiction for postponing the passing of the final decree.

I am therefore clearly of opinion that the contention of the learned counsel for the appellant has no force and the final decree passed is not a nullity.

I need not go back to the question of res judicata. The final decree, whether it should or should not have been passed has been passed and therefore no valid objection can be taken to its execution. The appellate decree has not in any way modified this final decree. There may be but we do not know if it is the case, a decree for costs passed by the appellate Court. That decree for costs may be a decree directing that the costs should be realized from the mortgaged property or it may be a decree directing that the unsuccessful respondent should pay the costs personally. If it is a personal decree, it will have to be executed independently. If the appellate decree directs that the costs should come out of the property mortgaged, that decree will not be executed till a final decree is made including the appellate costs. In any view, the final decree as it stands is capable of execution and nobody who is a party to the execution or his representative, can object to it. The result is that the appeal must fail I would dismiss the appeal with costs.

Niamatullah, J.—I am in complete agreement with the view taken by my learned brother and with the reasons assigned by him in support of it. I would add a few words of my own as I feel strongly on the question whether the final decree passed during the pendency of an appeal from the preliminary decree which it eventually affirmed by the Court of appeal is a nullity. Reliance is placed on behalf of the appellant

on *Lalman* v. *Shiam Singh* (1) for the proposition that such a final decree is not capable of execution. This view, if accepted, will lead to some startling results. O. 34, R. 5, runs as follows :

"(1) Whether on or before the day fixed the defendant pays into Court the amount declared due as aforesaid together with such subsequent costs as are mentioned in R. 10, the Court shall pass a decree (a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and if so required ; (b) ordering him to retransfer the mortgaged property as directed in the said decree, and also, if necessary, (c) ordering him to put the defendant in possessior of the property. (2) Where such payment is not so made, the Court shall on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in R. 4."

As soon as a suit for sale terminates in favour of the mortgagee a preliminary decree must follow. On the expiry of the usual period of grace, when payment is not made, the Court "shall" pass a final decree "on application made in that behalf by the mortgagee." No notice of such application need be issued to the mortgagor though one is usually issued. In view of the mandatory character of these provisions no Court can refuse to pass a final decree if the mortgagee applies therefor. The mortgagor cannot be heard to say that he has preferred an appeal and therefore, no final decree can be passed. This reductio ad absurdum becomes more marked if the provisions of O. 34, Rr. 2 and 3 are examined. When a preliminary decree is passed in a foreclosure suit it directs payment :

"on a day within six months from the date of declaring the amounts due to be fixed by the Court"

(Rule 2) :

"if such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant ..... be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property."

Then follows the proviso which proves the incorrectness of the view contended for demonstration. It is this :

"Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment."

If the preliminary decree has been appealed from there is, in that view, little room for the Court to exercise a discretion given by the proviso, nor, is there any need for a mortgagor to apply for an extension of time as he can help himself to an extension if he has only preferred an appeal and in many cases to an extension for inordinate length of time. If a case involves a substantial question of law an appeal to Privy Council will afford great facilities for preventing the mortgagee from reaping the fruits of his decree. Where the mortgage money already exceeds the value of the mortgaged property, as it may do in many cases, the delay in passing a final decree in a foreclosure suit is calculated to deprive him of any return for the interest accruing in the meantime.

It is true a decree passed by a Court of first instance, when affirmed on appeal, is merged in the appellate decree. But so long as no decree has been passed by the Court of appeal it continues in fulf force, and the mortgagee can take action according to its tenor. It is open to a mortgagee to obtain a final decree, if otherwise entitled to it, even where an appeal is pending from the preliminary decree. But such a course entails some disadvantages, e. g., interest at contract rate is to be awarded up to the date fixed for payment by the preliminary decree and thereafter at such rate as the Court may allow and if he waits for the appellate decree he would be entitled to interest at the contract rate for a longer period. Whether a decree passed by a Court of first instance will merge in the decree of the appellate Court affirming it when a final decree intervenes and the mortgagee insists on executing the final decree already obtained or whether he can throw up such final decree and obtain another on foot of the preliminary decree passed by the appellate Court affirmiug that of the Court of first instance, are questions which do not call for decision in this case. It is, however, clear to my mind that where a final decree was actually passed pending an eventually unsuccessful appeal from the preliminary decree, it is binding on the parties and is capable of excution. Since it cannot include costs of the appellate Court and possibly interest at a higher rate for a certain period, the mortgagee seeking to execute it cannot insist on including such costs and such interest, as he can do if he obtains a final decree on foot of the preliminary decree on appeal.

The case of *Lalman* v. *Shiam Singh* (1) is distinguishable for the reason last mentioned. The learned Judges in repelling the argument that the final decree passed rightly or wrongly was binding between the parties, observed :

"The simple answer to it is that the mortgagee does not come merely on the basis of that decree as having been passed in his favour rightly or wrongly. He includes in his application for execution costs awarded to him by the High Court as well and it is clear that he has in contemplation the correct final decree which ought to be passed in the suit. Such a correct decree has not yet been passed so there can be no question of its execution."

In the case before us there is no suggestion, and the question having been raised for the first time in his Court there is no evidence that, the mortgagee is, in effect, seeking to execute the supposed final decree based on the preliminary decree passed on appeal. It is true there are dicta in this and other cases, which, taken apart from the facts to which they refer, lend support to the appellant's contention. *Gajadhar Singh* v. *Kishan Jiwan Lal* (2), *Jowad Husain* v. *Gandan Singh* (4) and *Fitzholmes* v. *Bank of Upper India Ltd.* (3), decide no more than that an application, made after the decision on appeal for a final decree to be passed on foot of the preliminary decree passed on appeal, is not barred by Art. 181, Lim. Act, if it is within three years from the date of the appellate decree, though beyond three years from the date of the preliminary decree passed by the Court of first instance. There can be no authority for the proposition that no final decree can be passed before the appeal is decided and if passed cannot be executed. For the reasons stated above I concur in the order dismissing the appeal with costs.

D.D. *Appeal dismissed.*

(4) A. I. R. 1926 P. C. 93=6 Pat. 24=53 I. A. 197 (P. C.).

** A. I. R. 1929 Allahabad 291

SEN AND NIAMATULLAH, JJ.

Abdul Aziz—Judgment-debtor—Appellant.

v.

Shah Abdul Rahim and *others*—Judgment-debtor and Decree-holders—Respondents.

Execution Second Appeal No. 322 of 1928, Decided on 18-2-1929, from decree of 2nd Addl. Sub-Judge., Gorakhpur.

(a) **Civil P. C. S. 47—(*Sen, J.*)—**Conflict between judgment-debtors inter se—S. 47 does not apply**—(*Niamatullah, J. dissenting*).

Where the conflict of interest in the execution department is between two sets of judgment-debtors and there is no question between the decree-holder on the one side and one or other of the judgment-debtors on the other side relating to the execution, discharge or satisfaction of the decree, S. 47 does not apply : 7 *All.* 681; 30 *All.* 379; 31 *All.* 82 (*F. B.*) *Foll* ; *A. I. R.* 1924 *Mad.* 365, *Diss.* [P 292 C 2]

Niamatullah, J.—The view that S. 47 can, under no circumstances apply to an order passed by a Court executing the decree as between two judgment-debtors inter se cannot be accepted. [P 293 C 1]

*(b) **Civil P. C., S. 47—Mortgage decree—Purchaser of part made defendant—He applying that his portion be sold last—Court granting application but imposing certain conditions—Order is not one relating to execution, etc.**

Niamatullah, J.—*A* the mortgagor sold a part of the mortgaged property to *B* for a sum of Rs. 1,100 out of which Rs. 601 were left with the vendee for payment of the mortgage-debt in part. This payment was not made. The mortgagee brought a suit impleading both *A* and *B* and got a decree and applied for the execution of the decree. *B* then applied that the part purchased by him be sold last in execution of the final decree. The Court granted the application but on review altered it directing that the said order could be availed of by *B* on certain conditions :

Held : that the question whether the executing Court is justified in imposing certain conditions on the property, which had been purchased prior to suit by a third person and who was also a party to the suit, being sold last is not one relating to the execution, discharge or setisfactfon of the decree. [P 293 C 1]

M. Waliullah—for Appellant.

Sankar Saran—for Respondents.

Sen, J.—This is an appeal by a judgment-debtor and it arises out of the following facts: One Abdul Rahim executed a simple mortgage in favour of the Kayashta Trading and Banking Corporation for Rs. 600 which was payable in two years. The property hypothecated consisted of three houses and the rate of interest agreed upon was one rupee per cent per mensem at six-monthly rests. The mortgagee assigned the mortgage to one Shamsuddin on 19th March 1915. Abdul Rahim sold one of the mortgaged houses to Abdul Aziz, the appellant, on 14th June 1918. for a sum of Rs 1,100 out of which Rs. 601 were left with the vendee for payment of the mortgage-debt in part. This payment was not made. Shamsuddin having died, his heirs, namely, Mt. Shahidan Bibi and others brought

a suit on the mcrtgage dated 13th April 1912, against Abdul Rahim, Abdul Aziz and others. A preliminary decree was passed on 13th July 1926. The final decree followed on 14th January 1927. The decree holder applied to the Munsif of Gorakhpur for the execution of the decree and Abdul Aziz applied that the house purchased by him on 14th June 1918 be sold last in execution of the final decree. On 15th July 1927 the Munsif acceded to this prayer and passed an order to that effect behind the back of Abdul Rahim. Shortly after the making of the said order, Abdul Rahim appeared in Court and presented an application protesting against the orders of the learned Munsif directing that the house property purchased by Abdul Aziz be sold last. On 27th August 1927, the Munsif reviewed the order dated 15th July 1927 and directed that the said order could be availed of by Abdul Aziz on this condition that he paid a sum of Rs. 601 to the decree-holder in satisfaction of the mortgage together with interest on the said amount at one rupee per cent per mensem compoundable every six months from 14th June 1918, the date of hi purchase right up to the date of his payment.

Aggrieved by the aforesaid order, Abdul Aziz lodged an appeal in the Court of the learned District Judge which was heard by the Second Additional Subordinate Judge of Gorakhpur. A preliminary objection was raised by the respondent as regards the competency of the appeal. The learned Judge accepted the preliminary objection and dismissed the appeal upon the ground that no appeal lay to him. The ratio of the decision was that the order dated 27th August 1927, was passed in the course of an execution proceeding in which Abdul Rahim and Abdul Aziz, the rival judgment-debtors were ranged on opposite sides and there was no question between the parties to the suit in which the decree was made within the meaning of S. 47, Civil P C. Abdul Aziz appeals to this Court and urges that the matter between the parties was one under S. 47, Civil P, C. and that an appeal lay to the lower appellate Court.

Section 47, Civil P. C. providss :

"All questions arising between the parties to the suit, in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

The conflict of interest in the execution department was between two sets of judgment-debtors and there was no question between the decree-holder on the one side and one or other of the judgment-debtors on the other side relating to the execution, discharge or satisfaction of the decree. It would be straining the language of S. 47, Civil P. C. to hold that a dispute of this description between two sets of contending judgment-debtors would fall within the purview of S. 47. This question directly arose in *re Raynor* v *Mussoorie Bank Ltd.* (1). After discussing the facts of the case Brodhurst and Tyrrell, JJ observed at p. 686:

"this application purported to be made under S. 244, Civil P. C. But apart from other considerations showing that S. 244 is not applicable to a proceeding of this character, it is sufficient here to observe that an application cognizable under that section must be an application between the parties, that is to say, between the parties arrayed against each other as decree-holder of the one part and judgment-debtors or their representatives of the other. But this is not such a question. It is a controversy of two judgment-debtors inter se, and the provision of S. 244 do not apply to the determination of such questions."

This statement of law was cited with approval in *Anandi Kunwar* v. *Ajudhia Nath* (2) at p. 383 and it was observed that the controversy was between a judgment-debtor and his representative and that it would be straining the language of S. 244 to hold that such a dispute fell within the scope of that section. In *Bhagwati* v. *Banwari Lal* (3) the majority of the Judges constituting the Full Bench expressed themselves in support of the above view. Banerji, J. is reported to have said (see p. 98) that

"as regards the first condition it is manifest that the parties must be arrayed as decree holder or his representative on the one side and the judgment-debtor and his representative on the other. Any question arising between the decree-holder and his representative or between the judgment-debtor and his representative is clearly not a question within the purview of S. 244. This has been held so repeatedly that I deem it unnecessary to cite authorities."

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(1) [1885] 7 All. 681=(1885) A. W. N. 204.
(2) [1908] 30 All. 379=5 A. L. J. 557=(1908) A. W. N. 157.
(3) [1909] 31 All. 82=1 I. C. 416=6 A. L. J. 71 (F. B.).

The learned counsel for the appellant relies upon the case of *Thoppai Vedaviasa Aiyar* v. *Madura Hindu Sabha Nidhi Co. Ltd.*, (*A. I. R.* 1924 *Madras* 365). Their Lordships ruled in that case that S. 47, Civil P. C. ought to admit of a liberal interpretation and should not be confined to cases where the question in controversy was between the decree-holder and the judgment-debtor. It is submitted with all respect that the above view is not supported by by the language of S. 47, Civil P. C. and is opposed to the *cursus curiae* of this Court which I am bound to follow. The order not being one under S. 47, Civil P. C. no appeal lay to the lower appellate Court. It is not contended that the order was appealable independent of S. 47 and it is also not contended that O. 43, Civil P. C. applies. The result is that the appeal fails and should be dismissed with costs.

Niamatullah, J.—I entirely agree with my learned brother in the conclusion he has arrived at and would dismiss the appeal. I, however, rest my decision on a different aspect of the case. I am of opinion, that the question arising between the parties to this appeal, namely, whether the Court of first instance was justified in imposing certain conditions on the property, in which the appellant is interested, boing sold last is not one relating to " the execution, discharge or satisfaction of the decree " and for that reason the order impugned in this appeal is not one which can be regarded as an order passed under S. 47, Civil P. C. I hesitate in accepting the view that S. 47, Civil P. C. can, under no circumstances, apply to an order passed by a Court executing the decree as between two judgment-debtors inter se. The relevant part of S. 47 is this :

" All questions arising between the parties to the suit, in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

As I read the section, all that is necessary to be made out for its application is that the parties between whom a question relating to the execution, discharge or satisfaction of the decree arises should have been parties to the suit whether arrayed on the same side or on the opposite side. The word " between " does not, in my opinion, imply that such parties should have been arrayed as plaintiff and defendant. The word " between the same parties " occur in S. 11 Civil P. C. and it has been repeatedly held in relation to questions of res judicata that parties arrayed on the same side may have a conflict of interest and a decision arrived at on questions between them in a suit in which they are arrayed on the same side operates as res judicata in a subsequent suit in which they are arrayed on the opposite side. Some of the reasons for the view taken by the learned Judges of the Madras High Court in the case referred to by my learned brother merit consideration. In a suit for partition, for rendition of accounts or in an administration suit, after a decree has been passed questions may arise between the parties arrayed on the same side in the course of execution proceeding and if the scope of S. 47, Civil P. C. is narrowed down only to cases in which questions relating to execution, discharge or satisfaction of the decree arise between the decree-holder and the judgment-debtor, the very object underlying that section may be frustrated. While I am not prepared to dissent from the authorities which my learned brother has quoted in support of his view, I venture to express my hesitation in accepting that view as absolutely correct and of general application. As I agree in dismissing the appeal on another ground I need not examine the view in all its aspects and content myself by merely reserving my opinion on the question.

D.D. *Appeal dismissed.*

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* * A. I. R. 1929 Allahabad 293

MUKERJI AND NIAMATULLAH, JJ.

Hanwant Rai—Appellant.

v.

Chandi Prasad and *others* — Respondents.

First Appeal No. 96 of 1926, Decided on 31st January 1929, against decree of Addl. Sub-Judge, Azamgarh, D/- 21st November 1925.

**** (a) Transfer of Property Act, S. 55(2 —Covenant of indemnity — Pre-emptor's vendee can take benefit—Case is governed by Limitation Act, Art. 116.**

Vendee from a pre-emptor is entitled to take benefit of an express covenant to in-

demnify in a sale-deed and especially the original vendor cannot contend to the contrary : 7 *All.* 775 (*F.B.*), *Ref.* [P 295 C 1]

To such a case for a suit for compensation for loss of possession Art. 116, Lim. Act, applies and time runs from date of dispossession : 30 *All.* 402 *Foll.*; *A. I. R.* 1927 *All.* 734, *Expl.*; *A. I. R.* 1916 *P. C.* 182, *Appl.* [P 295 C 2]

*(b) **Limitation Act, Art. 116—'Contract.'**

The word "contract" in Art. 116, includes an implied contract also : *A. I. R.* 1927 *Pat.* 248 ; *A. I. R.* 1926 *Mad.* 255 ; *A. I. R.* 1925 *Bom.* 440 ; and *A. I. R.* 1924 *Cal.* 148, *Rel. on.* [P 295 C 2]

Pearey Lal Banerji and *Kamla Kant Verma*—for Appellant.

Iqbal Ahmad, *Mukhtar Ahmad* and *Abu Ali*—for Respondents.

Judgment.—This is an appeal by one who was arrayed as defendant 1 in the original suit. The suit arose under the following circumstances : The appellant Hanwant Rai sold, on 12th February 1912, a certain amount of property to Mulai and two others for the sum of Rs. 9,000. Kauleshar Rai, who has since died, brought a suit for pre-emption on 7th September 1912 and obtained a decree, on condition of payment of the entire consideration of the money of Rs. 9,000, on 25th January 1913. He deposited the money that he was required to do under the decree and obtained delivery of possession. The appeal to the High Court was dismissed. Kauleshar and his joint brothers who are plaintiffs 3 and 4 in this action, sold a half share in the property pre-empted to the plaintiffs 1 and 2 of the suit and three others, on 6th August 1916. The sons of Hanwant Rai challenged the sale made by their father, by suit No. 79 of 1919, and, eventually, got a decree for possession from the Court of first instance and also by the Court of appeal. The decree directed that on condition of payment of Rs. 2761/8, the plaintiffs, namely, the sons of Hanwant Rai, would be entitled to recover possession. They deposited the money and obtained delivery of possession on 12th March 1921.

Having thus been dispossessed of their property the present suit was instituted by the brothers and survivors of Kauleshar Rai and two of the five transferees. It has been found that defendant 1, one of each transferees, has a small interest in the property mortgaged and that the other transferees, never having paid anything towards the sale consideration, did not obtain any interest in the property. The present suit was directed for the recovery of several sums of money, viz., Rs. 6238/8, being the difference between the entire purchase money paid, viz., Rs. 9,000 and the sum of Rs. 2761/8 paid by the sons as a condition precedent to their recovery of the property, for recovery of Rs. 1,400, being the costs incurred by the plaintiffs in defending the sons' suit, Rs. 556/8 being the costs paid by the plaintiffs to the sons under the decrees obtained by them and Rs. 4336/14/6, interest on the sale consideration and other sums claimed. The suit has been decreed in its entirety except for the sum of Rs. 1,400 which represented the amount of costs incurred by the plaintiffs in defending the sons' suit. The plaintiffs have not appealed and as we have said, the present appeal is by Hanwant Rai alone. Two points have been urged before us, namely, (1) the pre-emptor's vendees are not entitled to the benefit of the indemnity clause in the sale-deed executed by Hanwant Rai in favour of Mulai and others, and (2), the suit was barred by limitation.

We shall take up the first point first. The original sale-deed, namely the one executed by Hanwant in favour of Mulai and others will be found printed at p. 23 of the record. By this sale-deed, Hanwant Rai expressly agreed to indemnify the vendees in case by any act of himself or by any claim of his children or the members of his family, any defect arose in the property. It is conceded that Kauleshar Rai, having succeeded in this suit for pre-emption we substituted for the original vendees, as the vendee. That this was the position of the pre-emptor is fully borne out by the Full Bench case of *Gobind Dayal* v. *Inayat Ullah* (1), vide the remarks of Mahmud J., at p. 808. It is clear, therefore, that so far as Kauleshar's surviving brothers are concerned, there can be no doubt that the suit is maintainable on the indemnity clause contained in the sale-deed of 12th February 1912. So far as the vendees are concerned, there are two positions. Either, to them the benefit of the contract was transferred or it was not. If it was not transferred, the benefit of the contract remains entirely in Kauleshar's survivors. If they have lost the entire property which was obtained by

(1) [1885] 7 All. 775=(1885) A.W.N. 182(F.B.)

pre-emption, they are entitled to recover the damages, irrespective of the fact that they have transferred half the property to other people. If, to the vendees, the rights accruing under the indemnity have been assigned, they too are entitled to maintain the suit. Further it appears that under S. 55, sub-S. 2, T. P. Act, there is always an implied covenant as to title and this covenant runs with the land. If that be the case with respect to an implied contract, it seems to follow that an express contract of this nature must also run with the land. In any case, the vendees from Kauleshar Rai and his brothers are entitled to take the benefit of the implied contract contained in S. 55, sub-S. 2, T. P. Act. In any view of the case, it is impossible to maintain on behalf of defendant 1 that the suit is not maintainable by the vendees of Kauleshar Rai and his brothers.

We now come to the question of limitation. It is argued on behalf of Hanwant Rai that either Art. 62 or Art. 97, Lim. Act applies, and as the suit was brought more than three years after delivery of possession to the sons of Hanwant Rai, the suit is barred by time. Reliance has been placed on several cases and mainly on the case of *Kundan Lal* v. *Bisheshar Dayal* (2). This was a decision of a Bench of two learned Judges of this Court and the learned Judges thought that they had to choose between two cases decided in this Court. Those two cases were *Mul Kunwar* v. *Chittar Singh* (3) and *Janak Singh* v. *Walidad Khan* (4). In the case in *Mul Kunwar* v. *Chittar Singh* (3) it was expressly decided that in the circumstances of the present case, Art. 116 Lim. Act applied. In the latter case in *Janak Singh* v. *Walidad Khan* (4), Art. 116 was not applied on the express ground that there was no covenant to which Art. 116 could be applied. Their Lordships analyzed the document before them and expressly found that there were no covenants to which Art. 116 could apply. The earlier case of *Mul Kunwar* v *Chittar Singh* (3), was not brought to the notice of the learned Judges. It was not necessary to do so. Their Lordships appear to have been fully alive to the contents of Art. 116, Lim. Act, but, as we have said, they expressly said that in the circumstances of that case there was nothing in the sale-deed to which Art. 116 could be applied. In the case under discussion in *Kundan Lal* v. *Bisheshar Dayal* (2), one Calcutta case and a Madras case were also cited, but they were not discussed. In view of the fact that the case in *Kundan Lal* v. *Bisheshar Dayal* (2), preferred to follow one of the cases to another of the cases decided in this Court, we think we are at liberty to accept the case in *Mul Kunwar* v. *Chittar Singh* (3), also a Bench decision as a proper guide for us.

Considering the case apart from authority there can be little doubt that Art. 116 Lim. Act would be applicable. We shall presently show that that article has been applied not only in this Court, in the case of *Mul Kumar* v. *Chittar Singh* (3) but by several other High Courts in India and also by the Privy Council. Art. 116 runs as follows:

"Suit for compensation for the breach of a contract in writing registered. Period of limitation—six years. Time from which period runs—when period of limitation would begin to run against a suit brought on a similar contract not registered."

The contract in writing registered is that, in case the vendees lost the whole or any portion of the property on account of the claim made by the children of the vendor, they would be entitled to be indemnified. This is an express contract of indemnity. The cause of action would arise from the date of dispossession, a date which is within six years of the suit. Apart from authority, therefore, there can be no difficulty in the application of Art. 116. Even if it had been the case that there was no express covenant, the implied covenant mentioned in S. 55, T. P. Act, would be applicable. The fact that the implied contract is not put into the document itself will not make any difference. A contract may be express or implied : see S. 9, Contract Act. In Art. 116, Lim. Act, the word used is "contract." This should include an implied contract also. We have to mention this aspect of the case because we have said that if the vendees from Kauleshar Rai and his brothers could not succeed on the express contract contained in the sale-deed of 1912, they

(2) A. I. R. 1927 All. 734.
(3) [1908] 30 All. 402=5 A. L. J. 480=(1908) A. W. N. 185.
(4) [1915] 13 A. L. J. 669=30 I. C. 410.

were entitled to succeed on the implied covenant which runs with the land.

In *Nabin Chandra Ganguly* v. *Munshi Mander* (*A. I. R.* 1927 *Patna* 248) it was held that the implied contract mentioned in S. 108, T. P. Act (the case was of a lease) could be read within Art. 116, Lim. Act and a suit for compensation for breach of the covenant would be governed by the six years' rule of limitation. The same view was taken in *Sigamani Pandithan* v. *Munibadra Nainar* (*A. I. R.* 1926 *Madras* 255) following earlier Madras cases. The same view was taken in *Ganapa Putta Hegde* v. *Hammad Saiba* (5) and in *Injad Ali* v. *Mohini Chandra A. I. R.* 1924 *Cal.* 148. In the case of *Tricomdas Cooverji Bhoja* v. *Gopi Nath Jiu Thakur* (6), the question arose whether where rent was payable under a registered document the Art. 110 which applied expressly to a suit for recovery of arrears of rent applied or Art. 116 with the larger period of limitation. Their Lordships of the Privy Council held that Art. 116 applied to all cases in which the contract was in writing registered, although such cases may have been provided for in the earlier portion of Sch. 1, Lim. Act. This makes it entirely clear that a suit for compensation for breach of a contract that is in writing registered, must be brought within Art. 116. We are entirely satisfied both on principle and on authority that the suit is within time. The result is that the appeal fails and is hereby dismissed with costs.

D.D. *Appeal dismissed.*

(5) A. I. R. 1925 Bom. 440=49 Bom. 596.
(6) A. I. R. 1916 P. C. 182=44 Cal. 759=44 I. A. 65 (P. C.).

** A. I. R. 1929 Allahabad 296

MUKERJI AND NIAMATULLAH, JJ.

Sarju Kumar Mukerji—Defendant—Appellant.

v.

B. Dwarka Prasad and *another*—Respondents.

First Appeal No. 80 of 1926, Decided on 31st January 1929, from decree of Addl. Sub-Judge, Allahabad, D/- 30th October 1925.

**** Civil P. C., O. 34, R. 1 — Subsequent mortragee paying prior mortgagee—Suit by puisne mortgagee—Subsequent mortgagee cannot insist on prior mortgage being paid—Property can be sold subject to prior mortgage—Transfer of Property Act, S. 74.**

Per Mukerji, J.—A subsequent mortgagee who has paid off a prior mortgage in a suit by puisne mortgagee cannot insist on being paid. He must allow the property to be sold subject to the prior mortgage which he has purchased. His only remedy is to enforce such securities as he may have succeeded to under the prior mortgage : *A. I. R.* 1922 *All.* 394 *Expl.* and *Appl.*; 32 *All.* 138 *Expl.* and *Dist.*; 7 *A. L. J.* 15, *Expl.* [P 298 C 2]

Tej Bahadur Sapru and *P. L. Banerji* —for Appellant.

Kailas Nath Katju and *N. P. Asthana* —for Respondents.

Mukerji, J.—This appeal arises out of a suit instituted by the respondent B. Dwarka Prasad against two defendants, the second of whom, Rai Bahadur Dr. Sarju Kumar Mukerji is the appellant before us. The suit was based on a mortgage bond dated 20th February 1918 executed by defendant 1 Inayat Husain for a sum of Rs. 2,300, principal. The appellant was made a party expressly on the ground of being a subsequent transferee and his status as a prior mortgagee was denied, in the plaint. The appellant obtained a mortgage by conditional sale in his favour from Inayat Husain and others on 18th December 1920 in respect of a large number of properties including a share (now principally in dispute) in the village Palohi.

There were five other mortgages over some or other of the properties mortgaged to the appellant. These mortgages are given in some detail in the judgment of the Subordinate Judge of Allahabad dated 18th February 1925, and printed at p.9 of the record. The appellant, having satisfied the decree obtained on the 3rd mortgage by one Mahtab Kuar, succeeded to her rights which accrued to Mahtab Kuar under her deed dated 21st August 1900. Mahtab Kuar had before she brought her suit, paid off the first mortgage dated 29th August 1895.

The appellant, Dr. Mukerji, brought the suit No. 161 of 1924 in the Court of the Subordinate Judge of Allahabad for foreclosure, on foot of his mortgage. It is the judgment in his case that has been mentioned above. To this suit B. Dwarka Prasad was party, as defendant 21. He

claimed priority in respect of his mortgage of 1918. As against Dwarka Prasad Dr. Mukerji claimed priority because he had paid off (by payment of the decree held by Mahtab Kuar) the mortgage of 1895 In view of these conflicting claims the Subordinate Judge made a decree, the operative portion of which will be found in the judgment at pp.13 and 14. In para. 5 at p. 14. he gave the then defendant 21, Dwarka Prasad, an opportunity to redeem two earlier mortgages namely of 1895 and 1896 and fixed a date for the purpose. The Judge, further, said that if Dwarka Prasad failed to pay off the earlier mortgages, he should be debarred from all rights to redeem tbose mortgages and the plaintiff's right to foreclose his mortgage would come into play. It was, however, added that the right of foreclosure would not affect the mortgage of Dwarka Prasad bearing the date 1918 and that that mortgage would remain enforcible later on, but would be subject "to the shields of the mortgages of 1895 and 1896." In this case we are not concerned with the mortgage of 1896. The mortgagee is not a party.

The share in Palohi is the bone of contention between the parties in this case and it was mortgaged in the mortgage of 1895 and is in mortgage with Dr. Mukerji.

The respondent B. Dwarka Prasad says that he would sell the properties mortgaged to him, including Palohi, but in the case of Palohi, he would sell it subject to the prior charge held by Dr. Mukerji, under the mortgage of 1895. On behalf of Dr. Mukerji it is contended that the respondent cannot sell the property subject to his (the appellant's) prior charge, but must pay him (the appellant) the full amount of the money due on the mortgage of 1895 before the share in Palohi is sold. The Court below has held that Palohi could be sold subject to the charge of 1895. The learned Subordinate Judge made a proposal to the defendant-appellant that Palohi might be sold free from encumbrance, that out of the sale proceeds, the entire amount of mortgage money that may be due under the mortgage of 1895 may be paid off and the balance of the sale proceeds may be given to B. Dwarka Prasad as the subsequent mortgagee. To this suggestion the appellant did not agree. We have now to see whether the appellant can insist on being paid the full amount of the mortgage of 1895 before the property (Palohi) is sold on foot of the mortgage of 1918.

Nobody denies that the appellant is a prior mortgagee of Palohi under the mortgage of 1895. Under O. 34, R. 1 Civil P. C., a subsequent mortgagee may bring the mortgaged property to sale without making the prior mortgagee a party to the suit. The property in such a case would be sold subject to the prior mortgage. It is clear, therefore, that under the statute, the respondent Dwarka Prasad has an absolute right to sell the property, Palohi, without at all paying the appellant. There can be no doubt that before the passing of the Civil Procedure Code of 1908, under the Transfer of Property Act, S. 85, it had been ruled by this Court that a property could not be sold subject to a mortgage. Under the ruling of this Court, a property was always to be sold free from incumbrances. That rule of law no longer prevails.

Sir Tej Bahadur Sapru, on behalf of the appellant contended, on foot of some authorities, to be presently mentioned, that his right to subrogation carried with it a right to be paid in cash. His argument was that if the property Palohi was going to be sold subject to the encumbrance of 1895, it would mean that Dr. Mukerji would have to institute a suit on foot of the mortgage of 1895 and it might be the case that such a suit would become time barred when it is instituted.

In the case of *Mamraj* v. *Ramji Lal* (1) relied on by the appellant's counsel it was found that the defendant, the successor-in-title of the mortgagor, had discharged an earlier mortgage. It was held that it must be taken that the purchaser had intended to keep the first mortgage alive for his own benefit. Having said so, the learned Judges said :

> "On the strength of these authorities, the appellant Mamraj is entitled to be paid by the plaintiffs the sum of Rs. 745, paid by him in discharge of the prior mortgage in favour of Umrao Singh before they can bring to sale the property mortgaged to them under their own mortgage."

It will be noticed that this decision was given on 25th May 1909, just within

(1) [1910] 7 A. L. J. 15=5 I. C. 177.

five months of the coming into force of the new Civil Procedure Code of 1908. In the case of substantive law, the old law would prevail and would have to be applied, viz., the law that was in force at the date when the respective rights of the parties arose. This explains why the learned Judge ordered the payment of the prior charge before the sale of the subsequently mortgaged property. There is no discussion in this case as to whether the prior mortgage should be paid or the person paying it should be left to bring his suit for sale on the prior mortgage. There being no decision on this point, this case is no authority on the point that is before us, even if we take it that the new law was to be applied on 25th May 1909, when the case was decided by the High Court.

The next case that was relied on by Sir Tej Bahadur Sapru, viz, *Matiullah* v. *Banwari Lal* (2) does not support his contention. On the other hand the fact that the Court remitted an issue as to whether the prior mortgages, paid off by the subsequent purchaser, were barred or not goes to show that the payment subrogated the payer only to the rights and titles of the mortgagees who had been paid.

Section 74, T. P. Act, deals with the right of a subsequent transferee to pay a prior mortgagee and says:

"The subsequent mortgagee shall . . . . . acquire in respect of property all the rights and powers of the mortgagee as such, to whom he has made such tender."

It is clear to us, therefore, that the only right obtained by the appellant is a right to the security furnished by the mortgage of 1895.

The case of *Ram Sarup* v. *Ram Lal* (3) was next quoted by Sir Tej Bahadur Sapru. In that case, a prior mortgagee had purchased the property which was subject to a second mortgage made before his purchase. In a suit by the second mortgagee, the Court held that the prior mortgagee had a right to be paid off before the property could be brought to sale. It is not necessary to consider in this case how far the case in (3) was correctly decided. It is enough to point out that the learned Judges who decided the case, themselves drew a distinction between a case where the prior mortgage is paid off by a purchaser of the property and where a prior mortgage is paid off by a subsequent mortgagee. The case of *Mati Ullah Khan* v. *Banwari Lal* (2) already quoted was relied on before their Lordships and they accepted the correctness of the ruling. But they said :

"The shield of a subsequent mortgagee who acquires the rights of a prior mortgagee is essentially different in character from the shield of a mortgagee who acquires the rights of a mortgagor. The former can protect himself so long as the right under the earlier mortgage subsists. In the case of the latter, his rights as mortgagee merge in those of the mortgagor or remain in suspension, as it were, till they are needed for the purposes of defence."

In the case before us, we have to look to the facts, as they stood at the date of the institution of the suit of B. Dwarka Prasad. On that date the present appellant was nothing but a subsequent mortgagee who had paid off a prior mortgage. We were told that since the judgment under appeal was delivered, the appellant has foreclosed his mortgage effectually by obtaining a final decree for sale and that he has now become the owner of the share in village Palohi. This is a fact of which we cannot take any cognizance, for the simple reason that the Court below could not anticipate what was going to happen. Thus, on the authority of the case of *Ram Sarup* v. *Ram Lal* (3) relied on by the learned counsel for the appellant himself, the appellant cannot insist on being paid. He must allow the property to be sold subject to the mortgage of 1895. The appellant's only remedy is to enforce such securities as he may have succeeded to, under the mortgage of 1895.

I have already mentioned that it is not necessary to decide how far the learned Judges were right in deciding that a prior mortgagee who had purchased the property subject to a second mortgage could with safety to himself, remain inactive, without enforcing the prior mortgage and whether when the second mortgagee brings his suit, the latter can bring the property to sale or not, subject to the prior mortgage, leaving the prior mortgagee to his remedy under the same. If it were necessary to decide the question, I might have had some difficulty in ac-

(2) [1910] 32 All. 133=5 I. C. 132=7 A. L. J. 64.
(3) A. I. R. 1922 All 394=44 All. 659.

cepting the propositions of law. I may point out that a Bench of two Judges deciding *Second Appeal No.* 177 *of* 1923, *Jagram* v. *Gauri Prasad* on 19th January 1925 indicated some doubt as to its correctness. It is true that in *Phul Chand* v. *Mt. Surji*, *A. I. R.* 1923 *All.* 457, Ryves and Daniels, JJ., said that it was "settled law" that the prior mortgagee who has purchased the property subject to a subsequent mortgage could insist on being paid by the second mortgagee, in his suit and could not allow the second mortgagee to sell subject to the prior mortgage. But their Lordships do not quote any authority and their opinion cannot be justified on principle. The principle is enunciated in S. 74, T. P. Act, and the satisfaction of the prior mortgage does not give any right beyond what is given by the mortgage itself.

The result is that the appeal must fail. I would dismiss the appeal with costs.

Niamatullah, J.—I concur with my learned colleague in dismissing the appeal on its own merits. I express no opinion on the question whether, under any circumstances, the person, a purchaser or subsequent mortgagee, paying off a prior mortgage, can insist on the mesne mortgagee to pay the prior incumbrance discharged by him, before obtaining sale of the mortgaged property in enforcement of his own mortgage or whether he (the mesne mortgagee) can always bring the mortgaged property to sale subject to the prior incumbrance. That question does not arise in the present case and my learned brother has not decided it. The cases referred to by him are, as shown by him, easily distinguishable from the one before us.

P.D./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 299

DALAL, J.

Dhu Ram—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 708 of 1928, Decided on 25th September 1928, from order of Addl. Sess. Judge, Cawnpore, D/- 17th August 1928.

Penal Code, Ss. 99 and 103— Dacoits about to break into house—Accused firing at them which caused death of one—Firing was in right of private defence.

Certain dacoits, with the intention of committing dacoity, were about to break into the house of the accused, but the owner of the house, the accused, hearing some noise noticed two or three persons, and fired at them owing to which one of them fell down and died :

Held : that the firing was in the right of private defence of property against intended robbery and house-breaking by night, and there was no reason to believe that more than necessary harm was inflicted. [P 300 C 1, 2]

F. Owen O'Neill—for Appellant.

Sankar Saran—for the Crown.

Judgment.—The consideration of this case by the learned Sessions Judge has suffered considerably by the wrong defence set up before him. Dhu Ram has been convicted of an offence under S. 304-A, I. P. C. His brother made a report at the Police Station to the effect that he and his brother were sleeping on the roof of the residential house one night while their father was absent at Banda, that they heard the noise of thieves and going to the end of the roof they noticed three persons on the roof of the cattle-shed close by. Baij Nath challenged them whereupon they began to run away and Dhu Ram thinking that they were thieves and bad characters fired a gun which he had carried to the corner of the roof. A thief fell down at some distance from the house to the north and died soon after. Baij Nath had the stupidity to deny the correctness of this report and naturally irritated the learned Judge. The learned Judge was also suspicious of the Sub-Inspector. In a case of this kind the sympathy not only of the Sub-Inspector but of every one else would be for the boy Dhu Ram who after all had fired at a dacoit or a robber. One does not wait for firing until a dacoit or robber comes up to shake hands or to enquire after one's health. The lie told by Baij Nath and the suspicion against the Sub-Inspector misdirected the mind of the learned Judge who did not carefully enquire how far the act of Dhu Ram was safe from criminal liability by the provisions of S. 103, I. P. C. According to the first report made by Baij Nath the thieves were on an adjoining roof and a house-holder would be entitled to draw the conclusion that the three men were there for the purpose of breaking into the house of the house-holder. The learned Judge after inspecting the locality came to the conclusion that the gun could not have been fired from the corner of the roof of the residential house

to the roof of the cattle-shed because there would be obstruction in between and was of opinion that this little incident in the first report was an invention. The question then arises that if the incident is invented in the report what is there else on the record to indicate the circumstances under which the gun was fired. The learned Judge complains that the idea of private defence "struck the head" of the Sub-Inspector. I am afraid that it has "struck the head" of this Court also. We may enquire into the competing view of the circumstances put forward by the Judge himself though that view rests on no evidence. He says :

"The facts as they happened are quite clear. Three or four men being armed with lathis, guns or pharsas came to the village. They might have been dacoits and they had come there for the purpose of committing dacoity. They were in the village. Baij Nath and Dhu Ram saw them. They commenced to run away and while so running Dhu Ram fired one or two shots and the deceased was injured."

As the dacoits had come to commit dacoity a villager was fully justified in firing at the dacoit. Possibly the point which the Sessions Judge desired to make, though he has not stated it specifically, is contained in the last para of S. 99 where it is enacted that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. I believe the learned Sessions Judge's idea to be this. There were dacoits who came to the village to commit dacoity but as they ran away the villagers ought to have thanked God for it and gone off to sleep. The firing in such a case was unjustified. Obviously though the Court entirely changes the circumstances of the firing from those given in the first report it harps back to the running away mentioned in the first report. The position of the shots, however, do not justify the Court's view that the gun was fired at an enemy who was running away. All the shots were received in front and not one on the back. The theory therefore of dacoits running away is demolished. According to the learned Judge's own observation "people might speak lie but the facts cannot."

I hold that the firing by Dhu Ram was in the right of private defence of property against intended robbery and house breaking by night. There is no reason to believe that more harm than necessary was inflicted by Dhu Ram for the purpose of defence. If persons were as quick as Dhu Ram with their guns I believe there will be fewer dacoities in villages. I set aside the conviction and sentence and order the appellant to be released. If he is on bail his bail shall be cancelled. If he has paid any fine it shall be refunded.

S N./R.K. *Conviction set aside.*

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* A. I. R. 1929 Allahabad 300

SULAIMAN AND KENDALL, JJ.

Bachchi Lal and *others*—Defendants—Appellants.

v.

Debi Din and *others*—Plaintiffs—Respondents.

First Appeal No. 157 of 1926, Decided on 25th January 1929, against decree of Addl. Sub-Judge, Banda, D/- 22nd February 1926.

*** (a) Hindu Law—Widow—Reversioners consenting after widow's death to oral gift by widow in favour of stranger—Even assuming reversioners are estopped from claiming possession, full proprietary title does not vest in donee.**

After the death of the proprietor and his widow the Patwari reported that the name of collaterals should be entered in the column of proprietors. An objection was made by one *J* that the widow had made an oral gift of the property in his favour and he was in possession as a donee. The collaterals admitted the gift and agreed to the mutation of names in favour of *J*. The Court accordingly ordered that the name of *J* should be entered in place of the deceased widow.

Held: that as no interest in immovable property can validly pass from one person to another in the eye of the law without there being a registered document of transfer, in the absence of such document, the proprietary interest in the property could not have passed from the widow to *J* or from the collateral to *J* and even if the collaterals be estopped from claiming the possession of the property it is impossible to hold that proprietary title has actually become vested in *J* or his transferee by virtue of the oral gift: *A. I. R.* 1923 *All.* 387 (*F. B.*) *Dist.* [P 301, C 2, P 302 C 1]

(b) Agra Pre-emption Act (11 of 1922), S. 4 (1)—Proprietor.

A person in adverse possession without actual title cannot be said to be entitled as proprietor to the property in his possession so long as his title has not matured by prescription within S. 4 (1). [P 302 C 1]

(c) Agra Pre-emption Act (11 of 1922), S. 20—Indefeasible interest.

The expression "indefeasible interest" in S. 20 refers to full proprietary title which is not liable to be defeated and the word interest

cannot include an interest less than a proprietary interest. [P 302 C 1]

(d) Agra Pre-emption Act (11 of 1922), S. 12 (3)—Sharer.

Bahri is a sub-division of the mahal very much like a thok, which is found in eastern districts of U. P. [P 302 C 2]

P. L. Banerji and *Ambika Prasad*—for Appellants.

Mahmudullah and *S. B. Johari*—for Respondents.

Judgment—First Appeals Nos. 157 and 158 of 1926 are connected and are defendants' appeals arising out of two suits for pre-emption. Under a sale-deed dated 9th August 1924, shares in two khatas Nos. 2 and 7 in mahal Mustaqil and mahal Ihtamli of village Tirmau were sold to the defendants. Two suits were separately instituted. The plaintiff alleged that the defendant-vendees were strangers and their names were wrongly recorded in the revenue papers. The defence raised by the defendants was that they were cosharers on the same footing as the plaintiff. The defendants claimed title through one Jagannath. Before the trial commenced the plaintiff's counsel made it clear that he was not admitting the title of Jagannath at all.

The Court below has found ia favour of the plaintiff and has decreed the claim except as regards mahal Ihtamli in which the defendants had become cosharers by virtue of another deed of gift dated 15th November 1920.

Sewak was a proprietor in this village and he died some time ago and was succeeded by his widow Mt Jasodia. She also died some time about 1918. After her death the patwari reported that the names of Sewak's collaterals Ramadhin and another should be entered in the column of proprietors. An objection was made on behalf of Jagannath, who claimed that Mt Jasodia had made a gift of the property in his favour and he was in possession as a donee. Apparently there was no registered deed and Jagannath was relying on an oral gift On 7th May 1919, an application was filed on behalf of Ramadhin purporting to act for himself and as sarbarahkar (or guardian) of Tissu and Gopi in which the gift in favour of Jagannath was admitted, and there was a statemeat that the petitioners refused to take back the property and agreed to the mutation of names in favour of Jagannath. The Court accordingly ordered that the name of Jagannath should be entered in place of the deceased Mt. Jasodia.

The plaintiff led no evidence in the Court below to show that any one other than Ramadhin and Gopi were the collarals entitled to succeed on the death of Mt. Jasodia. Nor was it made clear before the Court who Tissu was as whose guardian Ramadhin had acted. In the absence of such evidence the Court below has assumed that Ramadhin and Gopi were the next reversioners of Mt. Jasodia's husband, and that therefore there was a consent on the part of the person in whom the property had become vested on her death. The learned Judge has also assumed in favour of the defendants and this consent of the reversioners will estop them from ousting Jagannath and from taking possession from his vendees, the present defendants, but has held that consent cannot confer perfect title on Jagannath and his vendees so long as the full period of 12 years has not expired.

In appeal before us it is contended that inasmuch as the reversioners who became entitled to the estate are estopped from recovering possession of the property from Jagannath and his transferee, and the heirs who would come after them would have to claim through them, the defendants had acquired an indefeasible title which is by no means liable to be defeated and that inasmuch as they are in possession in the capacity of proprietors they can defeat the claim of the plaintiff. Great reliance is placed on the Full Bench case of *Fateh Singh* v. *Rukmini Ramanji Maharaj* (1)

In the case before the Full Bench there was a registered deed of transfer by the widow in her lifetime, but the consent had been given by the reversioners before they had become entitled to the estate. In the present case the consent was given after such title had accrued, but there had never been any deed of gift by the lady at all. Without deciding that the consent of Ramadhin and Gopi would operate as an estoppel against them and their representatives, we may for the purposes of this appeal assume that it would so operate. In this view it is unnecessary for us to examine whether this consent was for consideration or not. But it is clear to us that no interest in immovable property can validly pass from

(1) A. I. R. 1923 All. 387=45 All. 339 (F.B.).

one person to another in the eye of the law without there being a registered document of transfer. Under S. 123, T. P. Act, a gift can only be effected by means of a document duly registered. In the absence of such document, the proprietary interest in the property could not have passed from Mt. Jasodia to Jagannath or from Ramadhin and Gopi to Jagannath. Even if Ramadhin and Gopi or their heirs be estopped from claiming the possession of the property it is impossible to hold that proprietary title has actually become vested in Jagannath or his transferee.

For a person to become a cosharer under the Agra Pre-emption Act it is necessary under S. 4, sub-Cl. (1) that he should be entitled as proprietor to a share in the mahal. A right short of a proprietary title, e. g., that of a lessee or mortgagee, will not do. A person in adverse possession without actual title cannot be said to be entitled as proprietor to the property in his possession so long as his title has not matured by prescription. We think that the expression "indefeasible interest" in S. 20 also refers to full proprietary title which is not liable to be defeated. So long as proprietary title has not been acquired the defendant cannot successfully resist a claim by a cosharer for pre-emption. Estoppel against the heirs is one thing and acquisition of title as proprietor is another. And of course the word interest cannot include an interest less than a proprietary interest.

The Court below has held that the agreement for mutation of names in favour of Jagannath in the revenue Court was not in the nature of a family arrangement which would confer title on Jagannath. The application itself does not indicate that there had previously been any such family settlement. Nor is it clear that there was any bona fide dispute, nor could Jagannath, the son-in-law of Mt. Jasodia, be treated as a member of the family of Ramadhin and Gopi. The plea of a family settlement also was not raised in the written statement. We are, therefore, unable to hold that there was any such family settlement as, even in the absence of a registered document, could confer title on Jagannath. The result therefore is that the defendants cannot resist the plaintiff's claim on the basis of the alleged oral gift made to their vendor Jagannath

Under the gift of 15th November 1920, the defendants have acquired a share in patti No. 10 in mahal Mustaqil only. The shares sold are situated in khewats Nos. 2 and 7 which are in patti Sheo Din and patti Kalu respectively. According to the khewat, mahal Mustaqil is divided into several bahris, each bahri being subdivided into pattis and each patti into several khewats. Khewat No. 1 is in patti Sukhnandan. Khewats Nos. 2 and 3 are in patti Sheo Din. The areas of the two pattis are totalled separately and then the two are added together to make up bahri Gur Bakhsh Singh. The same process is followed as regards other bahris. It is clear to us, therefore, that bahri is a sub-division of the mahal very much like a thok, which is found in eastern districts. The plaintiff is undoubtedly a cosharer in bahri Gur Bakhsh in which khewat No. 1 is situated. The defendants are not cosharers in this bahri. The plaintiff accordingly has preference under S. 12, sub-Cl. (3).

As regards khewat No. 7 which is situated in patti Kalu, we find that it is a part of another bahri called bahri Sheo Shankar and khewat No. 10 in which the defendants had become cosharers is situated in the same bahri. As regards this khewat, therefore, the plaintiff cannot have preference as against the defendants. The learned Subordinate Judge has accordingly dismissed the claim with regard to this last mentioned khewat. In our opinion the view taken by the Court below was correct and the decrees are right. Both the appeals are accordingly dismissed with costs.

D.D. *Appeals dismissed.*

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* A. I. R. 1929 Allahabad 302

BANERJI AND KING, JJ.

Niranjan Prasad — Plaintiff—Appellant.

v.

Behari Lal and *others*—Defendants—Respondents.

Second Appeal No. 312 of 1926, Decided on 28th January 1929, against decree of Addl. Dist. Judge, Aligarh, D/- 23rd December 1925.

(a) Religious endowment—Sons appointed managers—Practically whole income given to sons as managers—No fixed amount allo-

cated for worship—Very little effect given to the endowment—Endowment is illusory.

A dedication under which the sons of the dedicator were the superintendents and were to take practically whole income of the endowed property as managers and no fixed amount was laid down for being spent upon the purposes of worship etc., but the superintendents were given complete discretion to spend whatever they thought fit and it was found that the managers did not keep any accounts whatever of the income of the endowed property and the only way in which effect could be said to have been given to the endowment was that the superintendents executed leases of the property in the name of the God.

Held : that the endowment was purely illusory or colourable. The testator's intention was to preserve the property in his family and to let his two sons and their descendants enjoy the income of the property without having the power of alienation : 42 *All.* 395 (*F.B.*), *Foll.* [P 304 C 1]

*** (b) Limitation Act, Art. 127—Suit by minor.**

A suit by a member to enforce a right to share in joint family property is not barred if brought within 12 years of his attaining majority. At the most it can be held that he became aware of his exclusion from the date of his attaining majority. [P 305 C 1]

Shiam Krishna Dar—for Appellant.

U. S. Bajpai, Iqbal Ahmad and *Mukhtar Ahmad*—for Respondents.

Judgment.—This was a suit for recovery of separate possession of a one-third share in certain house property and moveable property. The property originally belonged to Chote Lal the common ancestor of the parties. The pedigree showing the relationship between the parties will be found at p. 17. The plaintiff's case was that the parties and Chhote Lal were members of a joint family and that the property in suit was joint family property. After Chhote Lal's death the plaintiff was maintained by Behari Lal who was the manager of the joint family but in 1924 the defendants refused to give the plaintiff some money and the plaintiff was accordingly compelled to bring this suit for possession of his separate share. The principal defences were that the family was not joint but that the plaintiff's father had separated from the other members of the family before his death in 1898 and the plaintiff himself had been brought up by his father-in-law.

It was further pleaded that the property in suit was the self-acquired property of Chhote Lal excepting item No. 2 which was the self-acquired property of Behari Lal, defendant 1. The defendants set up a will alleged to have been executed by Chhote Lal on 11th October 1904 by which he had devised items 6 and 7 to Lakhpat Rai and Behari Lal and items 1, 3, 4 and 5 had been dedicated in favour of a family idol, namely, Gangaji. The plaintiff replied that the will was a forgery and that in any case the dedication in favour of the idol was invalid. The trial Court decreed the plaintiff's claim for all the property in suit excepting item 2 which was held to be Behari Lal's self-acquired property.

The lower appellate Court found that the family had remained joint even after the death of Chhote Lal. As to the will executed by Chhote Lal in 1904 the Court below has found that it was genuine. The property in suit was found to be Chhote Lal's self-acquired property which he was entitled to dispose of by will. As regards the dedication in favour of the idol the Court below found that Chhote Lal had clearly intended to make the dedication and that effect should be given to his intention. The result was that the Court below allowed the appeal and dismissed the suit. In this Court the finding that the will executed by Chhote Lal was genuine is not challenged. As regards the finding that the property in suit was the self-acquired property of Chhote Lal we see no reason to differ from the finding of the Court below. It has been expressly held that there was no presumption that the property acquired by Chhote Lal was joint family property. We hold, therefore, that Chhote Lal was competent to dispose of the property by will.

The principal question which we have to determine in this appeal is whether the dedication of the property in favour of the idol was valid. Chhote Lal's property which he disposed of in his will consisted of six items of house property which was not bringing in an income of more than about Rs. 15 or Rs. 16. Out of this Chhote Lal purported to dedicate items 1, 3, 4 and 5 to the idol Gangaji. There is no express finding as to the income of the property dedicated but it appears to be about Rs. 11 per mensem.

Chhote Lal undoubtedly states that he has earnestly and in good faith dedicated to Gangaji Maharani the property stated in order that management in respect thereof might continue till Doomsday.

He also lays down in his will that his two sons, Behari Lal and Lakhpat Rai should be the managers of the property dedicated and that they should see that the *rag, bhog and utsav* of the idol is in no way neglected. The testator stated that both the sons should, after considering themselves to be the superintendents and managers of the property, jointly spend as much of the income of their own authority from the rent of the property as they think proper towards the *rag, bhog and utsav*, etc. He further provides that each of the managers or superintendents shall have a right to get Rs. 5 per mensem as remuneration from the endowed property and that if the income of the property expands then the superintendents will be entitled to get a proportionate increase in their salary.

It would be seen that on the face of it there could be very little income available for the purposes of the idol. The income of the endowed property would only be about Rs. 11 per mensem and the two superintendents were expressly authorized to appropriate to themselves Rs. 10 per mensem. No fixed amount is laid down for being spent upon the purposes of worship etc., but the superintendents are given complete discretion to spend whatever they think fit.

It appears that the managers have not kept any accounts whatever of the income of the endowed property. The only way in which effect is said to have been given to the endowment is that the superintendents have executed leases of the property in the name of Gangaji. We are not satisfied that any expenditure whatever has been incurred for the purposes of the worship etc.: of the idol and in our opinion the endowment is purely illusory or colourable. The testator's intention was to preserve the property in his family and to let his two sons and their descendants enjoy the income of the property without having the power of alienation.

The facts of the case are very similar to those dealt with in the Full Bench ruling of the Allahabad High Court in the case of *Sri Thakurji* v. *Sukhdeo Singh* (1). In that case also there was a colourable endowment of property in favour of an idol but it was found that no attempt had been made to obtain mutation of names in favour of the idol and that no accounts were forthcoming relating to the administration of the property and that the expenditure on the idol did not amount to more than 1/10 of the income It was held by the Full Bench, that under these circumstances, there had been no real dedication of the property to religious purposes but only an attempt to create a perpetuity in favour of the descendants of the testator's daughter. We are bound by the decision of this Full Bench and we think that the principles laid down in that decision are fully applicable to the facts of the present case. We find that there has been no real dedication of the property to religious purposes but only an attempt to create a perpetuity in favour of the two sons of the testator It has been argued by the learned advocate for the respondents that even if the dedication be held illusory and inoperative nevertheless the will should be construed as giving proprietary interests to the two sons named in the will as superintendents of the dedicated property. The argument is that the testator intend that these two sons should get the benefit of the property and that effect should be given to his intention.

We are unable to accept this contention. The plaintiff is clearly an heir-at-law and he is entitled to a share in the property unless there is a valid bequest of it in favour of other persons. In the present case we have found that the dedication in favour of the idol is invalid. We are unable to construe the will as giving a proprietary interest to the two sons who were named as superintendents. Clearly the testator never purported to give those two sons proprietary rights' and we hold that there is nothing in the will which could defeat the claim of the plaintiff. as heir-at-law, to recover his share.

It has further been argued by the learned advocate for the respendents that the plaintiff's suit was barred by time. Chhote Lal died in 1904 and it is argued that the plaintiff has been excluded from his share in the property in suit from the date of Chhote Lal's death. The plaintiff was a minor at that time but he should have instituted his suit within three years of attaining majority and as he did not do so, the suit not having been instituted until 26th May 1924, it

(1) [1920] 42 All. 395=58 I.C. 583=18 A.L.J. 390 (F.B.).

is contended that the suit is barred by time. We think there is no force in this argument. We have held that the dedication in favour of the idol is invalid and the property which the will purports to dedicate must be held to be intestate property. In the hands of Chhote Lal it was self-acquired property but in the hands of his sons and grandsons it is ancestral property. The article of limitation applicable to the suit would be Art. 127 which gives a period of 12 years for enforcing a right to a share in joint family property from the time when the exclusion becomes known to the plaintiff. The plaintiff did not attain majority until about eight years before the institution of the suit and even if it be held that he became aware of his exclusion from the date of his attaining majority the suit is still clearly within time.

As regards item 2 the trial Court clearly found that this was the self-acquired property of Behari Lal, and the lower appellate Court has not disturbed this finding. As regards items 6 and 7 they have been bequeathed by Chhote Lal to the defendants and there is no reason for holding the bequest invalid. The result is that we allow the appeal in respect of items 1, 3, 4 and 5 and dismiss the appeal is respect of the remaining property. We accordingly pass a preliminary decree declaring the right of the plaintiff to a 1/3 share in items 1, 3, 4 as specified in the plaint. Parties will bear their own costs throughout up to this stage.

D.D. *Appeal partly allowed.*

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* A. I. R. 1929 Allahabad 305

ASHWORTH, J.

Jai Nandan Tewari—Defendant—Appellant.

v.

Umrao Koeri and *another*—Plaintiffs—Respondents.

Second Appeal No. 1099 of 1927, Decided on 1st February 1929, against decree of Sub-Judge, Ghazipur.

*** (a) Mortgage—Suit for redeeming usufructuary mortgage — Plaintiff alleging mortgage to be under two deeds—Admission of defendant that property is held by him as mortgagee under 12 mortgages—Court can allow plaintiff to succeed on defendant's admission—T. P. Act, S. 60.**

When in the case of usufructuary mortgage a plaintiff sues on the allegation that the property was mortgaged under two mortgages of which he gives the terms from hearsay and the defendant-mortgagee admits that he holds the property as mortgagee but under 12 mortgages, the Court is entitled to allow the plaintiff to succeed upon the admission of the defendant even though his plaint set forth mortgages different in number and in other respects: 14 *C. L. J.* 615, *Dist.*

[P 305 C 2; P 306 C 1]

(b) Evidence Act, S. 115—Usufructuary mortgage.

A usufructuary mortgagee cannot deny the title of the mortgagor and set up adverse possession unless he actually leaves the holding and enters under a different status.

[P 306 C 1]

A. P. Pandey—for Appellant.

U. S. Bajpai and *Narain Misra*—for Respondents.

Judgment.—These two appeals arise out of two redemption suits between the same parties. The suits were dismissed by the trial Court on the ground that the plaintiffs had not proved the two mortgages set up. The lower appellate Court decreed the suit on the ground that although the two mortgages set up were not proved, the defendant admitted that the whole property was mortgaged under 12, and not two mortgage-deeds, of approximately the same date. The mortgagee now appeals substantially on the ground that the plaintiffs were not entitled to succeed on different mortgages to those set up by them.

There was also a question in the lower Courts of the inability of the plaintiffs to prove that they were the successors-in-interest of the original mortgagors. The lower appellate Court found that one of them was a successor-in-interest of one of the mortgagors, and this finding of fact cannot be impugned in second appeal as admitted by the appellant's counsel.

The only question that arises is whether, when in the case of usufructuary mortgage a plaintiff sues on the allegation that the property was mortgaged under two mortgages of which he gives the terms from hearsay and the defendant-mortgagee admits that he holds the property as mortgagee but under 12 mortgages, the Court is entitled to allow the plaintiff to succeed upon the admission of the defendant. I have been shown certain decisions e. g., *Sahdeo Ojha* v. *Lachmina Kuar* (1), to the effect that where a plaintiff sues on a certain mort-

(1) [1916] 14 A. L. J. 615=34 I. C. 207.

gage in respect of the land, the admission by the defendant of the different mortgage will not entitle the plaintiff to succeed. But in these cases what the plaintiffs attempted to sue on was an original mortgage. What the defendant admitted were subsequent mortgages. These cases have no bearing on a case like this where the admission of the defendant is as to the original mortgage. I hold that a Court is entitled to allow the plaintiff to sue on mortgages admitted by the defendant even though his plaint set forth mortgages different in number and in other respects. Another question that was pleaded half-hearted by the appellant's counsel was that the status of the mortgagees had changed from that of mortgagees to that of absolute owners by reason of a compromise between the zamindar as paramount owner and the mortgagees. What is mortgaged in the suits are plots forming tenancy holding. The zamindar sued the mortgagees to recover possession on the ground that their mortgagors had left the village. The mortgagees compromised, and it was agreed that the zamindar should accept the mortgagees as tenants-in-chief. It is well-established that a mortgagee cannot deny the title of his mortgagor and set up adverse possession unless he actually leaves the holding and re-enters under a different status.

For the above reasons, I dismiss these appeals with costs.

R.D. *Appeals dismissed.*

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* A. I. R. 1929 Allahabad 306

MUKERJI AND NIAMATULLAH, JJ.

Ram Charan and *another*—Defendants—Appellants.

v.

Tulshi Ram and *another*—Plaintiffs—Respondents.

Second Appeal No. 245 of 1926, Decided on 1st February 1929, against decree of Dist. Judge, Cawnpore, D/- 2nd November 1925.

*** Civil P. C., O. 22, R. 9—Suit by alleged donor for cancellation of gift—Donor dying and suit abating under R. 9—Next suit by his legatee for possession against the alleged donees is not barred—O. 2, R. 2.**

Where the former suit is one for pure declaration and the second suit is for possession it must be taken that the two causes of action are different. [P 307 C 2]

One *D*, by will bequeathed his entire property to *A*. In his lifetime *D* brought a suit to obtain the cancellation of a deed of gift alleged to have been executed by himself in favour of one *B*. The ground on which that suit was brought was that *D* never executed the document, that by threats *B* had succeeded in obtaining his thumb-impression on a piece of blank paper and that by some stratagem and collusion with the Sub-Registrar, his admission to the execution of the deed of gift had been recorded as made by him. *D* having died during the pendency of the suit and his legal representative not having been brought on the record the suit was declared to have abated. *A* then sold the property in suit to the plaintiff and the plaintiff instituted the suit for recovery of possession. It was contended that on *D's* death his suit for the cancellation of the gift having abated, a second suit namely the present suit was not maintainable, in view of O. 22, R. 9.

Held : that the causes of action in the two suits were different and the second suit was not barred. [P 306 C 2 ; P 307 C 2]

Kailas Nath Katju—for Appellants.

B. E. O'Conor and *N. P. Asthana*—for Respondents.

Mukerji, J.—The first two defendants in the suit are the appellants in this second appeal. One Durga Prasad died possessed of certain properties moveable and immovable. One of his houses is the bone of contention in this litigation. Durga Prasad died in June 1921. Before his death on 2nd April 1920 he executed a will which was subsequently registered on 5th May 1920. By this will he bequeathed his entire property in favour of his cousin defendant 3, Mt. Sunder Kuar. In his lifetime Durga Prasad brought a suit on 24th August 1920 to obtain the cancellation of a deed of gift alleged to have been executed by himself in favour of the present appellants Ram Charan and Ram Sarup who are brothers and are distant agnates of Durga Prasad. The ground on which that suit was brought was that Durga Prasad never executed the document, that by threats the two defendants in the suit had succeeded in obtaining his thumb-impression on a piece of blank paper and that by some stratagem and collusion with the Sub-Registrar, his admission to the execution of the deed of gift had been recorded as made by him on 5th May 1920 when he appeared before the Sub-Registrar. Durga Prasad having died during the pendency of the suit and his legal representative not having been brought on the record the suit was declared to have abated. Sunder Kuar sold the property in suit to

the plaintiff and the plaintiff instituted the suit out of which this appeal has arisen for recovery of possession.

The defence in the suit was that Durga Prasad did execute a valid gift in favour of the defendants and put them in possession. The defendants challenged the validity of the will set up by the plaintiff in favour of Sunder Kuar. The learned District Judge found that the will was good and the gift was never executed by Durga Prasad. In this Court it has been contended that on the death of Durga Prasad his suit for the cancellation of the gift having abated, a second suit namely the present suit out of which this appeal has arisen, was not maintainable, in view of the enactment contained in the Civil Procedure Code O. 22, R. 9 O. 22, R. 9, Civil P C., lays down as follows :

"Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action."

The question that is before us, therefore, is

"whether the present suit has been brought on the same cause of action as the earlier suit brought by Durga Prasad."

It must be assumed that the present suit is by a person who represents Durga Prasad. The earlier suit was brought to obtain the cancellation of the alleged deed of gift and the suit was in the nature of a declaratory one. It is true that the defendants in the earlier suit did plead that they were in possession and had been put in possession by virtue of the deed of gift by Durga Prasad himself. The question of possession has not been gone into in the present case. It having been held, in the present litigation, that Durga Prasad never executed the document and never meant to execute it, it must be assumed, as a corollary, that Durga Prasad never put the appellants into possession in order to give effect to the gift. It follows that the defendant-appellants obtained possession in spite of Durga Prasad's attempt to obtain a declaration that the deed of gift was not binding on him or his estate. It further follows that the defendants obtained possession either in the teeth of Durga Prasad's opposition or on his death. The question then would be, whether the fact that the defendants obtained possession would alter the original cause of action or whether it should be taken that cause of action for the two suits are one and the same.

In order to see whether the causes of action in the two suits are one and the same, we must certainly see whether the cause of action is substantially the same. A mere change in the relief will not alter the decision of the Court. Where, however, the former suit is one for pure declaration and the second suit is for possession, I am of opinion it must be taken that the the two causes of action are different. If the defendants (the appellants) had not taken possession, the fact that the earlier suit was declared to have abated would not have made any difference. It would not have been necessary either for Sunder Kuar or for her transferee to bring the present suit, which is for possession. It is clear therefore that the declaration that the earlier suit abated would not have made the present suit at all necessary. The cause of action therefore for the present suit is materially different from the cause of action for the earlier suit. For these reasons I would dismiss the appeal.

Niamatullah, J.—I agree with my learned colleague in the order dismissing the appeal and would add a few words in support of the conclusion arrived at by him. O. 22, R. 9, Civil P. C., cannot bar the plaintiff's action unless their cause of action for the present suit is identical in whole or in part with the cause of action in the earlier suit. The expression "cause of action" has been defined to mean:

"every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court. *Salima Bibi* v. *Shaik Muhammad* (1)."

All that the plaintiff has to establish in the present case is the ownership of Durga Prasad in respect of the house in dispute, the will in favour of defendant 3 and the defendants' wrongful possession of the house in dispute. Unless the gift relied on by defendants 1 and 2 is an instrument of a voidable character, it is not necessary for the plaintfff to have it set aside before establishing the title of Durga Prasad and of defendant 3 in respect of the house in question. It has been held in a long string of cases that an instrument which is inoperative from its inception confers no title upon the transferee thereunder and need not be set aside by the alleged executant of

(1) [1896] 18 All. 131=(1896) A. W. N. 2.

such instrument. The latter can treat it as a nullity and a waste paper and can always assert his ownership: see for instance, *Petherpermal Chetty* v. *Muniandy Servai* (2) and *Jagardeo* v. *Phuljhari* (3). Having regard to the finding arrived at by the learned District Judge to the effect that Durga Prasad never intended to convey the house in dispute to defendants 1 and 2, that he never intended to execute a deed of gift and that he was unaware of the contents of the deed of gift signed by him and now relied on by defendants 1 and 2, it is clear to my mind that no conveyance of title was made by the alleged gift in favour of defendants 1 and 2. A gift has been defined by S. 122, T. P. Act, in these terms:

"Gift is the transfer of certain existing moveable or immovable property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee."

In view of the finding of the learned District Judge already referred to, it cannot be said that Durga Prasad voluntarily transferred or even intended to transfer the house to defendants 1 and 2. The alleged transaction, therefore, was not a gift and the so-called instrument of gift was inoperative from its inception and, therefore, it was not incumbent on Durga Prasad to institute a suit to obtain cancellation thereof within three years provided for by Art. 91, Lim. Act. It was optional with him to institute a suit under S. 39, Specific Relief Act, to obtain a declaration of the invalidity and the inoperative character of the deed of gift if he so desired and if he apprehended that if left unchallenged, it might prejudice his interests. Such was the character of the earlier suit which abated. If Durga Prasad had subsequently instituted a suit of the same character and for the same relief, the contention that such second suit was barred by the provisions of O. 22, R. 9, would probably have been well-founded. The suit out of which the present appeal has arisen is based on a different cause of action and has a different object in view. The immediate desire of the plaintiff is to obtain possession of the house which is wrongfully withheld by the defendant who, as already shown, has no title whatever. In other words, the scope of the present suit is to obtain possession from a rank tresspasser. No reference to the deed of gift was necessary in the plaint as part of the plaintiffs' cause of action. It has probably been made to anticipate the defence likely to be raised on behalf of defendants 1 and 2. Even if it were not so, it should be regarded as a mere surplusage, not being necessary for the plaintiff to allege in order to obtain the relief he is praying for.

As my learned brother has shown, possession of defendants 1 and 2 is not referable to the deed of gift but must have been obtained by them apart from it, and if it is right to hold that the defendants have no title under the gift, their possession is unwarranted and gave a cause of action to the plaintiffs if withheld from them when they demanded it. The order passed by the Magistrate under S. 145, Criminal P, C. made it necessary for the plaintiffs to seek a declaration of their title and the consequential relief of possession. For these additional reasons I concur with my learned colleague in dismissing the appeal with costs.

D.D. *Appeal dismissed.*

(2) [1908] 35 Cal. 551 = 35 I. A. 98=12 C. W. N. 562 (P.C.).

(3) [1908] 30 All. 375=5 A. L. J. 421=(1908) A. W. N. 156.

A. I. R. 1929 Allahabad 308

MUKERJI AND NIAMATULLAH, JJ.

Sah Ramchand—Plaintiff—Appellant.

v.

Panna Lal and *another*—Defendants—Respondents.

Second Appeal No. 941 of 1926, Decided on 18th February 1929, from a decree of Dist. Judge, Agra.

Court-fees Act, S. 7—Plaintiff can always effect saving of Court-fee by reducing his claim if otherwise permissible.

It is always open to plaintiff or an appellant to reduce his claim and effect a saving of Court-fee if otherwise permissible. In so far as he submits to the decree appealed against, it becomes final, and the appeal is limited to the amount in contest on which alone Court-fee need be paid. [P.308 C 2]

Iqbal Ahmad and *U. S. Bajpai*—for Appellant.

N. P. Asthana—for Respondents.

Judgment.—This is an appeal from the decree dated 17th February 1926 passed by the learned District Judge, Agra, purporting to dismiss the plaintiff-

appellant's appeal before him for non-payment of Court-fee within a time granted for deficiency therein being made good.

The plaintiff-appellant brought the suit out of which the present appeal has arisen for redemption of a mortgage without payment of amount, or in the alternative on payment of Rs. 3,661. The Court of first instance decreed the claim on payment of Rs. 27,000 within the usual period of grace. The plaintiff appealed to the District Judge of Agra valuing his appeal at Rs. 3,203-10-0. By an order, dated 7th January 1926, the learned District Judge ruled that the Court-fee payable on appeal should be calculated on Rs. 27,000, which was held to be the value of the appeal before him. Three weeks' time was allowed to the plaintiff to make good the deficiency. An extension of two weeks was allowed subsequently. Before the expiry of the period within which deficiency in the Court-fee should have been made good an application was presented on behalf of the plaintiff-appellant on 9th February 1926 which declared that out of Rs. 27,000 found to be due on the mortgage, the plaintiff withdrew his contest to the extent of Rs. 12,894, leaving Rs. 14,106 to which the appeal was confined. The Court-fee on this sum amounted to Rs. 610 of which Rs. 165 had already been paid and Court-fee stamps of the value of the remaining Rs. 445 were put in. The application prayed :

" that the valuation of the appeal is fixed at Rs. 14,106, and notice be now issued to the opposite party."

The learned District Judge did not give effect to the prayer contained in the application already referred to and dismissed the appeal by an order which runs thus :

" I do not see any reason to revise the order of the 7th January 1926 and the reasons given appear unsound. As the period allowed for depositing the extra Court-fee has elapsed (on 11th February 1926) and the extra Court-fee has not been deposited, I dismiss the appeal in default of compliance with the order."

We are unable to agree with the learned District Judge that the plaintiff's appllcation dated 9th February 1926 was one praying for reconsideration of the order, dated 7th January 1926. In substance it was one seeking to amend the valuation of appeal by foregoing part of the claim made in the original memorandum of appeal and by confining it to a lesser amount, viz., Rs. 14,106. It is always open to a plaintiff or an appellant to reduce his claim and effect a saving of Court-fee if otherwise permissible. In so far as he submits to the decree appealed against, it becomes final, and the appeal is limited to the amount in contest on which alone Court-fee need be paid. The prayer in the concluding part of the application dated 9th February 1926 :

" that the valuation of the appeal be fixed at Rs. 14,106 "

clearly shows what the object of the plaintiff-appellant was. He would have been well-advised if consequential amendment in the memorandum of appeal were prayed for, but the substance of what he desired is clearly borne out by the application.

Having regard to the nature of the application, dated 9th February 1926 above indicated, and to the fact that the requsite Court-fee was paid within the five weeks allowed by the order, dated 7th January 1926, we are of opinion that the learned District Judge was not justified in dismissing the appeal on the ground on which he dismissed it.

We, therefore, set aside the decree of the learned District Judge appealed against and direct that the plaintiff-appellant's appeal before him be heard and disposed of on the merits after the formal amendment of the memorandum of appeal is made by him.

There is nothing to show that the respondents opposed the application, dated 9th February 1926 before the learned District Judge, though they contested the appeal before us. The appellant will, under the circumstances of the case, receive half of his costs in this Court from the respondents. The costs in the Court below will abide the result.

R.D. *Decree set aside.*

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* A. I. R. 1929 Allahabad 309

BANERJI AND KING, JJ.

Naubat Lal and *others*—Defendants—Appellants.

v.

B. Mahadeo Prasad Singh and *others*—Plaintiffs—Respondents.

First Appeal No. 76 of 1926, Decided on 24th January 1929, from decree of Addl. Sub-Judge, Gorakhpur, D/- 22nd December 1925.

*** (a) Civil P. C., O. 34, R. 5—Sale effected in execution of mortgage decree—Deposit by purchaser of equity of redemption under O. 21, R. 89—Right of redemption does not come to an end—Suit to recover the amount from mortgagor is not covered by Limitation Act, Art. 61.**

Until a sale is confirmed it does not transfer the interest of the judgment-debtor to the auction-purchaser and, therefore, a deposit under O. 21, R. 89 by a purchaser of an equity of redemption after sale has been effected in execution of a mortgage-decree saves the right of redemption from coming to an end. A suit therefore to recover such amount deposited from the mortgagors is not covered by Art. 61, Lim. Act: 42 *All.* 517, *Rel. on.* [P 311 C 1]

(b) Transfer of Property Act, S. 81—Subsequent mortgagee purchasing portion of mortgage security—He cannot throw whole burden of prior mortgage on mortgagor—He is only entitled to contribution.

A subsequent mortgagee of a portion of mortgage security purchasing under his decree is not as such entitled to set up the plea that the property in the hands of mortgagor alone is responsible for the payment of the full claim of a prior mortgagee under a prior mortgage, but the subsequent mortgagee purchaser and the mortgagor must proportionally pay his own: 22 *All.* 284, *Foll.* [P 311 C 1, 2]

(c) Transfer of Property Act, S. 56 — Scope.

Provisions of S. 56 have no application to a case of an auction sale. [P 311 C 2]

P. L. Banerji and *Haribans Sahai*—for Appellants.

Iqbal Ahmad and *Harnandan Prasad*—for Respondents.

Judgment.—This is a defendants' appeal under the following circumstances:

The suit was for possession of certain zamindari property or in the alternative for recovery of a sum of Rs. 8,548-0-6 against a number of persons. The plaintiffs alleged that on 11th September 1894 the ancestors of defendants 1 to 9, who are appellants before us mortgaged 3 as.-1.33 pies in the village Chandpur to one Gokul Prasad. Gokul Prasad obtained a decree on foot of this mortgage and an auction sale in execution of that decree took place on 25th June 1919, when Gokul Prasad brought the property mortgaged. The plaintiffs who were purchasers under money decrees and mortgage decrees of 1a.-7 33 pies in the village, deposited the whole of the decretal amount which was Rs. 4519-12-4 on 17th July 1919 under O. 21, R 89, Civil P. C., and got the sale of 25th June 1919 set aside. They in the present suit claim possession over the property which is not in their possession and hypothecated in the deed of 11th September 1874 or the amount of money paid therein together with interest at 12 per cent from the date of payment. Defendants 1 to 9 pleaded that the plaintiffs' suit was barred by limitation and that the plaintiffs knew of the prior charge and hence they were liable to pay the same and the defendants were not bound to pay it. They also pleaded that the interest was excessive. The learned Subordinate Judge repelled the contention that the claim was barred by limitation and holding that as defendants 1 to 9 were heirs of the original mortgagors, they could not raise the question of rateable contribution and granted a decree to the plaintiffs for the amount deposited together with interest at 6 per cent, holding that that sum was a charge on the property in the hands of the defendants.

The defendants have come in appeal in this Court and it is contended by the learned advocate for the appellants that the plaintiffs' claim was barred by Art. 61, Lim. Act, and that the property in the hands of the appellants was liable rateably to the claim of the plaintiffs.

With regard to the first point, the case for the defendants is that the payment made by the plaintiffs was not a payment made for redemption of any mortgage and that the mortgage subsisted only till the date of the actual sale of the property. The learned advocate contends that under the Transfer of Property Act, S. 89, the right of redemption was barred on the passing of a final decree, but under O. 34, R. 5 the mortgage subsisted only till the date of the actual sale and that the sale having taken place before the date of payment made by the plaintiffs, such payment could not be treated as a redemption of the mortgage. In support of his argument, reference is made to a passage in the case of *Shah Mehdi Hasan* v. *Ismail Hasan* (1) at p. 518:

"Under the present Civil Procedure Code, which repeals S. 89, the mere passing of a final decree does not extinguish the mortgagor's right until a sale has actually taken place in pursuance of the decree."

It must be stated that in that case the point raised was different and that as a matter of fact no sale had actually taken place on the material date. In the present case no doubt, the auction sale

(1) [1920] 42 All. 517=56 I. C. 172=18 A. L. J. 622.

had been held and the property had been purchased by the decree-holders. A reference to R. 92, O. 21, shows that a sale cannot become absolute until it is confirmed by the Court and in fact when a deposit is made under R. 89, the Court makes an order setting aside the sale. It is only when a sale has become absolute that the Court grants a certificate specifying the property sold and that certificate bears the date on which the sale became absolute. We are of opinion that until the sale is confirmed it does not transfer the interest of the judgment-debtor to the auction-purchaser, and where in a case that interest is never transferred by the order of a Court, it cannot be said that the right of redemption had come to an end. In fact the payment made in this case was made by a person who was owner of the property and interested in it as a purchaser of the equity of redemption R. 89 had not on the date of this sale been amended by the rule-making powers of this Court to include the judgment-debtor and we cannot accept the contention that the payment made was not made by the mortgagor or his transferee but as a judgment-debtor. We are, therefore, of opinion that the plaintiffs' claim is not barred by limitation and that Art. 61, Sch. 2, Lim. Act, does not apply to the facts of the present case.

As regards the second point, we are of opinion that the contention of the learned advocate for the appellants must be accepted that the property in the hands of the plaintiffs and the defendant-appellants must contribute rateably to the claim of Gokul Prasad. The learned advocate for the respondents has urged that in view of the provisions of S. 81, T. P. Act, his client being a subsequent mortgagee and purchaser under his decree was entitled to set up the plea that the property in the hands of defendants 1 to 9 was responsible for the payment of the claim of Gokul Prasad under a prior mortgage. One of the essential points for putting forward the above plea is that the subsequent encumbrancer does not know of the existence of the prior encumbrances and as there are no materials on the record of the case, it is urged that an opportunity should be given to the plaintiffs to produce the original mortgage in his favour and to prove that he had no notice of the prior mortgage. We cannot permit fresh evidence to be adduced at this stage. It was for the plaintiffs to make out the case that is now attempted to be made out by their learned advocate in the plaint that he filed in the case. The plaint is so carelessly drawn up that the learned advocate himself cannot see how the plaintiffs were entitled to the first relief, nor can the defendants clearly set forward in their written statement the plea that the plaintiffs knew of the prior mortgage and unless the original mortgage deed is laid before the Court, no Court can decide what was the contract entered into by the plaintiffs and the appellants when the mortgage in favour of the plaintiffs was executed.

Mr. Iqbal Ahmad further contends that under the principles underlying the provisions of S. 56, T. P. Act, he was entitled to plead that the appellants should pay up the whole of the mortgage of Gokul Prasad inasmuch as the plaintiffs were second mortgagees. The provisions of S. 56, T. P. Act, can have no application to a case of an auction-sale and in the absence of facts even the principles of that section cannot be applied to the present case. The property in the hands of the plaintiffs and the defendant-appellants was liable to the extent of Rs. 4,519-12-4. In the case of *Bisheshur Dial* v. *Ram Sarup* (2), (at p. 289) it has been laid down that :

"When several parcels of property are mortgaged to secure one debt, every parcel is liable to the mortgagee for the whole amount of the debt : but as between themselves each parcel is liable, in the absence of a contract to the contrary, to contribute to the debt in the proportion which its value bears to the value of the whole property comprized in the mortgage ..... The primary liability on each of several properties included in a mortgage being thus a proportionate share of the mortgage debt, every person who purchases one of those properties incurs a liability to that extent ..... If any such purchaser has to discharge the whole of the mortgage debt, he is entitled to claim contribution from the owners of the remainder of the mortgaged property."

We are therefore of opinion that the plaintiffs were only entitled to a proportionate share of the money that they paid to the prior mortgagee. It is not denied that the proportion in which the parties are in possession of the property mortgaged under the deed of 11th

(2) [1900] 22 All. 284=(1900) A. W. N. 69 (F.B.).

September 1874 is that the plaintiffs are in possession of 19 and defendants in the possession of 17 pies each. The plaintiffs are therefore liable to that extent for the decree of Gokul Prasad and the defendants are liable in proportion. We modify the decree of the Court below and declare that instead of the sum of Rs. 6,005 we substitute Rs. 2,835. Under O. 34, R. 4, a decree will be prepared for Rs 2,835 with proportionate costs and with pendente lite and future interest at 6 per cent per annum against the defendant-appellants.

The parties will pay and receive costs in proportion to their success and failure in this Court and the Court below. The office will fix a date six months from hence for payment.

P.D./R.K. *Decree modified.*

A. I. R. 1929 Allahabad 312

BANERJI AND KING, JJ.

Habib Bakhsh—Appellant.

v.

Amina Bibi and *others*- -Respondents.

First Appeal No. 42 of 1926, Decided on 23rd January 1929, against decree of Sub-Judge, Jhansi, D/- 2nd November 1925.

Mahomedan Law—Gift of undivided share by one cosharer to another is not invalid.

There is no authority for holding that the gift of an undivided share by one cosharer to another cosharer in the same property is invalid. [P 314 C 2]

Mukhtar Ahmad—for Appellant.

M. *A. Aziz*—for Respondents.

Judgment.—This appeal arises out of a suit for a share in the inheritance of Rahim Bakhsh, the father of the plaintiff. Rahim Bakhsh died on 24th January 1921 leaving a mother, Mt. Mnhammadi, three widows, six sons and two daughters. According to Mahomedan Law the shares would be as follows: The mother, Mt. Muhammadi, would get 1/6 or 56 sihams; The three widows would get 1/8 between them or 14 sihamas each ; the six sons would get 34 sihams each, and the two daughters 17 sihams each ; total 336 sihams. In 1922 one of the widows, Mt. Latifan who had five sons and one daughter, brought a suit No. 24 of 1922, for partition of the share of herself and her children. The other heirs of Rahim Bakhsh were impleaded as defendants. The suit ended in a compromise whereby Latifan and her children obtained 7/16 of the property and the remaining 9/16 went to the other heirs.

The plaintiff, Mt. Amina, has now brought a suit for her share claiming 45 sihams out of 336. She claimed 17 sihams as her own share under Mahomedan Law and 14 sihams as the share of her mother, Mt. Zainab deceased on the allegation that Mt. Zainab had made an oral gift of her whole share in the plaintiff's favour. She also claimed 1-1/3 sihams as heir of Mt. Muhammadi deceased. She further claimed 12-2/3 sihams as her share of the 54 sihams relinquished by Mt. Latifan and her children. On this point we may as well explain at once that in the compromise, which ended the suit instituted by Mt. Latifan and her children, the plaintiffs in that suit got less than they would be entitled to under Mahomedan Law. They got 147 sihams only instead of 201 sihams. There was thus an excess of 54 sihams divisible among the remaining heirs. In this way the plaintiff claimed the excess which appertained to her mother's share and to her own share. The principal defence was that the plaintiff had made a registered deed of gift of her share which she inherited from her father in favour of her brother, Habib Bakhsh, whe is the principal defendant. This document was executed on 2nd March 1922 and purports to make a gift of the 17 sihams inherited from her father to her brother, on condition that her brother should pay her an allowance of Rs. 60 per mensem for her life.

It was also denied that Mt. Zainab had made a gift of her share in the plaintiff's favour. It was also pleaded that Mt. Muhammadi had made a gift on 18th April 1921 transferring her whole share of 56 sihams to Habib Bakhsh in lieu of a maintenance allowance of Rs. 60 per mensem for herself for life and subsequently for her two daughters. It was also pleaded that the plaintiff could not benefit from the excess share obtained by the defendants in Latifan's case because the plaintiff was not a party to the compromise. As regards the alleged deed of gift executed by the plaintiff in favour of her brother the plaintiff set up a clear plea of fraud. She said that she

never executed, to her knowledge, any deed of gift in favour of her brother but that her brother obtained her thumb impression on certain pieces of blank paper and she did on one occasion affix her thumb impression to a document which she believed to be a mukhtarnama, so that her brother should be empowered to act on her behalf in Latifan's suit.

The trial Court found that the plaintiff did in fact knowingly execute the deed of gift and that no fraud or misrepresentation had been practised upon her, but the learned Subordinate Judge found that the document had been executed under undue influence since her brother was in a position to dominate her will and had acted unfairly in persuading her to make a gift of a share of the value of about Rs. 50,000 in return for only Rs. 60 per mensem as maintenance. The Court accordingly held that the plaintiff was not bound by this deed of gift and that she was entitled to the 17 sihams which was her share under the Mahomedan Law. As regards the alleged deed of gift by the plaintiff's mother, Mt. Zainab, this was held to be not proved. The gift by the plaintff's grandmother in favour of Habib Bakhsh was held to be proved. As regards the share of the excess arising from the compromise in favour of the defendants in Latifan's suit the Court below held that the plaintiff could not get any benefit herself from the excess of 54 sihams since she was not a party to the compromise but she was entitled to 1/3 of the excess which came to her mother Mt. Zainab. In the result the learned Subordinate Judge passed a decree for 23-142/177 sihams in the plaintiff's favour.

Both parties have appealed. We first deal with the appeal of the defendant Habib Bakhsh. The only point for our determination in this appeal is whether the deed of gift executed by the plaintiff on 2nd March 1922 is binding upon her.

The original deed of gift has not been produced. We are unable to draw any adverse inference from this fact since the defendant has shown that the deed itself was missing from the house after the plaintiff and her husband left, and he infers that they must have taken it away. The deed was registered and if it was in any way fabricated for the purpose of supporting a false claim it is most unlikely that the defendant would not have produced it. On the plaintiff's own showing it appears tnat she must have affixed her thumb-impression to the document because she admits that she did affix her thumb-impression to a document presented to her by the defendant Habib Bakhsh but she believed that it was only a mukhtarnama and had no suspicion that it was a deed of gift. We have no reason whatever to suspect, therefore, that the original would not have been found to bear the genuine thumb-impression of the plaintiff.

The learned counsel for the appellant has laid stress upon the fact that the plaintiff never set up any plea of undue influence. She never pleaded that her brother exercised his influence unfairly so as to induce her to part with her valuable inheritance in lieu of a small monthly allowance, but she all along contended that a fraud must have been practised upon her and that she never executed any documont which she believed to be a deed of gift. She absolutely denies that the Sub-Registrar ever came to her house or read out any document to her.

On this point we are in agreement with the Court below. The learned Subordinate Judge found that the plaintiff's plea of fraud and misrepresentation was false. The endorsement made by the Sub-Registrar on the occasion of the registration of the deed shows that the contents of the document were fully read over and explained to Mt. Amina who admitted the execution and completion of the document. We are entitled to presume that the facts thus stated are correct. Moreover, the facts are supported by ample oral evidence. We have the evidence of two marginal witnesses who depose that they attested the document after Mt. Amina had executed it and they were also present on the occasion of registration and support the facts mentioned in the endorsement to the effect that the document was read over and explained to the executant who admitted execution. We have also the evidence of two other witnesses who were present on the occasion of the registration and who identified Mt. Amina as the executant in the presence of the Sub-Registrar. We see no reason to disbelieve them.

In our opinion the evidence is overwhelming to the effect that the plaintiff did execute the document and did admit its execution in the presence of the Sub-

Registrar after it had been fully explained to her. We hold that she made the gift willingly and fully understanding the nature and effect of her act. This finding is supported by the written statement dated 6th May 1922, filed on the plaintiff's behalf, in which she clearly admitted execution of the deed of gift. This evidence, however, is not conclusive as the plaintiff's knowledge of this statement is not clearly proved. The Court below has held that the plaintiff is not bound by this deed, in spite of the fact that she admitted execution after it had been read over and explained to her, on the ground that she had no independent advice and her brother was in a position to dominate her will and that he took unfair advantage of her position.

In the first place, we observe that the plaintiff herself never raised the plea of undue influence and that issue did not arise for determination. The plea of undue influence would have been quite inconsistent with the plea of fraud. In the next place, even if we consider the matter upon its merits we see no reason to suppose that the plaintiff was unfairly treated. Her grandmother had executed a similar deed of gift of her share, which was of much greater value in favour of Habib Bakhsh in lieu of a maintenance allowance of Rs. 60 a month only for herself and for her daughters. There is no allegation that the grandmother executed this deed under undue influence and we see no reason to suppose that the plaintiff was not actuated by feelings of family affection in allowing her brother to retain possession of the share of the inheritance to which she was entitled. The property consisted largely of a business of hardware etc : and the business itself would no doubt suffer severely if the stock-in-trade had to be reduced owing to reduction of capital. The business could not be considered free from trading risks, it would be liable to losses as well as to profits and the plaintiff at least obtained a certain income of Rs. 60 per mensem. Although the plaintiff is a pardahnashin lady it is not essential to prove that she had independent advice before she executed the gift. The transaction was not of a complicated nature and she doubtless consulted her mother who was in the same house and who was (according to the plaintiff's own case) devoted to her interests. In considering the question of fraud and undue influence we must also take into consideration the admitted fact that the plaintiff did receive Rs. 60 a month from her brother for about 18 months withot raising any objection. She evidently was content that the terms of the gift should be acted upon. We see no reason for holding that she should not be bound by it We decide this point in the defendant-appellant's favour.

We next turn to the plaintiff's appeal No. 56 of 1926. The first point taken is that the Court below has wrongly held the alleged gift by Mt. Zainab in the plaintiff's favour to be unproved.

On this point regarding the oral gift the only evidence consists of the statement of the plaintiff herself. We agree with the Court below in finding that this is quite insufficient for proving the alleged gift. The next point is that the Court below was wrong in finding that the gift by Mt. Muhammadi in favour of Habib Bukhsh was proved, and even if it were proved then the gift was invalid on the ground that the gift of undivided property "mushaa" cannot form the subject of a valid gift under the Mahomedan Law.

There is no force whatever in the contention that the gift was not proved since it was effected by a registered document and this part of the plea is not pressed. On the question whether a share of undivided property can be made the subject of a valid gift the learned counsel for the appellant has been unable to refer us to any authority for holding that the gift of an undivided share by one cosharer to another cosharer in the same property is invalid. We see no reason to differ from the finding of the Court below on this point. The principle point raised by the learned counsel for the appellant is that the plaintiff is entitled to benefit in proportion to her share, in the excess of 54 sihams to which we have already referred.

In para. 5 of the plaint the plaintiff stated that in the suit brought by Mt. Latifan for her share of the assets of Rahim Bakhsh it was, with the mutual consent of the parties. decided by the Court that the heirs of Mt. Muhammadi, Mt Zainab, Mt. Mahbubi, Habib Bakhsh and Mt Amina plaintiff would get something more than their shares under the Mahomedan Law, i. e., they were jointly given 9/16 share in the estate of Rahim

Bukhsh and defendants 2 and 4 to 9 were declared to be the owners of the remaining 7/16 share. In para. 5 of the written statement of defendant 1 it was admitted that 9/16 was fixed as the share of Habib Bakhsh and others and that 7/16 was fixed as the share of the plaintiffs in that suit. In our opinion this amounts to an admission that the persons mentioned in para. 5 of the plaint were jointly entitled to 9/16 in the assets of Rahim Bakhsh. On this admission the plaintiff is in our opinion entitled to a share in the excess of 54 sihams. Wo construe the plaintiff's deed of gift as conveying to Habib Bakhsh only the plaintiff's legal share, and not her share in the extra 54 sihams which subsequently became divisible among the heirs other than Mt. Latifan and her children. The proportion to which the plaintiff would be entitled works out as follows :

The persons entitled to the excess, and the proportion to which they are entitled would be as follows :

		sihams
Mt. Muhammadi	...	56
" Mahbubi	...	14
" Zainab	...	14
" Habib Bakhsh	...	34
" Amina	...	17
Total	...	135

The plaintiff's share out of the 54 sihams would, therefore, be 17/135 of 54 which comes to 6-4/5. In addition to this she is entitled to 1/3 share of the estate of her mother, Mt. Zainab, which comes to 6-8/15 The total share to which the plaintiff is entitled, therefore, amounts to 13-1/3 sihams.

The result is that we modify the decree of the Court below by ordering that the plaintiff shall get 13-1/3 instead of 23-142/177 sihams out of the property of Rahim Bakhsh. In other respects the decree of the Court below holds good. We further declare that the plaintiff is entitled to Rs. 60 per mensem to be paid by Habib Bukhsh for her lifetime. The parties will receive and pay costs in proportion to their success and failure.

D.D. *Decree modified.*

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* A. I. R. 1929 Allahabad 315

SULAIMAN AND KENDALL, JJ.

Dasami Sahu—Appellant.

v.

Param Shameshwar Uma Bhairabeshwar Ban Lingeshar and *another*—Respondents.

First Appeal No. 87 of 1926, Decided on 24th January 1929, against decree of Sub-Judge, Benares, D/- 23rd December 1925.

(a) Religious endowment—Intention of executant should be seen and should be determined from language of deed, surrounding circumstances and subsequent conduct.

There may be circumstances under which the mere execution and registration of a deed of endowment may not amount to a complete dedication and the proceeding may be merely a nominal one. On the other hand if a valid dedication has once been completed there would be no power left in the donor to revoke it, and no assertion on his part or subsequent conduct contrary to such dedication would have the effect of nullifying it. Not only the language of the document but the surrounding circumstances as well as subsequent conduct may be taken into consideration for dealing whether there was a real intention to dedicate the property. The mere fact that no mutation took place on the strength of a dedication does not necessarily show that the deed was not acted upon: *A. I. R.* 1917 *P. C.* 177, *Foll.* [P 317 C 1, 2]

*** (b) Adverse possession—Religious endowment.**

There can be adverse possession, not only as against the idols but over the idols themselves. [P 318 C 2]

*** (c) Adverse possession—Donor of dedicated property can himself acquire title to it by adverse possession—Religious endowment.**

Adverse possession can be acquired against idols in respect of property dedicated in their favour. The same principle applies whether the adverse possession is exercised by a total stranger or by the donor himself: 32 *Cal.* 129 (*P.C.*), *A. I. R.* 1926 *P.C.* 2, *Appl.*; 37 *Cal.* 885, *Ref.* [P 318 C 2]

A donor executed a deed dedicating his property to an idol making his mother a shebait.

No mutation was effected and the municipal taxes were continued to be paid by the donor. Two years later the donor with his mother revoked the dedication and thereafter the donor treated the property as owner for over 12 years.

Held: that he acquired title by adverse possession. [P 318 C 2]

Piari Lal Banerji—for Appellant.

Ramla Kant Varma and *Ambika Prasad* for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for a declara-

tion that the house in dispute was debutter or trust property and was not alienable. It originally belonged to the ancestor of the defendant Chittaranjan Mukherji and was sold away at auction and purchased by a stranger in 1878. Later on it was transferred by the auction purchaser to Chittaranjan's father and has been held by the family since then. The father of Chittaranjan died when the latter was a minor five years' old. He was brought up by his uncle Niranjan Mukharji who was appointed a certificated guardian. About 1902 Chittaranjan attained majority, but the management and some Government securities, remained in the hands of his uncle Niranjan Mukharji. On 2nd June 1908 a registered deed of release was executed by Chittaranjan in favour of his uncle Niranjan, stating that he had received all the accounts and received back what was due to him. On the same day Chittaranjan executed a deed of endowment dedicating the house in dispute in favour of three family idols and appointing his own mother as the shebait of the said idols. The deed of dedication specifically mentioned that Chittaranjan had ceased to be the owner of the property which had passed to the idols, and that possession had been transferred to his mother who was the shebait. It went on to provide, however, that the donor and his uncle and his heirs would have full power to see to it that the daily worship of the said idols was performed duly and regularly with the income from the said house. It is an admitted fact that no application for change of names was made in the Municipal Board of Banares within the limits of which this house was situated, and it is also admitted that there was no mutation of names in the revenue papers with regard to the land on which the house stood. The subsequent conduct of Chittaranjan further shows that he was paying the municipal taxes.

On 7th July 1909 Chittaranjan and his mother jointly executed a mortgage deed of this property. Chittaranjan described himself as the owner in possession of the premises, and his mother asserted that she had a charge of maintenance on it. They purported to mortgage the property in their own right as well as the shebaits if the idols; and the purpose for which the money was required was to carry out repairs of the house and to pay off the debt which had been contracted for carrying on the worship of the idols. The deed of dedication was shown to the mortgagee. On 7th March 1910 both Chittaranjan and his mother executed a deed of revocation, stating that Chittaranjan had been in proprietary possession and in enjoyment of the property always, and that it was owing to a deception practised upon him by his uncle that he had been made to execute the document of 2nd June 1908, which is not enforcible, and he accordingly cancelled and nullified it by this deed of revocation, and that to this revocation his mother who had been appointed shebait under the deed had agreed to and affixed her signature. It is by one witness that registered notices announcing the revocation were circulated and one of them was sent to Niranjan Mukharji and in 1911 Chittaranjan applied for and obtained permission for putting up a scaffolding.

On 13th May 1914 Chittaranjan made a second mortgage of this property in favour of Shiam Sunder. Neither the previous mortgage-deed nor the deed of endowment nor the deed of revocation was expressly mentioned in this document. But care was taken to make the mortgagor liable in case such prior incumbrances were discovered. Shiam Sunder instituted a suit on the basis of this mortgage-deed and obtained a decree in March 1922. This decree was put in execution and the property was proclaimed to be sold on 20th April 1923. Three days before the date fixed for the sale, a mortgage in favour of the appellant was executed by Chittaranjan, viz: on 17th April 1923. Under this document Chittaranjan received Rs. 165 at the time of registration, and the rest of the amount was left in the hands of the mortgagee for payment of the prior mortgagee, who was described as a creditor on the strength of a hand note as well as the decretal amount.

The plaintiff wanted to avoid this last mortgage-deed by the declaration that the property was not transferable. The contesting defendant pleaded that there had been no valid dedication, that the said deed of endowment had been executed under undue influence and misrepresentation, and that it was never acted upon or given effect to. There was a further plea that it had been duly re-

voked, and in any case there had been adverse possession for more than 12 years against the idols. Lastly it was pleaded that the amount of the mortgage-money had been taken for purposes of legal necessity and was binding on the trust property.

The learned Subordinate Judge has decreed the claim, holding that there was a valid dedication which could not have been revoked, and that there was no limitation. He has further held that although the amount borrowed might have been for legal necessity, the defendant had not established that he had paid the said amount. The plea of misrepresentation or undue influence alleged to have been exercised by Niranjan on Chittaranjan has not been pressed before us. We must therefore take it that the deed of endowment was duly executed and registered by Chittaranjan on 2nd June 1908.

The question whether it created a valid dedication depends on whether there was a real intention to dedicate the property and the dedication was completed. No doubt there may be circumstances under which the mere execution and registration of a deed of endowment may not amount to a complete dedication and the proceeding may be merely a nominal one. On the other hand it is also clear that if a valid dedication has once been completed there would be no power left in the donor to revoke it, and no assertion on his part or subsequent conduct contrary to such dedication would have the effect of nullifying it. Not only the language of the document but the surrounding circumstances as well as subsequent conduct may be taken into consideration when finding whether there was a real intention to dedicate the property. The learned advocate for the appellant has strongly relied on the circumstance that no mutation took place on the strength of this dedication, and that no attempt has been made to produce accounts which would show that the whole of the income of the house was spent for the purposes of the endowment. He has strongly relied on the Full Bench case of this Court in *Sri Thakurji* v. *Sukhdeo Singh* (1). The principle underlying that decision has been followed subsequently by two of the learned Judges in *Ram Dhan* v. *Prayag Narain* (2). But the question whether there was a real intention to dedicate the property is a matter of inference from the various circumstances and by no means an abstract question of law. We may point out that in the case of *Jadu Nath* v. *Sita Ramji* (3) there had also been a dedication not followed by mutation of names and there was a non-production of accounts showing that the wakf had been acted upon. Nevertheless in that case their Lordships of the Privy Council upheld the dedication. In the case before us the omission to apply for mutation of names can be explained to some extent by the circumstance that this was a house property situated in the city of Benares, as regards which the mutation of names may not be of the same importance as that with regard to zemindari property. In any case this omission by itself does not necessarily show that the deed was not acted upon. The oral evidence does indicate that the mother of Chittaran who had been appointed shebait actually lived in this house, and the worship of the idols had been carried on as it had been done before.

We come next to the mortgage-deed of 1909. The phraseology of this document is very curious and in some respects it is contradictory. But it is quite clear to us that this is the result of an anxiety in the mind of the mortgagee to take the mortgage from both Chittaranjan and his mother in both their capacities of owners and trustees. It is on account of this double capacity that the document has been carefully worded. There is no suggestion that the deed of dedication was a nullity or that it has been cancelled. On the other hand it is recited that it was one of the documents which was shown to the mortgagee. The amount borrowed is also stated to have been required for the repairs of the house and to pay off debts incurred for carrying on the worship of the idols. These were purposes of the trust. Both Chittaranjan and his mother are described as shebaits. Although there are recitals to the effect that one is the owner in possession and the other had a charge of maintenance on the premises, we are not satisfied that there was any clear assertion in this

(1) [1920] 42 All. 395=58 I. C. 583=18 A. L. J. 390 (F.B.).

(2) A. I. R. 1921 All. 37=43 All. 503.

(3) A.I.R. 1917 P.C. 177=39 All. 553=44 I.A. 187 (P.C.).

document that the deed of endowment had been a nullity from the very beginning or that it had been revoked. From these circumstances the Court below has inferred that there had been a real intention to dedicate the property. We find ourselves unable to differ from that view. We must therefore hold that the deed of 1908 was not a nullity from its very inception.

The next question to consider is whether adverse possession for more than 12 years has put an end to this endowment. Under the deed possession was to pass from Chittaranjan to his mother, who was entitled to live in the house or let it out on rent as the shebait of the idols, and was to spend the income on the worship of those idols. We have already pointed out that no mutation of names followed, and the payment of the municipal taxes continued to be made by Chittaranjan himself In 1910 Chittaranjan and his mother both joined in executing the deed of revocation by which it was made clear that the executants had agreed that the endowment had ceased to be effective. That deed further recited that Chittaranjan had himself been in proprietary possession and in enjoyment of the property. From that moment therefore the character of the possession of Chittaranjan over the house must be deemed to have been adverse as against the idols, of whom his mother was the shebait. It was after this that Chittaranjan applied to the Municipal Board as owner of the house for permission to make additions, and he did put up a scaffolding presumably at his own expense. There is nothing to show that he surrendered possession to his mother in her capacity as the shebait of the idols after the revocation On the other hand, even if she occasionally lived in the house she might well live in it because of her relationship with Chittaranjan. For over 12 years this state of things continued, and there was no assertion made on behalf of Niranjan or his heirs to intervene, or to see that the names of the idols were duly entered either in the municipal or the revenue papers In 1914 there was a further mortgage created by Chittaranjan on this property in assertion of his own proprietary interest. This also was a registered document. Decree was obtained on the basis of this document, and the property was put up for sale at a public auction. The present defendant advanced his money more than 12 years after the deed of revocation had been executed, and even if he had got the registration registers searched for 12 years he might not have discovered the earlier document. In any case the revocation itself had stood for more than 12 years and the possession of Chittaranjan over the house has remained for all that period without doubt.

The learned advocate for the respondent has argued before us that in the circumstances of this case there could have been no adverse possession at all. The view of the Court below that there could not be any adverse possession because the idols themselves remained in the house cannot for a moment be accepted. As a matter of fact there can be adverse possession, not only as against the idols but over the idols themselves. That adverse possession can be acquired against idols in respect of property dedicated in their favour is fully clear from several cases decided by their Lordships of the Privy Council. We may refer to *Maharaja Jagadindra Nath* v. *Hemanta Kumari Dasi* (4), which was followed by this Court in the case of *Man Singh* v. *Nawlakhbati* (5). We may also refer to the case of *Damodar Das* v. *Lakhan Das* (6). In our opinion the same principle applies whether the adverse possession is exercised by a total stranger or by the donor himself. So long as such possession is exercised to the ouster and knowledge of Chittaranjan's mother, who alone can hold the property on behalf of the idols, it would mature into title after the lapse of the prescribed period.

The learned advocate for the respondent has drawn our attention to the clause in the deed of dedication authorizing Chittaranjan to see to the proper carrying on of the worship. That conferred on him a right of intervention but it in no way amounted to a vesting of the trust property in him nor did it constitute him a trustee. There was, therefore, no bar to his exercising adverse possession or acquiring title by adverse possession over this property. We accordingly allow this appeal and setting aside the

(4) [1914] 32 Cal. 129=31 I. A. 203=8 C.W. N. 809=8 Sar. 698 (P.C.).
(5) A. I. R. 1926 P. C. 2=5 Pat. 290=53 I. A. 11 (P.C.).
(6) [1910] 37 Cal. 885=7 I. C. 240=37 I. A. 147 (P.C.).

decree of the Court below dismiss the plaintiff's suit with costs.

D.D. *Appeal allowed.*

A. I. R. 1929 Allahabad 319

BANERJI AND SEN, JJ.

Tikam Singh and *others* — Appellants.

v.

Likhi Singh and *others*—Respondents.

Second Appeal No. 416 of 1926, Decided on 8th February 1929, against decree of Dist. Judge, Agra.

Civil P. C., O, 22, R. 4—Proceedings as regards taking additional evidence, under the direction of the appellate Court, pending in lower Court—One of the respondents dying — Application for substitution of names can be entertained by the appellate Court and not by the lower Court—Civil P. C. O. 41, R. 27.

While proceedings as regards taking additional evidence were pending under the directions of the appellate Court under O. 41, R. 27 before the Additional Subordinate Judge, one of the respondents died. No application was made for substitution of the names in the appellate Court within 90 days from the date of the death. The respondents made an application in the Court of the Additional Sub-Judge, that as no legal representative of the deceased having been brought upon the record within the statutory period, the appeal had abated in its entirety and the Court should declare that the appeal has so abated. This application was, however, refused. But on subsequent application by appellant the Additional Sub-Judge, granted the application and brought the legal representatives on record. [P 320 C 1]

Held : that the only Court which could entertain an application for substitution of names was the appellate Court and that the Additional Sub-Judge, was not competent to either entertain or to pass any orders upon the application made for substitution of names. [P 320 C 2]

N. P. Asthana and *S. K. Dar* — for Appellants

G. N. Kunzru—for Respondents.

Judgment.—This is an appeal by the defendants in a suit for redemption of a mortgage dated 14th December 1896. Harbans and Ramjit were the mortgagors and Sobha Ram and Frunt were the mortgagees and the property in suit was usufructuarily mortgaged to secure Rs. 1,300. The mortgagors sold their equity of redemption to Lakhkhi, Chandan and Dipchand on 20th October 1900. After the death of Lakhkhi, his estate devolved upon Chunni Ram alias Chet Ram, Kalyan and Bhim Raj by succession. Chet Ram alias Chunni Ram sold his equity of redemption to the plaintiff on 3rd September 1920. The share of the plaintiff in the equity of redemption is about 1/6th in the property but the integrity of the mortgage not having been broken he institutes the present suit for redemption of the entire mortgage.

Sobha Ram, one of the original mortgagees, was dead and the suit, as originally framed, was instituted against Tikam Singh, and Ratan Singh, sons of Sobha Ram, and Frunt, one of the original mortgagees.

The plaintiff alleged that since the mortgage, a portion of the property had been acquired by the Government under the Land Acquisition Act and the mortgagees had received Rs. 50 by way of compensation from the Government. The suit was for redemption of the property on payment of Rs. 1,250.

Numerous grounds were put forward by way of defence. The defendants denied the plaintiff's title. They pleaded non-joinder of necessary parties and claimed costs, because the plaintiff had not deposited the proper amount of the mortgage money under S. 83, T. P. Act. The first Court dismissed the suit inter alia on the ground that the plaintiff had failed to prove that his transferrers were the heirs of the original mortgagors.

The plaintiff appealed. On 14th January 1924, the plaintiff asked for leave to tender additional evidence in support of the pedigree propounded by him. The learned District Judge under O. 41, R. 27 Civil P. C., accepted this additional evidence and directed the Court below to record such evidence as the parties might adduce, bearing upon the question of pedigree after bringing upon the record certain other persons whose joinder was necessary for the proper disposal of the suit The learned District Judge directed the Court below to certify the result. It may be noticed that the learned District Judge did not set aside the decree of the trial Court directing a remand under O. 41, R. 23, Civil P. C., nor did he remit an issue to the Court of first instance under O. 41, R. 25, Civil P. C. All that the trial Court was required to do was to record some evidence after joining certain persons in the array of parties and to certify the said evidence to the Court of appeal.

The only Court which had seisin of the appeal was, therefore, the Court of the learned District Judge of Agra. While proceedings were pending under the directions of the learned District Judge before Mr. Shamsul Hasan, the Additional Subordinate Judge of Agra, Frunt, one of the respondents died on 14th November, 1924. No application was made for substitution of the names in the Court of the District Judge within 90 days from the date of the death of Frunt. On 18th April 1925, the respondents made an application in the Court of Mr. Shamsul Hasan that Frunt having died and no legal representative of Frunt having been brought upon the record within the statutory period, the appeal had abated in its entirety and the Court should declare that the appeal has so abated. The learned Additional Subordinate Judge had no jurisdiction to entertain this application, and he properly refused to grant the prayer contained in the application of the respondents. The plaintiff-appellant, however, moved the Additional Subordinate Judge by an application dated 22nd April 1925 that certain persons should be brought upon the record as the legal heirs and representatives of Frunt deceased. Notice was issued upon this application and it was eventually granted on 30th May 1925.

The learned District Judge had already held that the pedigree set up by the plaintiff was established. When the appeal came on for final disposal, it was argued that the appeal had abated because there was an indivisible cause of action affecting Frunt and the other two defendants and that no legal representatives of Frunt had been brought upon the record in the Court below within the statutory period. The learned District Judge refused to entertain this plea and the reasons given by him are rather curious :

" On 30th May 1925, the learned Additional Subordinate Judge ordered under O. 22, R. 4, that the legal representatives of Frunt should be brought on the record and he issued notices to them and brought them on the record and subsequent to this, evidence was taken. Under O. 43, R. 1, there is no appeal from an order under O. 22, R. 4, bringing legal representatives of deceased defendant or respondent on the record. Consequentlly, the matter cannot be raised in appeal."

The finding of the Court below on this point proceeds upon an obvious fallacy. The only Court which had the seisin of the appeal was the Court of the learned District Judge and his powers in whole or in part had not been delegated to the Additional Subordinate Judge. The only Court, therefore, which could entertain an application for substitution of names was the Court of the learned District Judge. The Additional Subordinate Judge was not competent to either entertain or to pass any orders upon the application made by the plaintiff for substitution of names. The order, therefore of the learned Additional Subordinate Judge dated 30th May 1925 was passed without jurisdiction.

It is patent that the legal representatives of Frunt not having been brought upon the record within 90 days from the death of Frunt the appeal automatically abated and the abatement of the appeal not having been set aside by any proper procedure adopted by the plaintiff, the suit of the plaintiff for redemption is bound to fail. There are a number of other irregularities in the judgment under appeal but, in view of our decision on the point that we have just disposed of, it is not necessary to go into them. The result is that we allow this appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs throughout.

R.D. *Appeal allowed.*

A. I. R. 1929 Allahabad 320

DALAL, J.

Fateh Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Misc. No. 33 of 1929, Decided on 22nd January 1929, for bail under Ss. 497 (2) and 498, Criminal P. C.

(a) Criminal P. C., S. 498—Bail.

A Sessions Judge has wide powers under S. 498. [P 321 C 1]

(b) Criminal P. C., S. 498—Prosecution of two parties—Member of other party released on bail—Sessions Court must consider these facts and applicant should be released on bail if there is no danger of his absconding.

Where members of two parties were being prosecuted, and a member of the other party was released on bail but the applicant was charged under S. 304, I. P. C.

Held : that the reasons that the applicant was required to instruct the counsel and that the party being released will have better chance of representing their case must weigh with a Court, and if there was no danger of

the applicant absconding if released on bail, he should be so released and that it was necessary for the Sessions Judge to consider all these points under S. 498. [P 321 C 1]

Saila Nath Mukerji and *Girdhari Lal Agarwala*—for Applicant.

Judgment.—This is an application for bail of one Fateh Singh against whom an investigation is being made by the police on a charge under S. 304, I. P. C., punishable with transportation for life. The Magistrate guided as he was by the provisions of S. 497, Criminal P. C., expressed his inability to grant bail in such a case as there appeared to be reasonable grounds for believing that Fateh Singh was guilty. The Sessions Judge, however, had wide powers under S. 498, Criminal P. C., and has not considered the petition of appeal with care. It is represented that Fateh Singh is required to instruct his counsel, that members of two parties are being prosecuted, and that a member of the other party is released on bail and that, therefore, the other party will have a better chance of their case being properly represented in Court. It is true that against the other party there is no charge under S. 304, I. P. C. At the same time these reasons must weigh with a Court, and if there is no danger of the applicant Fateh Singh absconding if released on bail I think that he should be so released. It was necessary for the Sessions Judge to consider all these points under S. 498, Criminal P. C.

The trying Magistrate is directed to release Fateh Singh on bail if he is satisfied that there is no apprehension of his absconding on proper sureties being ordered and secured. The trying Magistrate will please fix a bond and security accordingly if, in his opinion, such a bond and security will be sufficient to prevent Fateh Singh from absconding.

A copy of this order shall be sent to the trying Magistrate through the District Magistrate for necessary orders.

R.D. *Order accordingly.*

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* A. I. R. 1929 Allahabad 321

KING AND BENNET, JJ.

Emperor

v.

Dukhu—Opposite Party.

Criminal Misc. Case No. 93 of 1928, Decided on 28th May 1928, under S. 339, Criminal P. C.

1929 A/41 & 42

(a) Criminal P. C., S. 337 (1-A)—Magistrate ordering "accused has stated that if he be given pardon he would make correct disclosure of facts . . . The Court therefore tenders pardon"—First sentence of this order states reason and pardon is not irregular.

Magistrate while tendering pardon ordered : "the accused has stated before me that if he is to be given a pardon he would make a full and correct disclosure of the facts of the case as they happened. The Court, therefore . . . . . tenders a pardon etc."

Held : that the Magistrate stated the reason in the first sentence of his order and therefore pardon is not irregular. [P 322 C 1]

*** (b) Criminal P. C., S. 337 (1-A)—Mere omission to record reason is not material irregularity but it must further be proved that such omission has occasioned injustice.**

Mere omission to record reason under S. 337 (1-A) is a defect which can be cured by S. 537. In order to vitiate the trial it must further be shown that the omission to record reason has in effect occasioned a failure of justice. [P 322 C 1]

(c) Criminal P. C., S. 339 (3)—Accused to whom pardon was granted in one statement stating that he accompanied murderer and caught murdered's legs while murderer gagged his mouth—In other statement he stating that he was out on the night when offence took place—Two statements directly contradictory—Sanction for prosecution was given—No locus paenitentiae was allowed.

The accused who was tendered pardon stated in his first statement that he accompanied the murderer and that while the murderer gagged the deceased's mouth, he caught his legs, and in his other statement he stated that he was out from the village on the night in which the murder took place, and that the accused was dead by the time he returned.

Held : that the two statements were directly contradictory and sanction given for his prosecution is proper, the case could not be considered fit for granting locus paenitentiae : 11 *A. L. J.* 964, *Ref.* [P 222 C 1]

U. S. Bajpai—for the Crown.

Debi Prasad Malaviya—for Opposite Party.

Judgment.—This is an application under S. 339 (3), Criminal P. C. by the Public Prosecutor for sanction for the prosecution of one Dukhu or Dukha to whom pardon was tendered by a Magistrate and against whom the Public Prosecutor now desires to bring a charge of giving false evidence in respect of two contradictory statements. The first argument that was advanced by the learned counsel for Dukhu was to the effect that the pardon was irregular because the Magistrate did not record his reasons for granting the pardon under S. 337 (1) (a), Criminal P. C. The Magistrate has re-

corded reasons to the following effect in his order dated 10th November 1927 :

" The accused Dukhu an under-trial in this case has stated before me that if he is to be given a pardon he would make a full and correct disclosure of the facts of the case as they happened. The Court, therefore, in exercise of its powers under S. 337, Criminal P. C. tenders a pardon to the said Dukhu on condition etc. "

The reason has been fairly stated by the Magistrate in the first sentence and we do not agree with the argument of the learned counsel that first sentence contains a condition and not a reason. We may note that it would not have been sufficient for the learned counsel to show that the Magistrate had omitted to record his reason. It would also have been necessary for the learned counsel to show that the omission of the Magistrate to record his reason had in effect occasioned a failure of justice ; otherwise the alleged defect would have been cured by the provisions of S. 537, Criminal P. C. The next argument that was addressed to us was that there was in effect no contradiction between the two statements of Dhukhu. The learned Government Advocate has quoted the two statements and from those statements we make the following selection :

" I then took my bed under the Nim tree. My mother, Mahadeo, Dhaneshri, Rajkalia and myself were there. At mid-night Mahadeo woke me up and said that Mt. Rajkuli must be killed as she is very quarrelsome. I refused to do so. He then took me there by force. Mahadeo went ahead. Aliyar and Dhaneshri had also gone there. Mahadeo had brought Aliyar there. I had also accompanied them. Rajkulia was asleep. Mahadeo gagged her mouth. Dhaneshri pressed her hands. Aliyar had pressed her wrist by his hands and I was catching hold of her legs. She then died. "

(a) " I went to Kunuraya a kos from my village. I did not return that night. I came back the next morning at sunrise. Mt. Rajkalia was dead by that time. I did not see how she died. "

We consider that these two quotations are directly contradictory and that sanction should be given for the prosecution of Dukhu on these grounds.

The final argument addressed to us was that a locus paenitentiae should be granted to Dhuku on the authority of *Emperor* v. *Bodha* (1). The granting of locus paenitentiae is a matter for judicial discretion and we do not consider that we should grant the locus paenitentiae in the present case.

(1) [1913] 11 A. L. J. 964=22 I. C. 428=15 Cr. L. J. 76.

Accordingly we grant the sanction under S. 339 (3), Criminal P. C. to prosecute Dukhu alias Dukha, son of Budhu Kahar, cultivator, resident of Bichayan, thana Chandauli, district Benares for giving false evidence under Ss. 193 and 194, Criminal P. C. for the two contradictory statements which we have quoted made in the course of the enquiry and trial, *Emperor* v. *Mahadeo* and *others* under S. 302, I. P. C., before the Committing Magistrate and the Sessions Court in Benares.

S.N./R.K. *Sanction granted.*

A. I. R. 1929 Allahabad 322

BOYS AND BANERJI, JJ.

Emperor—Applicant.

v.

Motha—Opposite Party.

Criminal Revn. No. 129 of 1928, Decided on 22nd May 1928, against order of Sess. Judge, Aligarh, D/- 28th November 1927.

(a) Whipping Act (4 of 1909), S. 5, Expl. —Court.

The word " Court " does not exclude the appellate Court. [P 324 C 2]

(b) Whipping Act (4 of 1909), Ss. 4 and 5—Juvenile can be punished with imprisonment in addition to whipping and High Court can award imprisonment even if whipping is already carried out.

A sentence of imprisonment can be inflicted in the case of a juvenile in addition to whipping and the High Court has power to inflict a sentence of imprisonment, even when the sentence of whipping passed by the lower Court has already been carried out: 7 *Bom. H. C. R. Crl.* 70, *Dist.* [P 324 C 2]

U. S. Bajpai—for the Crown.

Panna Lal—for Opposite Party.

Boys and Iqbal Ahmad, JJ.—A boy who has been found by the learned Additional Sessions Judge of Aligarh to be in his estimate not more than 15 years of age, has been convicted of rape under S. 376, I. P. C. There can be no question but that the offence was committed in the most brutal manner on a little girl, some 10 years of age. Very grievous injuries were inflicted upon her and they were inflicted upon her by the accused when she was in the employ of the accused's father and he therefore was to some extent in a trusted position. The learned Judge thought that the boy's age precluded the desirability of sending him

to jail. He could have, however, sentenced him to imprisonment and then sent him to a reformatory school. His reason for considering it undesirable to send him to a reformatory school, he expresses as follows;

"The question of sending him to reformatory school is also undesirable because he is the son of an agriculturist and he will learn more by ploughing in his field than by remaining in any reformatory school."

The reason appears to us wholly inadequate. It might just as well be said that the son of any other man employed out of doors or indeed, the son of many types of artizan would get more good by learning his father's trade than he would by going to a reformatory school. The learned Judge, having rejected the idea of imprisonment and the idea of a reformatory school, then considered whether the boy should be whipped. In the Civil Surgeon's view the boy could not undergo whipping in the ordinary way, so he was ordered to receive a caning in jail of 20 blows on his hand. The learned Judge also remarks:

"No doubt the girl has suffered much and the learned counsel who appeared for the accused was good enough to tell the accused's father to pay Rs. 30 to the girl's father and the money has been paid in my presence to the girl's father.

Here again the learned Judge does not appear to have exercised a well-balanced judgment. The fact that the accused's father was willing to pay Rs. 30 to the girl's father is absolutely no reason whatsoever for letting off the guilty son lightly. Neither would the accused be sufferer by such a procedure nor would the girl benefit.

The sentence of caning has no doubt before now been carried out.

The local Government being dissatisfied with the punishment inflicted in this case has considered it desirable to apply on the revisional side of this Court asking that the sentence be enhanced, on the grounds: (1) that the sentence passed on the accused is inadequate and (2) that a sentence of imprisonment is imperative under the law.

The learned Judge before whom this application was presented appears to have been in some doubt. He remarked that the sentence was not illegal and a sentence of whipping in lieu of imprisonment was in the case of a juvenile a legal sentence. He, however, directed that the case should be put up before a Bench of two Judges to decide whether notice should issue under the circumstances particularly in reference to "the accused's physical growth".

However, as the case has been referred to us we have to consider whether notice should issue. In view of the gravity of the offence we have no hesitation in saying that notice should issue. We have had to consider the law bearing on the point and as we have had to consider it with some care it is desirable to put on record the result for the assistance, if it be such assistance, of the Bench before whom the case may come.

We agree that, though the Judge may have not acted wisely, the sentence was not an illegal sentence. The boy was a juvenile and as such S. 5, Whipping Act, would be applicable. We had then to consider what order could be passed by this Court if we decided to issue notice for it was clearly futile to issue notice if the Court was to arrive at the decision that nothing could be done. The first question for determination is whether a sentence of imprisonment can be inflicted as well as whipping in the case of a juvenile. S. 4 of the present Whipping Act (Act 4 of 1909) says clearly that

"whoever commits rape may be punished with whipping in lieu of or in addition to any other punishment."

So far then a juvenile could clearly be sentenced both to imprisonment and whipping. S. 5 says that any juvenile offender who commits any offence (e. g. rape) under the Indian Penal Code except certain offences may be punished with whipping in lieu of any other punishment. It may be suggested that if a juvenile comes within the terms "whoever" in S. 4 then in this particular case, S. 5 would be a surplusage. On this the argument may be founded that the combined effect of Ss 4 and 5 is that in the case of a juvenile if whipping is to be inflicted it can only be inflicted in lieu of imprisonment. But we do not think that this is a safe conclusion. In the first place S. 5 only in terms makes it possible to remit the imprisonment and does not say that imprisonment and whipping may not both be inflicted. Again in S. 4 of the Act of 1864 in the corresponding S. 4 only the words "in addition to any other punishment" appeared while in the corresponding S. 5, referring to juveniles the words appeared "in lieu of any other

punishment." Under that Act it was held and obviously correctly held in *Reg* v. *Kusa* (1) that S. 4 was also applicable to juveniles and while they together with others could be punishable with both imprisonment and whipping. S. 5 gave the Court a discretion in cases of juveniles (not given in the case of adults) not to inflict imprisonment.

It would next appear that the legislature thought it desirable to give the same discretion in the case of adults and therefore in the new Act (Act 4 of 1909) we find that the words "in lieu of or" have been inserted before the words "in addition to any other." This was clearly done with a view to giving a discretion to inflict only whipping in the case of adults also and not with the intention of removing the discretion to give both imprisonment and whipping in the case of juveniles which had hitherto existed. Obviously, if the discretion had been actually definitely taken away it would not be for this Court to say that it was not the intention of the legislature to take it away. But where the sections certainly remain open to the construction that the Courts have discretion still to inflict both imprisonment and whipping it is material to consider what the object of the legislature was in inserting in S. 4 the words "in lieu of."

Finally we would note that to construe that this discretion still remains with the Courts to give both punishments in the case of juveniles is not necessarily to treat S. 5 as if it was now surplusage, for the scope of the two sections is wholly different. S. 4 only covers particular offences while S. 5 deals with all the offences in the Penal Code with the exception of a few specified and also deals with other offences. If then the Government Advocate urges us to hold that the present sentence of 20 canings is inadequate, that we have power to enhance the sentence to imprisonment in addition and that having so enhanced it, it is open to us to consider whether the recourse should not be had to the Reformatory Act by virtue of S. 8 of that Act, these are steps that cannot be taken without notice to the accused. We have only noted such points as we have had to consider for the assistance possibly of a Bench that may hear the case after notice had issued. Let notice go to the accused. (After hearing the accused the following order was passed.)

(1) [1870] 7 B. H. C. Crl. 70.

Boys and Banerji, JJ.—In this case notice was issued to the opposite party to show cause why the sentence should not be enhanced. The reasons for issuing that notice and the desirabilty of a sentence of imprisonment are set out in the order of this Court dated 22nd February 1928. We think that there is no question of our power to inflict a sentence of imprisonment though the sentence of whipping has been carried out. In the first place the whole of the evidence on the record tends to show that the accused in this case was not under the age of 16. The opinion of the learned Judge as he has expressed it can hardly be construed as a finding. Even if it be regarded as a finding, the next question that arises is whether that finding is final or whether the "Court" referred to includes the appellate Court. We can find no reason for holding that the use of the word Court excludes the appellate Court. It is a much more natural interpretation to put on the word "Court" that it is intended to exclude the refusal of jail or other authorities to accept the finding. Apart altogether, however, from either of these considerations we are also of opinion that upon a proper interpretation of Ss. 4 and 5, Whipping Act a sentence of imprisonment can be inflicted and in this respect we accept the view of the Bench that has issued the notice.

In view of the serious and brutal nature of the attack we enhance the sentence on the accused by inflicting a sentence of 18 months' rigorous imprisonment. The District Magistrate will be informed and will issue a warrant in the ordinary course.

S.N./R.K. *Sentence enhanced.*

A. I. R. 1929 Allahabad 324

ASHWORTH, J.

Hans Raj—Plaintiff—Appellant.

v.

Surja and *others*—Defendants—Respondents.

Second Appeal No. 1114 of 1927, Decided on 11th February 1929, against decree of Addl. Sub-Judge, Bulandshahar, D/- 7th March 1927.

Cosharers — Damages — One co-tenant enjoying area slightly smaller than but roughly corresponding to what he would be entitled on strict division—He eannot claim damages.

Where there is a certain area held in co-tenancy and the area enjoyed by one co-tenant roughly corresponds to the area to which he would be entitled by a strict division of the total area according to shares he is not entitled to ask for damages because the area possessed by him is slightly smaller than that which mathematical division would give him.

[P 326 C 1]

N. C. Vaish—for Appellant.

Panna Lal—for Respondents.

Judgment.—This second appeal arises out of a suit brought by Hansraj, plaintiff-appellant, against his cousins for damages in respect of a certain 5 bighas 1 biswa, 6 biswansis of a tenancy holding which the defendants are said to have cultivated over and above the area in the holding to the possession of which they are entitled. The plaint set forth that one Madho Singh had three sons, and that the plaintiff was the son of Sheo Sahai. The other defendants were sons of Ganga Bakhsh and Har Bakhsh. It went on to say that there was an occupancy holding belonging to all three brothers, that the plaintiff inherited his father's rights as a co-tenant and as such was entitled to be in possession or to enjoy the profits of 18 bighas 7 biswas and 7 biswansis, whereas he had only been allowed to cultivate 13 bighas 6 biswas. He, therefore, asked for a sum of Rs. 355 as remuneration for three years in respect of the land in the possession of the defendants. The suit was resisted on the ground that Madho Singh had five sons, not only three, and that the occupancy tenancy was acquired by all the five brothers. Of these five brothers Sheo Sahai was separate, but the other four brothers formed two and not four units inasmuch as the second brother was joint with the fourth and the third with the fifth. Hence when Sheo Sahai died the plaintiff got a one-third share, but he got nothing else when two of the three brothers died without issue, these two brothers' share going to the two brothers with whom they were respectively united.

The trial Court accepted the plaintiff's contention and decreed damages but not to the amount claimed. In appeal to the Subordinate Judge the latter came to a finding that there were five brothers, and on this finding held that the plaintiff was only entitled to a one-fifth share of the tenancy. He relied on the oral evidence of the defendants, supported as it was to some extent by a khatauni, to which he referred although the document was not produced as evidence in the trial Court.

In this second appeal the first point taken is that the lower appellate Court was not entitled to take the khatauni of 1859 as evidence without recording reasons thereof. This objection, in my opinion, fails. It was not a case of the Court accepting evidence filed in the appellate Court by the defendants, but it appears that the trial Court itself chose to refer to the khatauni. Any way the question whether the Court was justified in using the khatauni has no importance in view of my findings below.

A second plea is that even if the khatauni be accepted, the plaintiff's share must be deemed to have been 1/4th and not 1/5th. The argument on which this contention is based is that the khatauni of 1859, which showed the existence of a 4th brother Surja, shows that all the four brothers entered then were entered as non-occupancy tenants. Even then if Surja survived until the non-occupancy tenancy matured by lapse of time into an occupancy tenancy the khatauni only is evidence of four co-tenants. The reply of the respondents to this argument is that the whole case of the plaintiff was based on the allegation of there being only three brothers, and once this contention was disproved, as it was by the khatauni, his whole case must fail.

I do not find that the plaintiff's case as set forth in the plaint rested on there being only three sons of Madho, but it did rest on the allegation that only three sons had acquired occupancy rights and that was all that was necessary for the purpose of the plaint. The khatauni does not prove that the four brothers entered therein became occupancy tenants.

At the same time this Court is entitled to uphold the general finding of the lower appellate Court on different grounds, provided that it confines itself to the evidence on the record. There appears to be no reliable evidence to justify it being held that the plaintiff had a one-third share. There can be no doubt that there were more than three brothers. Whether any one brother was united with any other brother in such a way that on the

death of one of them his share went to the children of his united brother and not to any other brother or the children of any other brother is not proved. Nor is there any prima facie presumption in the matter. This being so, the plaintiff was bound to show that his area was defective. The lower appellate Court has dismissed the suit on a finding that the plaintiff was only entitled to a one-fifth share. I hold that the suit should have been dismissed on the finding that the plaintiff had not made out his case for being entitled to a larger share. Even if we infer from the khatauni that there were four brothers, and four brothers only, who acquired the occupancy right, the plaintiff's share would be very slightly bigger than that which he holds at present, Where there is a certain area held in co-tenancy and the area enjoyed by one co-tenant roughly corresponds to the area to which he would be entitled by a strict division of the total area according to shares, I hold that he is not entitled to ask for damages because the area possessed by him is slightly smaller than that which mathematical division would give him. It may well be that the circumstances of the holding did not allow a strict apportionment. I dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 326

DALAL, J.

Karam Ali—Plaintiff—Appellant.

v.

Mohammad Latif and *others*—Defendants—Respondents.

Second Appeal No. 1004 of 1927, Decided on 7th February 1929, against decree of Sub-Judge, Azamgarh, D/- 21st March 1927.

*** (a) Mahomedan Law—Dower —Widow's right of retention may be sold — Transfer of Property Act, S. 6.**

A Mahomedan widow's right of retention of her husband's property for her dower may be sold : *A. I. R.* 1925 *P. C.* 63 *Cons.* [P 327 1]

(b) Mahomedan Law—Widow selling husband's property of which she was in possession for Rs. 700—Her dower debt was only Rs. 51—No mention of dower amount in sale-deed—She intended to transfer not merely right of retention but property itself and heir's right to recover accrued since date of sale.

Where a Mahomedan widow who was in possession of her husband's property, sold it for Rs. 700 while her dower was only Rs. 51 and further the sale-deed itself made no mention of the amount of dower debt, her intention was to sell not merely the right of retention but the property itself, and hence the right of the heirs to recover accrued on the date of the sale. [P 327 C 1]

M. Waliullah—for Appellant.

K. N. Katju—for Respondent.

Judgment.—This property in suit was once held by a man of the name of Wazir. He disappeared and his wife Bandi Bibi took possession of the property as against the rightful heirs by right of succession. She sold the property on 16th September 1873 to two persons for a sum of Rs. 700. Ultimately one of these, Mohammad Ali became owner of the entire property by purchasing the other portion of the property by right of pre-emption. The plaintiff of the present suit is legal heir of Wazir and sued the defendants who are successors-in-interest of Mohammad Ali for recovery of possession of the property. His case was that Mt. Bandi Bibi was in possession ot the property in lieu of a dower debt of Rs. 51, that the debt had been paid out of the usufruct, that what was transferred was a right of retention of property until her dower debt was paid and that the defendants were liable to give up possession and to render accounts. The learned Judge of the lower appellate Court held that what was sold in 1873 was not the right of retention of the property till dower debt was paid but the property itself, that consequently on such sale the heirs of the husband became entitled immediately to take possession of the property and that Mohammad Ali's possession from 1873 became adverse to the heirs. He therefore held that the suit was time barred. He further held that the suit was also barred by the provisions of S. 233 (k), Land Revenue Act, because the plaintiff had not raised the question of his title to this property at a partition of zamindari property in which suit both he and the defendants were parties. In my opinion the second point is dependent on the first ; if the defendants held the property merely by way of security for payment of dower debt, the plaintiff was not entitled to immediate possession and could not raise the question of his title in the suit for partition. If on the other hand,

there was a transfer of property in 1873 the suit would be time barred as well as barred under the provisions of S. 233 (k), Land Revenue Act.

There is a conflict of authority as to whether the widow's right of retention is transferable or not. In some cases it has been held that the right of retention is a personal right and cannot therefore be transferred. In other cases it has been held that the right of retention may be considered as property under the Transfer of Property Act and is transferable. In the case of *Maina Bibi* v. *Chaudhri Vakil Ahmad* (1), their Lordships of the Privy Council have made observations which would favour the view of certain Indian Courts that such right of retention is not transferable. Adopting, however, the view current in this Court that the right of retention may be sold, it is necessary to enquire what was transferred under the sale-deed of 1873. If Bandi Bibi alienated the property itself and delivered possession of the property to the alienee, her husband's other heirs were entitled to recover possession of the property from the alienee without payment to him of the dower debt. In my opinion the learned Subordinate Judge has given very satisfactory reasons for holding that the transfer was of property and not of the right of retention. It was rightly pointed out by the learned counsel for the respondents that if the intention had been to transfer only the right of retention, the important matter of the amount of the dower debt would have been prominently mentioned in the deed. That amount is not mentioned. Further the sale consideration is Rs. 700 and as according to the plaintiff, the dower debt was only Rs. 51, it is certain that interest boyond the right of retention for a sum of Rs. 51 was transferred. The zamindari rights having been transferred, Wazir's heirs became entitled to recover the property in 1873 and a suit for its recovery in 1925 is clearly time barred. I dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1925 P. C. 63=47 All. 250=52 I. A. 145 (P.C.).

A. I. R. 1929 Allahabad 327

MUKERJI AND NIAMATULLAH, JJ.

Mansa Tewari and *others*—Appellants.

v.

Parmeshar Tewari and *others*—Respondents.

Second Appeal No. 252 of 1926, Decided on 4th February 1929, against decree of Dist. Judge, Benares, D/- 11th November 1925.

Specific Relief Act, S. 54 (e)—Parties entitled to "birt jajmani" agreeing to receive gifts periodically — One party interfering with right of other party—Perpetual injunction can be granted to restrain that party from so interfering.

Where parties, entitled to "birt jajmani," agree between themselves that the gifts made for certain number of days should be received by one, while those made in the rest of the days of a month should be received by the other, and one of the parties interferes with the right of the other party to receive gifts according to the agreement, a perpetual injunction can be granted under S. 54 (e) against the interfering party to restrain it from so interfering : 35 *All.* 412, *Dist.*

[P 329 C 1]

M. L. Agarwala—for Appellants.

S. M. Husain and *R. C. Ghatak*—for Respondents.

Judgment.—This is a second appeal by the defendants. The plaintiffs among whom are people, who were originally made pro forma defendants, brought the suit, out of which this appeal has arisen, for a declaration of their title and for a perpetual injunction. The suit arose out of the following facts: The pedigree given in the plaint will show that one Sheodan Tewari had four sons : Raman Tewari. Meharban Tewari, Sita Ram Tewari, and Diha Ram Tewari. These four sons divided the "birt jajmani" of Sheodan Tewari in four equal shares, that the "gifts" received in three months of the year went to one son and "gifts" received in another three months to another son and so on. Diha Ram died and his heirs, according to the pedigree, were his nephews, the sons of Sita Ram. Kishun Dayal Tewari, one of the sons of Sita Ram, claimed to have been adopted by Diha Ram. In that capacity, he claimed the entire "three months" of Diha Ram. It is said that Sita Ram was then alive and he persuaded his sons to settle their dispute. It was settled in this way that in every month Kishun Dayal was allowed to share the gifts made in 24 days and the other sons

of Sita Ram were allowed to take the gifts made on six other days, in the course of a month. It is to be understood that this division was as to the three months belonging to Diha Ram. The plaintiffs who were some of the sons of Sita Ram and descendants of others, brought the suit on the allegation that Kishun Dayal's sons were interfering with the six days which were allowed to the plaintiffs. The defence set up was that Kishun Dayal was entitled to those six days also and not only to the 24 days as admitted, as the proper share of Kishun Dayal, by the plaintiffs. The Courts below have found that the plaintifls' case was true and they have agreed in decreeing the suit.

In this Court, only one point has been urged by the learned counsel for the appellants and it is this. In the circumstances of the case, the relief of perpetual injunction was not proper. The appellant's point is that a perpetual injunction cannot be granted where pecuniary compensation would afford an adequate relief. The argument is that if and when the defendants receive any gifts, which, ordinarily, ought to go to the plaintiffs the plaintiffs' remedy would be to bring a suit for recovery of that gift. The learned counsel had to go so far as to admit that this might mean that at the end of every month the plaintiffs would have to institute a suit or they might let their reliefs accumulate and they might bring their suit once at the end of the year. This is a proposition of law which, in our opinion has only to be mentioned to be rejected. One of the grounds on which the perpetual injunction can be granted is mentioned in Cl. (c), S. 54, Specific Relief Act. It is:

"where the injunction is necessary to prevent a multiplicity of judicial proceeding."

If the learned counsel's argument is correct, as we have already stated, there would be an endless litigation between the parties to the suit. Therefore, a perpetual injunction is the only adequate relief.

As another branch of this argument Dr. Agarwala relied on the case of *Sona Dei* v. *Fakir Chand* (1). It was argued by the learned counsel that a perpetual injunction would really amount to an injunction to the clientele of the parties, who are not parties to the suit. The argument was developed in this way. A jajman might think of making a special gift to one of the defendants and the result of granting an injunction would be to bind the client who wants to make a special gift from making one. In our opinion, the case of *Sona Dei* v. *Fakir Chand* (1) which is quoted has no bearing on the present litigation. The facts of that case were not similar to the facts of this case. The parties of the case of Sona Dei divided the birt jajmani by days. One of the parties to the agreement died and his share devolved, by right of inheritance, on his widow Sona Dei. A jajman refused to make a gift to Sona Dei on the ground that she was a woman. Incidentally, we might mention that a gift to a Brahman must be made to a male Brahman and not to a female Brahman. A gift to the female Brahman has not the same merits, if it has any merits at all, as a gift to a male Brahman. The jajman, as we have said, refused to make a gift to Sona Dei, seeing that she was only a female. He, however, made a sort of consolation gift to Sona Dei and made another gift to the defendant, Fakir Chand. Thereupon Sona Dei brought the suit, out of which the appeal arose, to recover the gift made to Fakir Chand. The question was whether Sona Dei could recover the amount of the gift. Two learned Judges, as against one, held that this was a special kind of gift and it was not covered by the agreement on which Sona Dei relied. The following occurs at p. 417 in the judgment of Banerji, J., with whom another learned Judge agreed :

"In the present case neither of the Courts below has found that the contract between the parties was of the wide nature just now mentioned, and as I have already said, it was not the plaintiff's own case, as laid in the plaint."

In our opinion the facts of that case have nothing to do with the facts of the present case. The parties in this case have not pleaded that it was possible to make a special gift to anybody. The contract between the parties has not been considered by the Courts below in view of this new pleading. In the circumstances, we cannot allow what is virtually a new case to be set up—a case which must depend on allegations of fact and a consideration of the agreement in view of those allegations. We have considered the pleadings in this case. The simple case

(1) [1913] 35 All. 412=19 I. C. 990=11 A. L. J. 563.

that arose between the parties was one of fact, namely, whether Diha Ram's share was or was not divided among the parties as alleged by the plaintiffs.

In our opinion, an injunction is the proper remedy in a case like this. It does not involve any compulsion on the clients. The parties have agreed to share in a certain way the gifts made on particular days. It will surely be the duty of the party who is not entitled to the gift, not to make any attempt to accept those gifts. His duty would be to keep himself away. This duty can only be secured by a personal injunction and which must be of a permanent character. In the result, we dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 329

ASHWORTH AND SEN, JJ.

Shah Ali Hammad—Appellant.

v.

Mohammad Nazir Ali and *others*—Respondents.

Second Appeal No. 1954 of 1928, Decided on 13th February 1929, against decree of Second Addl. Sub-Judge, Jaunpur.

(a) Mahomedan Law—Shia Law—Waqf—Facts insufficient to prove creation of waqf.

A house with a court-yard was claimed to have been waqf property. The court-yard was known as imambara, majlises were held on it at the time of Moharrum and Chehlum, tazias used to be kept in it in front of the dalan and a number of graves were to be found in different portions of the property :

Held : that a Court is not bound to hold from these facts that house was dedicated according to Shia law. [P 329 C 2]

(b) Mahomedan Law—Shia Law—Waqf—Writing is not necessary—Dedication can be inferred from long user.

In order to constitute waqf under the law, the existence of an instrument in writing is not necessary and dedication may be inferred from long user. [P 329 C 2]

Hyder Mehdi and *Zafar Mehdi*—for Appellant.

Judgment.—This is a defendant's appeal arising out of a suit for possession of a house with a court-yard and a pucca well. The plaintiff came into Court on the allegation that he was the owner of this house by right of purchase. The defendants denied the plaintiff's title and insisted that the property was waqf property and that the defendants were in adverse proprietary possession for a period of more than 12 years before suit. The trial Court decreed the suit. It held that the plaintiff's title to the property was established, that the defendants had failed to prove that the property was dedicated and that the defendants were not in adverse possession of this property for a period of more than 12 years before the institution of the suit. The lower appellate Court has affirmed the findings of the trial Court on all the aforesaid points and has dismissed the appeal.

It is contended that the lower appellate Court has misdirected itself in holding that the property was not dedicated property because it ought to have found upon a certain number of facts which were either admitted or proved that the property did, as a matter of fact, constitute waqf under the Shia law. It has been found by the lower appellate Court that the court-yard was known as imambara, that majlises were held in the court-yard at the time of Moharram and Chehlum and that tazias used to be kept in the court-yard in front of the dalan and that a number of graves of the family of Shah Husain Bakhsh were to be found in different portions of the property. The learned counsel for the appellants contends that on these facts the Court ought to have held that the property was dedicated according to Shia law. It may be conceded that in order to constitute waqf under the law the existence of an instrument in writing is not necessary and that dedicatien may be inferred from long user. It cannot, however, be urged that upon the facts found by the lower appellate Court it was bound to come to the conclusion that the property was waqf property. It is a matter of common knowledge that tazias are kept in the court-yards of the houses of Shia Mussalmans and that majlises are held in their houses on the occasions of Moharram and Chehlum. It is also a fact of common knowledge that graves sometimes are to be found in the residential houses of Shia Mussalmans. The popular description of a place is of little or no evidential value to prove dedication. In these circumstances it could not be said that the learned Judge was bound to hold in this case that the property was

waqf property. We think that the appeal is concluded by the finding of fact arrived at by the lower appellate Court and there are no circumstances pointed out to us to shew that the said finding is vitiated either by misapplication of substantive law or an error of procedure. The appeal is dismissed under O. 41, R. 11, Civil P. C.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 330

BOYS, J.

Ajodhya and *others*—Appellants.

v.

Indra and *another*—Respondents.

Second Appeal No. 1426 of 1926, Decided on 15th November 1928, against decree of Sub-Judge, Mirzapur, D/- 14th May 1926.

(a) Transfer of Property Act, S. 63—Redemption suit—Mortgagee claiming compensation for guava grove of 75 trees from 7 to 11 years old—Lower Court finding it impracticable to remove trees with roots and allowing neither compensation nor removal of trees—Question being one of fact, High Court did not interfere—Civil P. C. S. 100.

In a redemption suit mortgagee claimed compensation for a guava grove consisting of 75 trees between 7 and 11 years old, but the lower Court holding that it was impracticable to remove the trees with all their roots allowed neither compensation for the trees nor their removal.

Held: that the question whether particular trees could or could not be removed with their roots being one of fact, there was no reason to hold that lower Court's decision was wrong: *A. I. R.* 1926 *All.* 67, *Appl.*; *A. I. R.* 1921 *All.* 353 (*F.B.*), *Cons.* [P 331 C 1]

(b) Transfer of Property Act, S. 63—Meaning of accession.

It is doubted whether the planting of trees can come under any circumstances within the phrase "any accession" in S. 63, except it may be in those cases in which the planting of trees is, as it sometimes is, a step taken to preserve the property, e. g., to prevent erosion by water. [P 331 C 1]

Haribans Sahai—for Appellants.

S. N. Varma and *Mahadeo Prasad*—for Respondents.

Judgment.—Two points were taken before me. I was asked to hold that the lower appellate Court was wrong in not allowing the defendant to press the plea of adverse possession. I do not think it was wrong in view of the plea deliberately and definitely and, I have no doubt truly taken in the written statement. There is no need for me to add anything to what the lower appellate Court has said. The other point is whether the defendants, representatives of the original mortgagee, and who for the present purpose may be treated as mortgagees, were entitled on the plaintiff mortgagor redeeming a usufructuary mortgage to compensation for the trees of a guava grove, trees said to be 75 in number and to have been planted 10 or 11 years previously, or whether they were entitled to remove the trees and to have time given them for removing them. I have taken the description of the grove from the defendant's written statement. The plaintiff in a misguided effort to improve his own case apparently admitted that the trees had been planted only seven or eight years ago. Obviously the younger the trees the more easily they could be removed. The trial Court gave the defendant Rs. 450 as compensation.

The lower appellate Court held that the defendants were not entitled to any compensation and moreover were not entitled to remove the trees, relying on *Nageshwar Rai* v. *Nand Lal* (1), a decision of two Judges of this Court. There the trees were slightly in excess of the number of trees in this case and were apparently large mangoes. It was held that it was "impracticable" to remove all the roots of the mangoes, and therefore the mortgagee could not restore the land in the condition in which he received it if he was allowed to cut the trees. In the present case there were 75 trees ranging apparently somewhere between 7 and 11 years of age. I can see no justification for holding that the decision in *Nageshwar Rai* v. *Nand Lal* (1) was wrongly applied. It may be, if this question is to be decided as one of fact in each case, that another Judge would take a different view; and I am not wholly satisfied that in each particular case there could be satisfactory evidence as to whether it was possible or not possible to remove a number of trees with all their roots. I, therefore, can see no principle on which to determine whether in the particular case before me the decision to which I have referred should be applied, or the decision of the Full Bench in *Raghunandan Rai* v. *Raghunandan Pande* (2). There

(1) A. I. R. 1926 All. 67=48 All. 70.
(2) A. I. R. 1921 All. 353=43 All. 638 (F.B.).

their Lordships without referring to any considerations of the number of the trees or the age of the trees broadly held that the mortgagee was not entitled to compensation but was entitled to remove the trees. They did not consider whether it was practicable to remove the roots of the trees, and in the later case where weight was given to that consideration no reference was made to the Full Bench decision. I see no reason in this particular case for holding that the lower appellate Court was wrong in applying the decision in *Nageshwar Rai* v. *Nandlal* (1). It had the decision before it, and it is a question of fact whether the particular trees with their roots could or could not be removed.

At the same time I feel that it is unsatisfactory to leave the determination of cases of this description to be guided by a consideration of whether there is one tree more or less in a particular case, whether the trees are one year more or less old, etc., and I would observe that it is at least doubtful whether the planting of trees can come under any circumstances within the phrase "any accession" in S. 63, T. P. Act, except it may in those cases in which the planting of trees is, as it sometimes is, a step to preserve the property, e. g., to prevent erosion by water. The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 331

DALAL, J.

Zorawar Singh and *another* — Appellants.

v.

Dip Chand and *others* — Respondents.

Second Appeal No. 940 of 1927, Decided on 30th January 1929, against decree of Addl. Sub-Judge, Agra, D/- 4th February 1927.

(a) Specific Relief Act, S. 42—Scope.

For a suit for declaration there may be repeated causes of action and each new cause would give a fresh right to sue. [P 332 C 1]

(b) Adverse possession—Male owner being away, woman's name entered in village papers—Woman does not hold adversely.

In a case where a woman's name is entered in village record, because the male owner is away, the woman would be considered to be in possession on behalf of the man and not adversely. [P 332 C 1]

(c) Specific Relief Act, S. 42, Prov.—Two brothers mortgaging property—One brother dying and his widow selling half equity of redemption—Other brother suing for declaration that he was owner of whole equity of redemption by survivorship and that sale by widow was void—Suit for mere declaration without relief of redemption was not incompetent.

Two brothers mortgaged certain property and after the death of one of them, his widow sold the equity of redemption with regard to half the property mortgaged. The other brother sued for declaration that he became the owner of the entire equity of redemption by right of survivorship and that nothing passed to the vendees from the widow.

Held: that as the declaration was confined to half the property and as he could not sue to redeem the whole property alone, the suit for mere declaration would not be barred by proviso to S. 42: (1882) *A.W.N.* 73; and (1884) *A. W. N.* 78, *Discussed.* [P 332 C 2]

K. N. Laghate—for Appellants.

N. P. Asthana—for Respondents.

Judgment.—This is a second appeal by two defendants known as defendants 1 and 2 in the original suit. Their father was mortgagee of a certain property by virtue of an old mortgage. The mortgagors were Dip Chand, plaintiff and his brother, Chhidda, who died leaving a widow, Mt. Kokla. On 11th January 1919 Mt. Kokla sold half the right of equity of redemption in the property to the defendant Gopi with a declaration that it belonged to her. Thereupon the father of defendants 1 and 2 pre-empted the property by a suit filed in 1920. The present suit was filed by Dip Chand on 10th August 1925 for a declaration that Dip Chand and Chhidda were members of a joint Hindu family, that Mt. Kokla had no rights in the property, Dip Chand having become owner of the entire equity of redemption by right of survivorship on the death of Chhidda, that no rights passed to Gopi by the sale, that no rights passed to the father of defendants 1 and 2 under the decree for pre-emption and that the relation of mortgagor and mortgagee with respect to half the property in suit continued between the plaintiff Dip Chand and defendants 1 and 2. Such declaration was granted by the lower appellate Court. In this Court, the arguments are well summarized in the first three grounds of appeal.

1. That a suit for declaration with respect to a sale effected more than six years prior to the institution of the suit was barred by time under Art. 120, Lim. Act.

2. That when Chhidda and his brother were joint, the possession of Mt. Kokla was adverse and ripened into that of a proprietor after 14 years when she sold the equity of redemption.

3. That the suit was barred by the provisions of S. 42, Specific Relief Act.

The sale did take place in 1919 but the plaintiff obtained a fresh cause of action by the proceedings in 1920 when the father of defendants 1 and 2 sued for pre-emption and in defence, the sale, which is attacked, is put forward by Gopi. For a suit for declaration there may be repeated causes of action and each new cause would give a fresh right to sue. Within six years Gopi had put forward his claim under the sale and, therefore, the suit for declaration regarding the effective character of the sale was within time. The decree for redemption was passed within six years of the institution of this suit and a declaratory relief with regard thereto must be considered to be within time.

The lower appellate Court has held that Mt. Kokla was not in possession in her own right. The mere entry of her name in the village record cannot start adverse possession. There is no evidence that she held the property to the knowledge of Dip Singh as owner of the equity of redemption. It often happens that a woman's name is entered when she is in the village and the male owner is away. In such a case the woman would be considered to be in possession on behalf of the man and not adversely. I hold that Mt. Kokla did not acquire any proprietary title by adverse possession.

In the provisions of S. 42, Specific Relief Act, is the proviso that no Court can make any declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so. In the present case, the deduction of the learned counsel for the appellant was that the plaintiff could seek the further relief of redemption and, therefore, he was not entitled to obtain a declaration from a civil Court. On behalf of the respondents, two rulings of this Court were referred to : viz., *Bhujhawan* v. *Nanha* (1) and *Ram Charan* v. *Durga Prasad* (2). No reasons are given in those judgments. It was there held that a mortgagor may seek for a declaration that he was a mortgagor without seeking the relief of redemption of mortgage. The decisions are by a Bench of two Judges, so I shall not comment thereon. The argument that "further relief" meant relief of the same nature does not appeal to me. In the nature of things, such further relief would be of a different character, just as a relief for declaration is different from a relief for possession. In the present case, however, I am of opinion that the plaintiff was not in a position to seek the relief of redemption. His declaration was confined to half the property and without the consent of the defendant, he could not redeem the property piecemeal. It was pointed out by Mr. Laghate that the plaintiff himself was the mortgagor of the other half. That is true, but he is not bound to join up another property when he seeks relief with respect to a particular property. He desires relief with respect to half the property only. Redemption thereof would not be possible in this suit. For this reason I hold that the provisions of S. 42, Specific Relief Act do not apply. I dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1882] A. W. N. 73.
(2) [1884] A. W. N. 78.

A. I. R. 1929 Allahabad 332

DALAL, J.

Gayadin Singh and *others*—Defendants—Appellants.

v.

Kalka Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 305 of 1927, Decided on 5th February 1929, against Decree of Dist. Judge, Benares, D/- 15th July 1926.

Limitation Act, S. 19—Person in one case in settlement Court maintaining all along that he was full tenant and denying anybody's right to redeem him—But judgment stating that he admitted that he did not get mutation of names effected because he held possession as mortgagee—Exact statement not before Court—Statement did not amount to acknowledgment.

A person, against whom an acknowledgment that he was mortgagee of a holding was sought to be proved by reference to a judgment of settlement Court, had in fact in that case maintained that he was a full tenant of the holding and had denied that anybody had the right to redeem him. But in the judgment of the settlement Court it was stated "In his examination he admitted that he did not get the mutation of names effected because he

held possession as mortgagee". The exact statement of the person in that case, however, was not before the Court.

Held: that the statement did not amount to acknowledgment of liability as mortgagee so as to give fresh start of limitation under S. 19: 12 *A. L. J.* 374; 1 *All.* 117 (*F.B.*); 17 *A. L. J.* 330; *A. I. R.* 1925 *All.* 174; *Dist.*; 38 *All.* 540; 8 *Bom.* 99 and *A. I. R.* 1925 *All.* 353, *Rel. on.* [P 333 C 2, P 334 C 2]

Iqbal Ahmad, Badari Narain and *Gadadhar Prasad*—for Appellants.

K. N. Katju—for Respondents.

Judgment.—This matter in dispute here is whether a certain alleged statement in Court, which statement has been weeded out, may be taken as an acknowledgment of liability as mortgagee by the person who made the statement. The acknowledgment is sought to be proved under S. 19, Lim. Act, in order to extend the period of limitation which had expired at the date of the institution of the suit for redemption from the date of the mortgage, 13th June 1856. Both the subordinate Courts have held that that statement was in writing and signed by Sheo Nandan Singh. Those findings are binding here. Both the subordinate Courts have held the statement to be a sufficient acknowledgment of Sheo Nandan's liability to be redeemed at the time in 1884.

The question is of considerable difficulty because the statement is not before the Court, and the circumstances under which the statement was made and the exact words cannot be gathered from the oral testimony and from the judgment of the settlement Court which is still in existence. It appears, however, that Sheo Nandan Singh's contention at the time was that he was a tenant of the fixed-rate holding, and that the applicant (one Jaglal) had no right to be recorded as a mortgagor. In the result the applicant Jaglal was not recorded as a mortgagor. Reference should be made to the pedigree given at the commencement of the judgment of the lower appellate Court. Ram Sahai was the mortgagor, and he had mortgaged the holding usufructuarily to certain money-lenders whose names it is not necessary to record. After the death of Ram Sahai his cousin, Durga redeemed the mortgage in the lifetime of Ram Sahai's widow, Mt. Lachminia and took possession. Durga appears to have acted on behalf of himself and his brother. Sheo Nandan was the brother's son of Durga. In 1884 Jaglal, who was in the same degree of relationship through males with Ram Sahai as Durga was, applied to the settlement Court to be recorded as a mortgagor and Sheo Nandan, and Lachhman, the son of Durga, to be recorded as mortgagees. Sheo Nandan put in an appearance and contested that he was the principal tenant and that the applicant had no right. This defence of Sheo Nandan is recorded in the judgment in the following words:

"Ram Sahai Singh, the original tenant, was related to me as uncle. He twice mortgaged the cultivated holdings to Balak Sahai and Sheo Ratan Sahai. But after his death my uncle Durga Singh paid the mortgage money to the mahajans and entered in possession thereof. All the cultivated holdings in dispute have ever since been in our possession. They may be recorded as holdings in our cultivation" (*Hamari kashtkari likhi jawe*).

The question in issue was what record was to be made in the papers at the time of settlement as regards this fixed-rate tenancy holding and the defence of Sheo Nandan was an assertion of full tenancy rights in denial of the mortgage alleged by the applicant Jaglal. So far there was no admission of liability of any mortgage but rather a denial thereof on the part of Sheo Nandan. Then follow these words in the judgment:

"In his examination he admitted that he did not get the mutation of names effected bscause he held possession as mortgagee".

This sentence is relied upon as giving in effect the subsistance of the acknowledgment of liability made by Sheo Nandan. The word "admitted" indicates that this was something which was forced out of the mouth of Sheo Nandan in cross-examination, and the mortgage was mentioned only as a reason for certain action not taken by Sheo Nandan. When all along there was a denial of any right of redemption on the part of Ram Lagan, I am not prepared to hold that this statement amounted to an acknowledgment of liability as mortgagee and of Ram Lagan's right to redeem, when the extact statement is not before the Court nor is it clear whether the settlement officer correctly interpreted what Sheo Nandan said in that connexion. It is significant that the settlement officer finally continued the entry of mortgagor in the name of a deceased person and did not substitute the name of Jaglal applicant who desired such substitution.

Dr. Katju on behalf of the respondents quoted various rulings, but in all those cases the actual acknowledgment was before the Court, and the question was really of the interpretation of a matter which was certain. There may be an admission of mortgage in a written statement filed by the mortgagee as in *Indrapal Singh* v. *Mewa Lal* (1), or one in a Record-of-Rights prepared at the time of settlement which was signed by the mortgagee and contained a description of the mortgagee as a mortgagee as in *Daia Chand* v. *Sarfaraz* (2), or a description of themselves as mortgagees in a plaint in a suit for arrears of rent as in *Kamla Devi* v. *Gur Dayal* (3), or an admission in a signed list of property describing the property as subject to a mortgage as in *Sanwal Das* v. *Sayid Ali Mahdi* (4). I have not been referred to any case where doubt may exist as to what the person in possession stated and under what circumstances and with what intention. In this case there is entire conflict between the alleged acknowledgment of liability and the whole case of Sheo Nandan in denial of any existing right of any mortgagor to redeem him. It was held in *Khiali Ram* v. *Taik Ram* (5), that the acknowledgment of liability must be in unequivocal terms. Their Lordships quoted from the case of *Dharma Vital* v. *Govind Sadvalkar* (6) at p. 102.

"The intention of the liability is manifestly to make an admission in writing of an existing jural relation of the kind specified equivalent for the purposes of limitation to a new contract; but for this purpose the consciousness and intention must be as clear as they would be in a contract itself, and no one could pretend that a contract to buy land awarded by a particular decree was an admission of the particulars of the judgment. The reference would be merely a means of defining the things bargained for, and here the reference was merely a means of defining the thing delivered."

Applying this principle their Lordships refused to consider as an acknowledgment of liability a description of the property in a dakhalnamah as a mortgage. In *Sham Devi* v. *Bhagwat Dayal* (7), a learned Judge of this Court insisted that an acknowledgment of liability should be a conscious acknowledgment. According to the learned Judge there should be evidence that the maker of the statement thought and believed that he was liable to be redeemed on the way of making the statement. In this particular case the belief of Sheo Nandan was the other way about that he was not liable to be redeemed by Jaglal at the time his statement was recorded in the settlement Court.

I hold that the statement did not start a fresh period of limitation under the provisions of S. 19, Lim. Act. I set aside the decrees of both the subordinate Courts and dismiss the plaintiffs' suit with costs of all the Courts.

S.N./R.K. *Decree set aside.*

(1) [1914] 36 All. 264=23 I.C. 429=12 A.L.J. 374.
(2) [1875] 1 All. 117 (F.B.).
(3) [1919] 17 A.L.J. 330=51 I. C. 283.
(4) A. I. R. 1925 All. 174.
(5) [1916] 38 All. 540=36 I.C. 452=14 A.L.J. 834.
(6) [1884] 8 Bom. 90.
(7) A. I. R. 1925 All. 353.

A. I. R. 1929 Allahabad 334

DALAL, J.

Tamizan—Plaintiff—Appellant.

v.

Nanhey Lal and *others*—Defendants—Respondents.

Second Appeal No. 818 of 1927, Decided on 23rd January 1929, against decree of Dist. Judge, Budaun, D/- 29th January 1927.

Civil P. C., O. 41, R. 33—Appellate Court can grant relief to defendant who could have but has not appealed.

The appellate Court is entitled to grant relief to a defendant who could have appealed but has not appealed : *A. I. R.* 1927 *All.* 37, *Foll.* ; 34 *All.* 32, *Dist.* [P 335 C 2]

Baleshwari Prasad—for Appellant.

K. N. Laghate—for Respondents.

Judgment.—The name of respondent 9 shall be removed from the record. Reference should be made to the order passed by another learned Judge on 27th June 1927 when admitting the appeal. The plaintiff who was the heir of one Channu Khan was entitled to seven siham property on his death and her brother Farid Khan only to fourteen. Mutation was made accordingly on the death of Channu Khan, but in 1319 Fasli, that is, in 1912, an alteration was specifically made in the khewat and the name of Mt. Tamizan was recorded against one siham and of Farid Khan against 20. When Farid Khan died the distribution of his property was made on the basis of his owning 20 sihams plus two sihams inherited

from his mother. His daughter inherited a correspondingly large share, and Munnu Lal, defendant is purchaser of the share of the daughter. There has also been an auction sale of the assets of Farid Khan in the hands of his two sisters. That sale also took place on the basis of Farid Khan owning 22 siham property. After all these transfers Mt. Tamizan came to Court to obtain possession of her proper share of the property, eight sihams, from the purchaser of Mt. Taufiqan and from the successor-in-interest of her sister Mt. Rahiman Bibi. She has sought no relief against the decree-holder, Munnu Lal. The lower appellate Court held that the entry in 1319 Fasli was not wrong, that it was correct, and that it was made according to an understanding between brother and sister. The learned Judge of the lower appellate Court has pointed out that Mt. Tamizan paid revenue according to her share as recorded in the khewat and not in excess, that there were several mutations when she did not object. He also pointed out that Mt. Tamizan received no profits and, that her explanation that she held *sir* land was not true. There is thus a definite finding of fact that in 1912 the record was correctly prepared and by some arrangement by which Mt. Tamizan was bound she was recorded as cosharer of one siham only. The learned Judge of this Court has added another reason that if Farid Khan was cheating his sister Tamizan out of seven sihams of her eight sihams, there is no explanation why he should have been cheating her when he did not cheat her sister, Rahiman Bibi who was recorded for her full eight sihams. It is obvious to me that Mt. Tamizan has taken steps against strangers when the property passed out of the family. A portion of the share in possession of the famiiy had also to be included in the suit not to expose her real desire of depriving strangers of family property which they had rightly acquired. I hold that since 1319 Fasli, that is, 1912, Mt. Tamizan has been entitled to only one siham property of her father, and not seven sihams. On this finding her entire suit was to be dismissed.

It was argued that the lower appellate Court was not entitled to give relief to the defendant who had not appealed. I am of opinion that the provisions of O. 41, R. 33, Civil P. C., will apply, and the Court was entitled to grant relief to a defendant who had not appealed. The case of *Mohsham Ali Khan* v. *Mulu* (1) may be quoted in support. On behalf of the appellant reference was made to the Full Bench ruling in the case of *Rangam Lal* v. *Jhandu* (2). The facts of that case were not analogous to the facts of the present case. There as between the appellant and the respondent the respondent had submitted to a certain decree passed in favour of the appellant. In the present case there was no submission by any respondent to a decree passed in favour of the appellant in the lower appellate Court. The case was of a respondent who could have appealed but has not appealed, and in such a case the lower appellate Court was entitled to exercise in favour of any of the respondents the power granted to him although such respondents had not filed an appeal. I dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) A.I.R. 1927 All. 37=48 All. 551.
(2) [1912] 34 All. 32=11 I.C. 640=8 A.L.J. 1111.

A. I. R. 1929 Allahabad 335

DALAL, J.

Har Saran Das—Plaintiff—Appellant.

v.

Harbans Singh and *others*—Defendants—Respondents.

Second Appeal No. 838 of 1927, Decided on 24th January 1929, against decree of Addl. Sub-Judge, Bulandshahr, D/- 26th March 1927.

(a) U. P. Land Revenue Act (1901), S. 2 (12)—Grove recorded in Record-of-Rights of 1901 as 'sir' and continued to be so recorded since, is 'sir'.

Where a grove as sntered is "*sir*" in the Record-of-Rights of 1901 and the entry is continuously repeated since, the grove must be recognized as "*sir*" and Court cannot go behind such entry: *A. I. R.* 1924 *P. C.* 247, *Ref.* [P 336 C 1]

(b) Landlord and Tenant—In U. P. zamindar is owner of trees in tenant's land but subject to contrary custom.

A zamindar in U. P. is owner of the trees standing on tenant's land as a general rule ; but this rule is subject to a custom to the contrary : 5 *All.* 61 ; 9 *A. L. J.* 672 and *A. I. R.* 1923 *All.* 406, *Rel. on.* [P 336 C 2]

M. L. Agarwala—for Appellant.

Haribans Sahai—for Respondents.

Judgment. — The plaintiff zemindar sued for the price of certain trees

sold by the defendants. These trees were situated on plot 249. There was also a prayer for an injunction that the defendants may be prevented from cutting down more trees.

In para. 1 of the plaint the plaintiff described himself as the owner and possessor of the plot while he described defendant 1 at first as an exproprietary tenant of the same plot on behalf of the plaintiff. Subsequently his pleader appears to have seen wisdom, and an amendment was made that defendant 1 was an exproprietary tenant of other plots.

The lower appellate Court held that the defendant was a tenant of the plaintiff of the plot in suit, and that under a custom recorded in the wajib-ul-arz a tenant was entitled to cut the tress standing on the land within his cultivating occupation. For these reasons the plaintiff's suit was dismissed, and he has come here in second appeal.

The argument here was that no exproprietary rights can accrue in grove land, which cannot be *sir* land. The plaintiff is purchaser of the zamindari property of the defendant, and a grove stood in this portion of plot 249. It was argued that as the plot was grove no *sir* rights could accrue therein. Reference was made to a Bench ruling of this Court in *Bhagwan Din* v. *Peare Lal* (1). I am in agreement with that ruling so far that *sir* rights cannot accrue by cultivation in a grove because grove land cannot be cultivated. The learned Judges have, however, gone further and held that this Court has jurisdiction to examine the correctness of a settlement entry also, and even though an entry of *sir* may have been made in the Record-of-Rights framed prior to 1901 no *sir* rights could accrue in a grove. With all respect I am unable to agree with this proposition. The question of cultivation arises only with respect to (b) of the definition of *sir* given in S. 2 (12), Land Revenue Act of 1901. There is, however, Cl. (a) in which it is stated that *sir* means land recorded as *sir* in the last Record-of-Rights framed before the commencement of the Act of 1901 and continuously so recorded since or which but for error or omission would have been so continuously recorded. My opinion is that where there is an entry even with respect to a grove the grove would be recognized as *sir* land. A Privy Council ruling in the case of *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (2) was also quoted in support of the contention that a grove was not land held for agricultural purposes within the meaning of the Tenancy Act of 1901. As pointed out by me, this question will not arise where there is an entry in the Record-of-Rights and a continuation of that entry. It would, therefore, have been necessary to inquire by remitting an issue to the lower appellate Court whether plot 249 was recorded as *sir* in a Record-of-Rights framed before 1901 and continuously so recorded since. In the present case, however, the plaintiff has admitted the defendant to be a tenant of the land in suit. No copy of the proceedings by which rent of exproprietary tenancy was fixed is on the record. There is, however, a copy of a plaint filed by the plaintiff in a suit for the recovery of arrears of rent in which he declared Bahadur Singh, defendant to be a tenant of this very plot along with other plots and claimed rent as such in respect of this plot as well as in respect of other plots. There cannot be the slightest doubt, therefore, that the defendant is a tenant of the plaintiff. Such being the case, he is entitled according to the custom recorded in the wajib-ul-arz prepared at the time of Mr. Stoker's settlement, to cut the trees standing on plot 249. It is true that as a general rule in these provinces the zamindar is owner of trees standing on tenant's land. Such rule has been followed by this Court ever since 1883, the time of the ruling of *Kasim Mian* v. *Bahde Husain* (3). In 1912 there was the case of *Lachman Das* v. *Mohan Singh* (4) and a more recent case in 1923 of *Kamta Prasad* v. *Sheo Prasad* (5). In all these cases, however, there was a provision that such rule would be enforced in the absence of custom or contract to the contrary. Tyrrell J., in delivering judgment in the case reported in 5 *Allahabad* observed:

"And it may be that there are districts where the tenant has an exclusive and absolute property in the trees he has grown or inherited on his lands. But apart from such local and particular conditions, which would, of course, be made questions in issue in the

(1) [1920] 42 All. 483=58 I. C. 620=18 A.L.J. 510.

(2) A. I. R. 1924 P. C. 247=46 All. 831=51 I. A. 381 (P.C.).
(3) [1883] 5 All. 616=(1883) A. W. N. 169.
(4) [1912] 9 A. L. J. 672.
(5) A. I. R. 1923 All. 406=45 All. 361.

case in which they might be alleged, the presumption of law and the general rule would be that the property in timber on a tenant's holding rests in the landlord in the same way as, and to no less an extent than, the property in the soil itself."

In the present case there is a custom to the contrary. I dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 337

DALAL, J.

(*Bohra*) *Hukum Singh*—Applicant.

v.

Surajpal Singh and *another*—Defendants—Opposite Parties.

Civil Revn. No. 10 of 1928, Decided on 31st January 1929.

Civil P. C., S. 152—Clerical mistakes.

The provisions of S. 152 give power to the Court not only to correct clerical or arithmetical mistakes in judgments, decrees or orders, but also errors arising therein from any accidental slip or omission and such correction may be done at any time by the Court, even without any application by any of the parties: 7 *All.* 411; 47 *P. R.* 1913 and *A. I. R.* 1924 *Mad.* 225, *Dist.* [P 337 C 2]

Benod Behari Lal—for Applicant.

N. P. Asthana—for Opposite Parties.

Judgment.—The learned Judge of Agra, Mr. Bennet, amended a judgment and decree of his predecessor-in-office Mr. Herchenroder on the ground of an accidental slip. A decree-holder failed in the execution Court to obtain sale of certain trees and materials of a house of a judgment-debtor in the execution Court. The judgment-debtor was a tenant and the trees grew on his holding and he was a licensee of the house. The decree-holder thereupon brought a declaratory suit that the trees and the materials of the house were saleable in execution of his decree. The suit was decreed with respect to both the trees and the materials by the trial Court of the Munsif of Agra. An appeal was taken to the Court of the District Judge and Mr. Herchenroder, Additional District Judge, decided it. In the operative part of the order he appears to have made the mistake of transposing the words "materials of the house" and "trees." His judgment shows that he held the materials of the house liable to sale but not the trees and so his intention was to decree the suit as to materials and dismiss as to trees. By some slip the words were transposed. Mr. Herchenroder left the district and there was no successor to him as Additional District Judge. The successor to the office was Mr. Bennet, the District Judge. A petition was presented to Mr. Bennet by the defendants zamindars under S. 152, Civil P. C., desiring both the judgment and the decree to be amended for reasons already stated by me. A notice was issued to the plaintiff-decree-holder, Hukum Singh. He made no appearance and the judgment and the decree were corrected as desired by the defendant zamindars.

It is argued here that Mr. Bennet had no jurisdiction to make the correction. In my opinion he had. I remember a second appeal in Oudh where under similar circumstances I corrected both the judgment and the decree of a learned brother of mine, who had by a slip written the word decreed in place of dismissed. My learned brother had then left the Court of the Judicial Commissioner and was in England as was the case here. The provisions of S. 152 are wider than the provisions of S. 206 of the Code of 1882. The provisions of S. 206 gave the Court power only to amend the decree if it was found to be at variance with the judgment. Under the provisions of that section, no power was given to the Court to correct any accidental slip in the judgment. The provisions of S. 152 are very wide and give power to the Court not only to correct clerical or arithmetical mistakes in judgments, decrees or orders, but also errors arising therein from any accidental slip or omission. This may be done at any time by the Court, even without any application by any of the parties. The aim of the present Code of Civil Procedure is to give a Court the widest powers possible to pass orders for the ends of justice at any time and in any situation. Reference as to rulings passed prior to 1908 can therefore be of no help. The rulings quoted by learned counsel for the applicant were: *Surta* v. *Ganga* (1) with the Full Bench judgment in *Surta* v. *Ganga* (2) and *Sahab Din* v. *Siraj-ud-din* (3). These rulings are no longer applicable. A ruling of the Madras High Court in the case of *Lakshman Iyengar* v. *Narayana Iyengar* (*A. I. R.* 1924 *Mad.* 225) was quoted. The matter was de-

(1) [1885] 7 All. 411=(1885) A. W. N. 88.
(2) [1885] 7 All. 875=(1885) A.W.N 256 (F.B.).
(3) [1913] 47 P. R. 1913=17 I. C. 418=25. P. W. R. 1913.

cided there on a very technical ground that the application wae only for the amendment of the decree and not for the amendment of the judgment, and the decree, when it agreed with the judgment, could not be corrected under S. 152. The Court, however, gave the indulgence of having the same application treated as an application for review. Obviously the Court's attention was not drawn to a simpler method of treating the application as an application for the correction of the judgment as well as for the correction of the decree. I have read the judgment of Mr. Herchenroder and agree with Mr. Bennet that Mr Herchenroder has made a slip and the correction was necessary for the ends of justice. This application is dismissed with costs.

S.N./R.K. *Revision dismissed.*

A. I. R. 1929 Allahabad 338

BANERJI AND SEN, JJ.

Emperor

v.

Jukhan—Opposite Party.

Criminal Ref. No. 894 of 1928, Decided on 8th February 1929, made by Sess. Judge, Bareilly, D/- 22nd November 1928.

Criminal P. C., S. 307—High Court can interfere with jury's verdict if it is perverse or patently erroneous — Accused charged under Penal Code S. 394—Guilt established by prosecution evidence—No evidence led to prove his innocence—Jury giving verdict of not guilty because injury caused was trivial and stolen goods were not found in accused's house — Verdict held to be perverse.

Where the verdict of the jury is perverse and patently erroneous and it is established that the verdict amounts to a gross miscarriage of justice, the High Court is entitled to draw its conclusions from the evidence as to the guilt of the accused. The accused was charged under Penal Code, S. 394, was caught at the spot with a lathi. The prosecution evidence fully established the accused's guilt and the accused led no evidence to establish his innocence. The majority of the jury, however, gave a verdict of not guilty on the ground that the injuries caused to the complainant were trivial and that the stolen goods were not discovered in the accused's house.

Held: that the verdict of the jury was perverse : 2 *A. L. J.* 475, *Ref.*

[P 338 C 2 ; P 339 C 1]

M. Waliullah—for the Crown.

Judgment.—This is a reference made by the learned Sessions Judge of Bareilly under S. 307, Criminal P. C.

Jukhan was committed to sessions on a charge under S. 394-75, I. P. C. The trial proceeded with the aid of five jurors. A verdict of "not guilty" was returned by a majority of 3 to 2. The learned Sessions Judge disagrees with the verdict of the majority and is clearly of opinion that it is necessary for the ends of justice to submit the case for the consideration of this Court. The Judge has stated his opinion on the evidence and given his reasons for differing from the majority of the jury. The reference to this Court fulfils the requirement of S. 307, Criminal P. C.

Ordinarily the verdict of the jury to whom the decision of the case was primarily entrusted by law is entitled to very great weight and their verdict is not liable to displacement upon the mere ground that upon a consideration of all the evidence, a Judge would have arrived at a conclusion different from that arrived at by the jury: *Emperor* v. *Chirkua* (1). But where the verdict of the jury is perverse and patently erroneous and it is established that the verdict amounts to a gross miscarriage of justice, this Court is entitled to draw its conclusions from the evidence as to the guilt of the accused.

Maya Ram complainant was proceeding from his native village Khera to a neighbouring village Kerka on 2nd August 1928. It was a lonely road. The time was about nightfall. He was carrying on a stick a bundle containing clothes for his son. When he reached a bridge near Kurtara, he was suddenly attacked by three persons, who were armed with lathis. Upon his shouting for help two of his assailants ran off to a maize field with his bundle. He caught the third assailant but the latter managed to escape into a rice field. Maya Ram's cries for help attracted two chamars who were returning from their singara cultivation and also a third man, kurmi by caste, who was on his way to his field. They ran to help Maya Ram and caught Jukhan in a rice field. A report was lodged at the police station without any delay and Jukhan was placed into the custody of the police. Two days later, the complainant was medically examined His injuries were slight.

The case of the prosecution rests upon the statement of Maya Ram, the com-

(1) [1905] 2 A. L. J. 475.

plainant, who is corroborated in essentials by the three persons who came to his rescue, viz., Dulloo, Sadho and Jai Sukh. The statements of these witnesses appear to be perfectly natural and straightforward and no facts have been elicited to their discredit.

The three witnesses saw the assault from a distance. They saw two of the assailants running away with a bundle of clothes. The accused was caught at the spot with a lathi. The prosecution witnesses state that they never knew Jukhan before.

Jukhan pleaded not guilty. He was produced before a Magistrate on 8th August 1928 but he refused to make any statement. On 12th September 1928 he made the following statement before the Committing Magistrate :

"I was returning from Fatehganj Bazar, I had a bundle of thread. Maya Ram and Sadho were quarrelling. Many others were present. This was at culvert, near Kurtara. Maya Ram and Sadho said "catch him." I was caught and my bundle was taken. All accused knew me before."

It is difficult to conceive a story more absurd and unconvincing than this. In the Court of Session he improved upon this story with this addition that he had seen Maya Ram and had quarrelled with him and other witnesses and that he had bought the thread from a bania of Fatehganj bazar whose name he did not know. Jukhan produced no evidence in support of his story. His presence near Kurtara about nightfall is not accounted for. The police have searched the house of the accused but no stolen property was found. The majority of the jurors were influenced by the fact that Maya Ram's injury was of a trivial character and that no property was recovered from the house of the accused.

The verdict of the majority did not proceed upon a consideration of the evidence for the prosecution which was all one way and absolutely free from any taint. The verdict was clearly perverse and the learned Sessions Judge was justified in reporting this case to this Court under S. 307, Criminal P. C

We hold on the evidence that Jukhan committed robbery of a bundle belonging to Maya Ram and voluntarily caused hurt in committing the said robbery and that therefore he is guilty of an offence under S. 394, I. P. C.

Jukhan is about 60 years old. The learned Sessions Judge has noted against him a long record of previous convictions, out of which, those under S 193, I. P. C. or under S. 110, Criminal P. C., cannot be taken into account. He admits the following convictions :

(1) 17-1-1903 Ss. 457/75 4 years' R. I. (Jukhan says he got 3 years under this).
(2) 13-2-1920 Ss. 457/75 2 years' R. I.
(3) 28-7-1925 Ss. 457/75 3 years' R. I.

I convict Jukhan under Ss. 394/75, I.P. C., and sentence him to 4 years rigorous imprisonment, and it is to count from 22nd November 1928.

S.N./R.K. *Accused convicted.*

A. I. R. 1929 Allahabad 339

MEARS C. J., AND MUKERJI, J.

Ram Kumar Singh and *others*—Defendants—Applicants.

v.

Muhammad Salim — Plaintiff — Opposite Party.

Privy Council Appln. No. 41 of 1928, Decided on 16th November 1928.

(a) Civil P. C., S. 109 (c)—Point of general importance but settled by Privy Council decision—Case should not be sent up.

Although a matter may be of general importance, if the question of law involved in the appeal has been settled definitely by a judgment of the Privy Council the case should not be sent to Privy Council for a fresh decision on the same point. [P 340 C 1 ; P 341 C 1]

(b) Specific Relief Act, S. 42—Suit for right to sacrifice cow in particular way is not barred.

A suit for declaration of a right to use the plaintiff's own property in a particular way (to sacrifice a cow in a particular way) is not barred by S. 42 : *A. I. R.* 1925 *P.C.* 36, *Rel. on.* [P 340 C 2]

Peary Lal Banerji and *Rama Kant Malaviya*—for Applicants.

B. E. O'Conor—for Opposite Party.

Mukerji, J.—This is an application for leave to appeal to His Majesty in Council by certain persons, who were defendants, in a suit instituted by one Mohammad Salim, for a declaration that he had a certain right with respect to the sacrifice of cows in a certain village and for injunctions. The suit failed in the Court of first instance but has succeeded in this Court. The Court granted a declaration with certain safeguards and the injunctions prayed for.

As already stated, the defendants have made this application for leave to appeal

to His Majesty in Council. The question is whether that leave should be granted. It is conceded that the valuation of the suit was below Rs. 10,000 and, therefore, it is impossible to say that the subject-matter involves directly or indirectly property of the value of Rs. 10,000. Mr. Banerji, who appears for the applicants, has contented himself with putting the case under Cl. (c), S. 109, Civil P. C. His contention is that the matter is of general importance and the question of law involved in the proposed appeal, has not been settled definitely for India.

There can be no doubt that the matter is of general importance. The question is often disputed between the two main communities of the country and in that way it must be a matter of general importance. But the more important question is whether the two points proposed to be argued before their Lordships of the Privy Council have not in truth been settled by a pronouncement of their Lordships or whether we should regard them as still open for argument before the Privy Council. The points that have been urged before us are Cls. (a) and (b) of the memorandum of appeal proposed to be filed before His Majesty in Council. They are as follows :

(a) Because the suit did not involve any claim to any legal character or any right as to any property and as such was not maintainable.

(b) Because S. 42, Specific Relief Act, enables Courts to grant relief where no relief is available in common law and is not intended to be converted into a new and mischievous source of litigation, nor should declaration be made of abstract rights exclusive of practical utility.

Put in other words, the question raised is whether S. 42 Specific Relief Act would permit the suit to be maintained. S. 42, of the Act reads as follows :

Any person entitled to any legal character or to any right as to any property .....

It has been urged that no question of "any right to any property" is involved in this particular case. The argument is that the right of the plaintiff to sacrifice the cow is not denied, but from the mere fact that the plaintiff owns a cow and that that he is entitled, as the owner of the cow, to kill it, it does not follow that the civil Court should grant a declaration to that effect The contention, put in other words, is this : The word "right" as used in S 42 is synonymous with the word "entitled" in the same sentence and that whilst declaration as to title may be given, a wider declaration as to user in any particular way may not.

In the case of *Manzur Hasan* v. *Mahmud Zaman* (1) certain Shia residents of a village called Aurangabad claimed a declaration that they were entitled to take out a procession through the public streets of the village and to perform their religious ceremonies in the course of the progress of the procession. That right was denied by the Sunni sect of the community and one of the questions that arose was whether such a suit was maintainable in a civil Court. There was a difference of opinion among the High Courts in India and their Lordships, after reviewing all the cases, and one of their own judgments, came clearly to the conclusion that the suit was maintainable. At page 65 of the report it will be found that the suit instituted by the Shias of Aurangabad was far a declaration of their right to go in procession and for a perpetual injunction. The "right" there claimed was, therefore, a right to "use" the public way just as here the right claimed is a right to use the plaintiff's own property in a particular way. In the case before their Lordships of the Privy Council it was not denied that a member of the public had a right to pass over a public road. On the same page their Lordships observe :

The case seems to their Lordships to raise for authoritative decision the question as to the "right" of religious processions to proceed along the roads in India.....

Here again is a clear indication that the right claimed was not mere title but a right to use a particular thing in a particular way. At p. 66 of the report their Lordships formulate the following question for themselves :

Does a civil suit lie against those who would prevent a procession with its observances ?

Having formulated this question for themselves, their Lordships, as already stated, granted a declaration of the "right."

This case of *Manzur Hasan*, therefore, appears to be a clear authority that S. 42, Specific Relief Act is no bar to the maintenance of the present suit Mr. Banerji has, however, argued that what their Lordships of the Privy Council had in their mind was S. 9, Civil P. C., and not

(1) A. I. R. 1925 P. C. 36 = 47 All. 151 = 52 I. A. 61 (P.C.).

S. 42, Specific Relief Act. As a matter of fact, the Privy Council do not say that they were considering S. 9, Civil P. C. It is true that they do not also mention S. 42, Specific Act, but in a general way, they do lay down that such a suit of this nature was maintainable. We, therefore, decide that S. 42 is no bar to the maintenance of the suit.

The matter being concluded, in our opinion, by a judgment of their Lordships of the Privy Council, it would be unnecessary for us to send up this case for a fresh decision on the same point.

In the result, we dismiss this application with costs.

R.K. *Application dismissed.*

A. I. R. 1929 Allahabad 341

BANERJI AND KING, JJ.

Suraj Pal Singh—Plaintiff—Appellant.

v.

Ramjit—Defendant—Respondent.

First Appeal No. 160 of 1925, Decided on 1st November 1928, from decision of Asst. Collector, First Class, Aligarh.

(a) Agra Tenancy Act (2 of 1901)—Option once exercised cannot be resiled.

The landlord is bound to exercise his option under S. 75 before he comes into Court to make an offer or to apply for immediate possession of the lands and if the option is once exercised the landlord cannot resile from it.

[P 342 C 1]

(b) Agra Tenancy Act (2 of 1901), S. 75—Compensation for rose trees.

In awarding compensation under S. 75 for rose trees the Court has to ascertain their present value to the cultivator of the land with reference to their age, condition and prospective flower-producing capability at the material date: 32 *All.* 458; (1893) *A. W. N.* 24 *Rel. on.*

[P 343 C 2]

(c) Practice—Subsequent events—Suit is to be tried as on the date of cause of action—Subsequent events can be considered only in exceptional cases—Agra Tenancy Act (2 of 1901), S. 75.

The ordinary rule is that a suit must be tried in all its stages on the cause of action as it existed at the date of its commencement; the doctrine that events that happen after the date of the commencement of the cause of action can be taken into consideration, is of an exceptional character and is applied in cases where the original relief has become inappropriate: 20 *C. L. J.* 108, *Ref.*

[P 343 C 2, P 344 C 1]

Shiam Krishna Dar and *Narain Prasad Asthana*—for Appellant.

Kailas Nath Katju—for Respondent.

Judgment.—The litigation which has given rise to this appeal arises under the Agra Tenancy Act. It appears that Ramjit, the defendant-respondent before us, was a non-occupancy tenant of a certain holding of which the owner was the plaintiff-appellant, Raja Surajpal Singh, the Raja of Avagarh.

It is admitted that the plaintiff, as zamindar, took steps under Ss. 58 and 63, Agra Tenancy Act, Act 2 of 1901, to eject the defendant Ramjit. The zamindar got a decree for ejectment, and on 26th September 1922, the zamindar was awarded possession. At p. 27 of the record there is the dakhalnama showing the delivery of possession to the zamindar. The entire holding was one of 27 bighas odd of which 22 bighas odd were held by sub-tenants. It seems that out of this area an area of 18 pakka bighas was under rose cultivation. These lands are situated in a part of the Aligarh district where the industry of rose growing for purposes of perfumery is well established.

Having got a decree for ejectment there were two courses open to the landlord. Under S. 75 (1), Tenancy Act, it is provided that if at the date on which ejectment takes effect there are ungathered crops or other products upon the land, the landholder shall have the option of purchasing the same, and upon his forthwith tendering the price of the same to the tenant, the right of the tenant to such crops or other products and to use the land for the purpose of tending, gathering and removing the same shall cease. Sub-S. 2 of the same section provides that if the landlord does not elect to purchase the ungathered crops, the tenant shall be entitled to use the land as aforesaid for a further period until such crops or other products have been gathered and removed paying a fair rent therefor.

In the present case the landlord exercised his option under S. 75 (1) of the Act and so it became necessary to determine the amount which the landholder was liable to pay for the ungathered crops or other products. The landlord apparently made an application to the Court offering Rs 43-6-0 as being an adequate compensation for the ungathered products. This offer was contested, the defendant Ramjit putting forward the case that he had a very valuable crop for which he was entitled to demand compen-

sation to the tune of Rs. 20,000. The case was eventually decided in the Court of a first class Assistant Collector, Mr. Mahadeo Prasad. He was of opinion that the landholder was bound to pay Rs. 12,000 compensation for the rose crops. From this he deducted a certain amount which was due to the landlord for arrears of rent and made the Raja liable to pay to Ramjit the sum of Rs. 11,338-14-10. It was argued before us that the procedure of the Assistant Collector was wrong and that he had acted on a wrong system of valuation, and indeed the contention was put forward in the course of the argument that it was open to the landlord, after the amount of compensation had been determined, either to pay that amount or to allow the tenant to remove the ungathered products. This argument, however, cannot be accepted for it seems perfectly plain to us that the landlord is bound to exercise his option under S. 75, Tenancy Act, before he comes into Court to make an offer or to apply for immediate possession of the lands ; and we are clear that if the option is once exercised the landlord cannot resile from it. Here, as we have said, the landlord came into Court and exercised the option of purchasing the ungathered crops. Having done that he was bound by his choice.

There remains the question of the valuation. It seems that at first the parties agreed to the appointment of a commissioner, a gentleman named Thakur Bijay Singh, on whose report they both thought they could rely. Bijay Singh inspected the place and heard certain evidence produced by the parties. His report is printed at p. 19 of the record and it is clear that he had some diffculty in making up his mind as to the amount he was prepared to assess by way of compensation. However, he adopted a system of calculation which he explains in his report and at p. 20 we find that he came to the conclusion that Rs. 1,950 would be a suitable compensation for the defendant Ramjit.

Both parties were dissatified with the ommissioner's report and ultimately the case was referred to the Court of Mr. Mahadeo Prasad, the Assistant Collector who has finally decided it. We may remark here that at one stage of the case Ramjit, the defendant, offered to let the case be decided by the Raja himself and the papers were sent to him but the Raja very properly, in our opinion, declined to give a decision in a case in which he was interested himself.

The learned Assistant Collector seems to us to have tried various ways in which the amount of compensation for these rose trees should be assessed. It is complained here that he based his decision in part, at any rate, upon two decisions which are said to have been passed awarding compensation for rose crops in this village of Barwana. In his judgment the learned Assistant Collector refers to two cases, Nos. 5 and 6 of mouza Barwana, which were decided on 19th March 1924. It is complained here that these cases should not have been considered and it is also made a matter of complaint that there is no trace of one of the cases to which the learned Assistant Collector refers. As an alternative method of assessing the value of the rose trees the learned Assistant Collector, finding that there were 60,000 rose bushes on this holding, assessed them at an average value of 4 annas each on which basis the compensation would come to Rs. 15,000. Then he tried another method of assessment by taking into account the average annual profit derived from the sale of rose flowers. Eventually by a combination of all these methods he arrived at a decision that Rs. 12,000 represented a fair amount as due.

We think that the decision of the Assistant Collector is open to attack on the ground suggested, namely, that he did not follow a proper method of valuing the crop. We refer here to a case decided by the Board of Revenue in the year 1892, a a case which, as far as we know, has been followed ever since. *Abdul Baki* v. *Mathura Prasad* (1). There again the case was one of a holding on which roses were being grown for the purpose of making perfumery, and it was held by both members of the Board that for purposes of awarding compensation the value not merely of the flowers of the rose bushes for one year but of the bushes themselves was to be taken into consideration. Mr. Kaye, the Junior Member, said that as rose plants, once they were planted, lasted for many years, it would be inequitable to give compensation only for the flowers that might be on the trees at the time of ejectment. Incidentally we may observe

(1) [1893] A. W. N. 24.

here that as the ejectment in this case took place in September 1923, there could not have been any crops of rose blooms ready at that time.

Mr. Reid, the Senior Member, in the judgment just referred to, laid down the same principle. He said that rose and jasmine plants go on bearing flowers for several years and possess a value for the cultivator as long as they do so. He laid down as the principle to be adopted in determining compensation that the price of the plants as growing crops was to be estimated at their present value to the cultivator of the land with reference to their age, condition and prospective flower producing capability.

That case has been followed by a Bench of this Court in the case of *Ram Prasad* v. *Suba Rai* (2).

It seems to be well established in the present case that the rose plantation which was in the possession of the defendant and his sub-tenants was in good condition. When Thakur Bijay Singh made his report on 26th September 1924, he said that the crop was in good condition except one field the area of which he took to be about 8 bighas kham. A similar inspection note was recorded by the Assistant Collector himself. This is to be found at p. 21 of the record. We think we ought to take it, therefore, that the rose plaints were in good condition and were capable of bearing a good crop. It is true that Ramjit admitted in his deposition that the plants had been planted over 30 years ago. It is doubtful, however, whether he meant by this statement that every bush standing on the 18 bighas under rose cultivation was planted at that time or whether he meant only that the plantation had been begun 30 or 35 years before these proceedings. However that may be, we think it ought to be assumed now that the plants were in good condition and capable of producing a full crop.

The only way in which we can have this case decided is by remitting an issue to the Court below and both parties ought to be allowed to give such evidence as they can put forward. The Assistant Collector will, after taking this evidence, come to a finding as to the value of the rose plants at the time ejectment proceedings took effect and in coming to his conclusion he will be guided by the principle laid down by the Senior Member of the Board of Revenue in *Abdul Baki's* case (1) above referred to, namely, that he has to ascertain their present value to the cultivator of the land with reference to their age, condition and prospective flower producing capability at the material date. The finding ought to be returned to us within two months and after the return of the finding ten days will be allowed to the parties for objections.

[On receiving the findings their Lordships delivered the following judgment]:

Judgment.—The facts of this case are stated in the order of 21st November 1927, by which an issue was remanded to the Court below. We directed the Assistant Collector to come to a finding as to the value of the rose plants at the time the ejectment proceedings took effect. This has now been done and the learned Assistant Collector has found this value to be Rs. 14,900. Objections have been taken to this by the appellant. The first point taken by the learned advocate for the appellant is that the value of the rose plants should be estimated as on 31st May 1926, the date on which the appellant obtained actual possession of the land in execution of a decree of the civil Court in his favour awarding him possession and mesne profits. In support of this contention the learned advocate for the appellant has referred to the case of *Ishwari Prasad* v. *Dulhin Gunjeshwari Devi A. I. R.* 1927 *Pat.* 422. His contention is that as the date on which the Assistant Collector originally assessed the value of the rose plants and at the date when the issue remanded was tried, his client had given evidence that the defendant, Ramjit, was in possession of the rose plants until 31st May 1926, and the condition of the plants was not good, he is entitled to claim that by reason of the wrongful act of Ramjit it was necessary to base the decision of the Court on the altered circumstances, that is, as on 31st May 1926, in order to do complete justice between the parties. The ordinary rule is that a suit must be tried in all its stages on the cause of action as it existed at the date of its commencement. No doubt exceptions had been recognized in a number of cases which will be found mentioned at p. 108 of 20 *Calcutta Law Journal*, but in each of those cases there were special circumstances

(2) [1910] 32 All. 458=6 I. C. 74=7 A. L. J. 397.

and the doctrine that events that had happened after the date of the commencement of the cause of action can be taken into consideration, is of an exceptional character and is applied in cases where the original relief has become inappropriate. We are of opinion that the present case is not one which comes within the exception. The plaintiff cannot show that even on the date when the decree was passed by the Court of first instance, the defendant, Ramjit, had done anything to alter or damage the rose plantation; in fact a reference to the report of Kr. Bijai Singh, dated 26th September 1924, and the inspection note of the Assistant Collector dated 9th November 1924, shows that all the rose crop was in good condition, except a field the area of which was about eight bighas.

The next point urged by the learned advocate for the appellant is that in the present action by the plaintiff all that the defendant was entitled to was the price of the rose crops that he would get if he took them out and took them away. We may mention that the matter was referred in the order of 21st November 1927 and we see no reason to take a different view. In that order we referred to a ruling of the Board of Revenue of the year 1892, and as far as these provinces are concerned, that is the law that has been understood ever since and was affirmed by a Bench of this Court in the case of *Ram Prasad* v. *Suba Rai* (2), referred to in that order. We directed the Assistant Collector that in arriving at the value of the rose plants he was to ascertain the value to the cultivator of the land with reference to age of the rose plants, the condition, and the prospective flower-producing capability on the date when the ejectment proceedings took place The Assistant Collector has, therefore, very rightly stated the points which he had to determine at p. 10 of the supplementary record under three heads, namely, the age of the plants at the time of ejectment, the condition of these plants, and the prospective flower-producing capacity at that date. As regards the first point he has found that the age of these plants was 26 years on 26th September 1923. As regards the condition of the plants he has found that the condition was good except as to eight bighas. He found that the average produce of a bigha kham of this plantation was seven maunds. As regards the third point, namely, the average flower-producing capability at that date, he found that for the first three years after the ejectment the average produce would be seven maunds, four to six years after ejectment five maunds, and seven to nine years three maunds, per bigha. He, therefore, took the average of the 46 bighas in each of these nine years to be five maunds. After deducting the annual cost of cultivation, which he held to be Rs. 22 per bigha, and the rent, he came to the conclusion that the annual net value of the rose plants to the defendant was Rs. 36 per bigha.

The learned advocate for the appellant contests each one of these points and he has taken us through the evidence in great detail. We may state at the outset that we think that on the whole the way in which the learned Assistant Collector has assessed the damages is not unfair to either party, but we will proceed to examine in detail as to whether the figures given by him in each case are correct. The first point for determination therefore is as to what was the age of the plants at the time of ejectment. It appears to us that the evidence called on behalf of the plaintiff proves that the land was given to defendant 26 years before the date of ejectment, after the ejectment of one Sukh Ram Aheria and when the land was given to the defendant there was rose plantation of 17 kham bighas of land. The learned Assistant Collector has referred to the settlement khatauni and has come to the conclusion that the rose plants could not have been more than the period of the tenancy of the defendant, namely, 26 years. We agree with him except as to the 17 bighas kham referred to in the statement of Risal Singh. The defendant himself at pp. 10 and 11 has stated that he planted the rose trees 28 or 30 years ago, in his examination-in-chief, and that the rose trees were planted 30 or 35 years ago, in his cross-examination. We think that both the statements of the defendant can only be explained on the hypothesis that as regards the 17 bighas kham of land the rose trees were planted 35 years ago and as regards the others they were planted after he got the land from the zamindar. We therefore find that the rose plantation on 17 bighas was 35 years old on 26th September 1923, and the age of the

other plantation was 26 years. Mr. Dar has questioned, as we have stated, the condition of the plants. The evidence that has been referred to by him cannot be entirely relied on, because if that evidence was literally taken to be true, it would prove that even before the ejectment proceedings taken by the plaintiff-appellant the rose plants were in a very bad condition. We have no reason to disbelieve the report of the commissioner and the result of the inspection in November 1924, by the Assistant Collector, and there is nothing to show that up to the date when the decree was passed by the Court of first instance, namely 3rd January 1925, the condition of the rose plants was anything but good. No doubt the inspection note shows that eight bighas were in bad condition in November 1924, and it may be that the evidence of the witnesses really relates to these eight bighas without reference to the rest of the land. We therefore are of opinion that the learned Assistant Collector was right in ignoring the produce of the eight bighas out of the 54 bighas.

In a case where the yield of rose is to be calculated many years after the material date, a Court cannot but work out averages, as the learned Assistant Collector has done, and we affirm the finding of the learned Assistant Collector that 35 years is to be taken as the average age up to which these rose plants could give results that would mean a real source of profit to the cultivator. Another reason why average has to be taken is that the yield from a rose plant is not uniform in every year and the chances of bad years for the cultivator have also to be taken into account. The result therefore is that, taking the age of the rose plant at 35 years, the average produce at the material date should be taken to be five maunds per bigha, and nine years as the period which would give a real profit to the cultivator to cultivate these rose plants. We therefore find that in 17 bighas the rose plants cannot be taken into account in computing the value of the land to the cultivator on 26th September 1923. The eight bighas must, in our opinion, be included in the 17 bighas which we have held contained rose plants 35 years old, otherwise there does not seem to be any reason why on the eight bighas there were poor rose plants when the Assistant Collector in November 1924, examined the land.

The learned Assistant Collector has given good reasons for coming to the conclusion that 60 per bigha kham should be taken as the gross income to the cultivator.

We are however unable to accept the deductions made by the learned Assistant Collector. He states that the plaintiff has not produced any evidence regarding the annual cost of production, but in our opinion it was unnecessary for the plaintiff to produce any evidence if the plaintiff accepted the statement of Ramjit. We find that Ramjit in his statement on 28th February 1904, stated that Rs. 25 or 30 were regularly spent on one bigha of land. We are of opinion that it is unlikely that Ramjit would be exaggerating the amount of money that he would have had to spend per bigha. We therefore accept the figure of Rs. 30 as given by Ramjit as the annual expenses of cultivation per bigha. To this has to be added the sum of Rs. 2 per bigha as the rent of the land and the net value of the rose plants, therefore, comes to Rs. 28 per bigha. So for the 37 bighas the annual profit would come to Rs. 1,036. We have already accepted the finding of the learned Assistant Collector that nine years is to be taken as the period of the prospective flowor-producing capability of this land and multiplying the annual net value it comes to Rs. 9,324.

We cannot lose sight of the fact that out of the land which Ramjit had let he was making a profit of Rs. 500 annually and out of the land which he had in his own possession we think that he might have made a profit of another Rs. 200 so that, in any event, even if he kept the land in his possession in the way that he had been keeping the land, he could not for the nine years have made Rs. 9,324. We, therefore, think that we are entitled, in view of the provisions of Cl. (2), S. 76, Tenancy Act, to deduct from Rs. 9,324 a sum of Rs. 1,324. We think that we are entitled to make this deduction because of the fact that Ramjit is getting this sum of money which he would have made in 99 years and there might be years in which the income from the rose plants might be very little.

We allow the appeal in part and vary the decree of the Court below and declare that Ramjit is entitled to the sum of

Rs. 8,000 as the value of the land to him on 26th September 1923. From this sum must be deducted a sum of Rs. 661-1-2, the amount of the plaintiff's claim from Ramjit, for rent of the land. The plaintiff's claim is decreed for Rs. 7,339-14-10. The parties will pay and receive costs in proportion to success and failure in both the Courts.

R.K. *Decree varied.*

A. I. R. 1929 Allahabad 346

ASHWORTH, J.

Har Gobind and *another*—Plaintiffs—Appellants.

v.

Gitam and *others*—Defendants—Respondents.

Second Appeal No. 1344 of 1927, Decided on 26th February 1929, from a decree of Offg. Addl. Dist. Judge, Agra, D/- 4th May 1927.

(a) Civil P. C., S. 11—Ex parte decision operates as res judicata.

There is no distinction under S. 11 between an ex parte decree and a decree which has been contested : [P 346 C 2]

(b) Civil P. C., S. 11 — Minor defendants are bound where their co-defendants had identical interests.

The minority of the defendants at the time of prior decision does not preclude the operation of res judicata against them provided that some of the defendants had identical interests with theirs : *A. I. R.* 1927 *P.C.* 56. *Rel. on.* [P 346 C 2]

Baleshwari Prasad—for Appellants.

Kedar Nath Sinha for *N. P. Asthana*—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-appellant against the defendants for possession of a certain plot of land. The suit was against five defendants. Defendants 1 — 3 did not contest the suit. There has been a previous suit for possession of exactly the same plot against defendants 1 to 3 decided on 12th December 1918. That suit was No. 508 of 1918. At the time when that suit was decided defendants 4 and 5 of the present suit were minors. They are the brothers of Bahore Singh and Zalim Singh defendants 2 and 3 and the nephews of Sitaram defendant 1 all of which 3 defendants were parties in the former suit.

The trial Court gave a decree holding that the plaintiff's claim was proved under the rule of res judicata. The lower appellate Court rejected this finding on the ground that defendants 4 and 5 were minors, and no parties to the former suit.

In this appeal it is contended that defendants 1—3 in the former suit were litigating bona fide not only for themselves but for the two defendants 4 and 5, and Expl. 6, S. 11, Civil P.C. is invoked. For the respondent this is not denied, but it is stated that the former suit was decided ex parte, and so cannot operate as res judicata against defendants 4 and 5. I understand this to mean that inasmuch as defendants 1 to 3 did not appear to contest the former suit it cannot be said that they litigated bona fide on behalf of the minors.

The respondent's counsel was no doubt wise in accepting the position that a decree may be binding on persons who were not actually made parties to that decree if that decree was against persons who were litigating not only for themselves but also for other parties. The decision of their Lordships of the Privy Council in *Lingangowda* v. *Basangowda* (1), is clear. As regards the question whether it makes any difference whether the former suit was obtained ex parte or not I would remark that no distinction is made under S. 11 between an ex parte decree and a decree which has been contested.

"It has to be seen whether, on examination of all the materials properly admissible, it clearly appears that the party in allowing judgment to go against him by default must have intended to submit not only to the order contained therein but also to a determination of some question of fact or law which was to conclude him, see : Bower's res judicata, 1924, 27."

In this case it is clear that the question whether the plaintiffs were entitled to possession in the former suit or are entitled to possession in the present suit can only be determined after a finding as to their title. The plaintiffs set up their title in the former suit in the same language and on the same grounds as in this suit. Defendants 1 to 3 must in the ordinary course of events have resisted that suit if they thought that they could do so on the merits. Their failure to do so binds them and binds defendants 3 and 4 who were equally interested with defendants 1 to 3 in the former suit. It is reasonable to suppose that the elder brothers of two minors who have identi-

(1) A. I.. R. 1927 P.C. 56.

cal interest with the minors will adequately represent them in a suit asking for a declaration as to the title of other people in property to which the minors must have a title if the defendants have a title and in which the minors can have no interest if the actual defendants have no interest.

For the above reasons I accept this appeal. It is allowed with costs and the decree of the trial Court is restored. The appellant will get their costs in the lower appellate Court and in this.

P.R./R.K. *Appeal allowed.*

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* A. I. R. 1929 Allahabad 347(1)

DALAL, J.

Nankoo Ahir—Applicant.

v.

Bhagelu Ahir and *others*—Opposite Parties.

Second Appeal No. 1630 of 1928, Decided on 12th March 1929.

*** (a) Civil P. C., O. 22, R. 2—On the death of any plaintiff or defendant when the surviving plaintiffs or defendants alone can sue or be sued, Court will make entry to that effect and proceed, there being no abatement.**

There can be no abatement under O. 22, R. 2, where the right to sue or be sued against survives to the surviving plaintiff or defendant, or plaintiffs or defendants alone, after the death of any of them. It is incumbent on the Court to make an entry to that effect on the record without any application.

[P 347 C 2]

*** (b) Civil P. C., O. 22, Rr. 3 and 4—Abatement occurs only when survivors cannot sue alone.**

Abatement arises only under Rr. 3 or 4 when one of two or more plaintiffs or defendants dies and the right to sue does not survive.

[P 347 C 1]

M. Waliullah—for Applicant.

Judgment.—There appears to be a lot of misapprehension as regards the provisions of O. 22. In the present case, the statement before the Court is that Chilar Ahir deceased respondent died and a request is made that the abatement as against him be set aside. At the same time it is submitted that the right to sue survives against the existing respondents. This is to misunderstand the provisions of O. 22. Abatement arises only under R. 3 when one of two or more plaintiffs dies and the right to sue does not survive, or under R. 4, when one of two or more defendants dies and the right to sue does not survive. There can be no abatement under R. 2 where there are more plaintiffs or defendants than one, and any one of them dies and where the right to sue survives to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone. In such a case no application by any party is necessary but it is made incumbent on the Court to cause an entry to that effect to be made on the record without any application. The present case falls under R. 2 in which there is neither abatement nor any question of limitation. An entry shall be made on the record that Chilar Ahir is dead and the right to sue survives against the other respondents. Chilar's name shall be removed from the record.

P.D./R.K. *Suit remanded.*

A. I. R. 1929 Allahabad 347(2)

DALAL, J.

Shiva Prasad Naithani—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 929 of 1928, Decided on 15th February 1929, against order of Dist. Magistrate, Garhwal, D/- 9th December 1927.

(a) Criminal P. C., S. 439—Scope.

High Court refused to dismiss important application on a technical ground. [P 348 C 1]

(b) Criminal P. C., S. 491 (1)—Section does not apply in case of person in a Native State.

Where the person wanted is in custody of a Native State power to issue directions under S. 491 (1) cannot be exercised. [P 348 C 1]

(c) Criminal P. C., S. 83—Political Agent cannot be directed to produce a person in custody in Native State.

Political Agent of a Native State cannot be directed by High Court to produce a person in custody in the Native State, as he is not in the vicarious custody of the said person : *A.I.R.* 1926 *Bom.* 332, *Dist.* [P 348 C 1]

K. D. Malaviya—for Petitioner.

M. Waliullah—for the Crown.

Judgment.—On behalf of one Shiva Prasad Naithani this Court is moved to revise an order of the District Magistrate of Garhwal directing a warrant issued by the Native State of Tehri to be executed within his jurisdiction. The application in one way may be summarily dismissed, because the information placed before the

Court by the learned Assistant Government Advocate is that Shiva Prasad Naithani was arrested in pursuance of a warrant endorsed by the District Magistrate of Saharanpur and not in pursuance of the order of the District Magistrate of Garhwal dated 9th December of which revision is sought. This mistake, however, may be due to the want of information of the person who has sworn an affidavit, and an application of this importance I would not like to dismiss on a technical ground. In whatever way Shiva Prasad Naithani may have been arrested in British India, it is admitted in the affidavit that he is no longer within the limits of the jurisdiction of this Court, but is in custody in a Native State over which this Court does not exercise jurisdiction. For that reason the power of this Court to issue directions of the nature of a habeas corpus under S. 491 (1) cannot be exercised.

It was next argued that directions could be issued to a person within the jurisdiction of this Court to produce Shiva Prasad Naithani in this Court even though Shiva Prasad Naithani may himself be in custody in a Foreign State. I requested Mr. Malaviya to disclose the name of the person to whom such notice may be issued by this Court, and he suggested that a direction may be issued to the Political Agent of the Tehri State at Garhwal. The affidavit, however, shows that Shiva Prasad Naithani is not in custody under his direction or his control. In the case quoted by the learned counsel of *Mahomedally Allabux* v. *Ismailji Abdul Ali* (1) there was a person within the jurisdiction of the Bombay High Court who had sent minor children who had been in his custody to Junagadh, a Native State, and the Court held that it had jurisdiction to direct the person within the Court's jurisdiction to produce the minors whom he had sent away to a Foreign State. We need not inquire whether the jurisdiction of the Bombay High Court under the Supreme Court Charter gives it more extensive powers than are open to this Court, because the circumstances are entirely different, and in the present case there is no person within the jurisdiction of this Court who may be said to have vicarious custody of Shiva Prasad Naithani. Under these circumstances the remedy of the applicant does not lie to this Court. The stage of inquiry as to whether the warrant issued for his arrest in British India was legal or not is long past, because the warrant has been executed and the applicant has been taken away outside the jurisdiction of this Court. The learned Assistant Government Advocate informed the Court that the allegations made in the affidavit are not accurate. It is not my province, however, when there is no jurisdiction, to determine whether they are correct or not. The only observation possible in a case of this nature is that, if the allegations are correct, the applicant ought to seek redress through the British Government.

I dismiss this application.

P.D./R.K. *Application dismissed.*

(1) A.I.R. 1926 Bom. 332=50 Bom. 616.

A. I. R. 1929 Allahabad 348

ASHWORTH, J.

Kallu—Appellant.

v.

Ganesh and *others*—Respondents.

Second Appeal No 40 of 1929, Decided on 19th February 1929, against decree of Addl. Sub-Judge, Jaunpur, D/- 3rd December 1928.

(a) Transfer of Property Act, S. 62—Mortgagee cannot claim for repairs or rebuilding.

Usufructuary mortgagee of a house cannot claim sums spent by him for repairs because he is bound to pay all normal expenses from rents and profits of the property. [P 349 C 1]

(b) Transfer of Property Act. S. 76—Scope.

Section does not apply to usufructuary mortgagee. Section applies only when possession is taken during mortgage and not at inception. [P 349 C 1]

(c) Transfer of Property Act. S. 63 — Rebuilding fallen house is not accession under S. 63—Remedy of usufructuary mortgagee is under S. 68 if it applies to him—Transfer of Property Act, S. 68.

Section 63 only allows the mortgagee to recover the price of an accession where he can prove that the accession was necessary to preserve the property from destruction. When a house has fallen down, it is impossible to preserve it from destruction. The only remedy of the mortgagee would be under S. 68, assuming that that section can be made applicable to a usufructuary mortgage. [P 349 C 2]

H. C. Mukerji—for Appellant.

Judgment.—This appeal arises out of a suit brought by the plantiff-respondent for redemption of certain mortgaged property. The Courts below

have held that the property was first mortgaged by one Bhawanidin to Kallu on 7th November 1890 for Rs. 90 a provision of the mortgage being that the mortgagor should repair the house. A second mortgage was made by Jokhu, Bhawani's son, in favour of Mt. Batul, wife of Kallu. This was dated 1st July 1901. Part of the mortgage money was assigned for the redemption of the mortgage and Rs. 58 for cost of repairs during the previous eleven years. The Courts have found that Kallu was in effect the mortgagee under the second deed, and consequently that second deed must be deemed to cancel the first deed and amount to a fresh mortgage in favour of Kallu. This finding has been objected to in grounds 3 and 4 of the memorandum of appeal, but these grounds are not pressed by the appellant's counsel. Consequently we are only concerned with the deed of 1901. The present plaintiff is the purchaser of the equity of redemption from Jokhu by a deed dated 5th November 1927.

The only question that arises in this appeal is whether the lower appellate Court was justified in refusing to add to the mortgage money as money to be paid before redemption was allowed (a) sums alleged to be spent by Kallu for rebuilding the house six or seven years ago and (b) sums spent from time to time by Kallu for keeping the house in repairs. As regards (c) the lower Court has held that as the mortgage deed of 1890 placed the duty of doing the repairs on the mortgagor, the mortgagee was not entitled to spend money or repairs except so far as he could pay for such repairs out of the rents and profits. It applies S. 76 (d), T. P. Act. It is sufficient to say that S. 76, T. P. Act, is not applicable to a usufructuary mortgage. That section applies, and is expressed as applying to a case when during the continuance of the mortgage the mortgagee takes possession of the mortgaged property. It cannot apply to a case where the mortgage is in its inception usufructuary. In the case of a usufructuary mortgage the mortgagee is bound to pay all normal expenses of upkeep, it being a condition of such a mortgage that the rents and profits are to be received in lieu of interest, and that the property is to be redeemed on payment of the mortgage money. The same remarks apply to the sums spent for rebuilding. A usufructuary mortgagee has no right to claim from his mortgagor the costs of rebuilding the property. S. 63 only allows the mortgagee to recover the price of an accession where he can prove that the accession was necessary to preserve the property from destruction. When a house has fallen down it is impossible to preserve it from destruction. The only remedy of the mortgagee would be under S. 68, assuming that the section can be made applicable to a usufructuary mortgage. I hold, therefore, that the decision of the lower Court was right although on different grounds to that advanced. The appeal, therefore, fails and is dismissed.

P.D./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 349

BOYS, J.

Mewa Lal and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 823 of 1928, Decided on 3rd January 1929, made by Addl. Sess. Judge, Pilibhit, on 22nd September 1928.

(a) Criminal P. C., S. 260—Grave offence committed—It should not be minimised to justify summary trial — Criminal trial—Court's duty.

It is not right for a Court to minimise an offence by shutting its eyes to a graver offence which on the facts found by it has been committed, and to refrain from charging the accused with that offence, and by such abstention to justify itself in trying the case summarily. [P 350 C 1]

(b) Criminal P. C., S. 106—Conviction under S. 323, Penal Code—Offence involving breach of peace—Taking security depends on probability of recurrence.

In all ordinary cases of conviction under S. 323, Penal Code, there is a conviction for an offence involving a breach of the peace, and the desirability of taking security must depend upon how far the circumstances indicate that of such a breach the peace is likely to recur : *A. I R.* 1927 *All.* 157 and *A. I. R.* 1926 *All.* 144, *Expl.* [P 350 C 2]

M. Waliullah—for the Crown.

Judgment.—This is a reference by the learned Additional Sessions Judge of Pilibhit. Five persons were convicted under S. 323, I P. C. and four of them were sentenced to pay fines. A boy of the name of Debidin was ordered to be released and made over to a relative on

the execution of a bond for his good behaviour. Further the four adult accused were ordered to furnish security under S. 106, Criminal P. C., for a period of one year. The four adult accused applied in revision to the Sessions Judge of Pilibhit an application which resulted in this reference. The effective ground taken in revision was that it having been found that five persons took part in the assault there was a riot, and the Magistrate had no jurisdiction to try the case summarily. It has been repeatedly held that it is not right to minimise an offence, for the Court to shut its eyes to a graver offence which on the facts found by it has been committed, and to refrain from charging the accused with that offence, and by such abstention to justify itself in trying the case summarily. The learned Sessions Judge has referred the case on this amongst other grounds. He has also expressed an opinion that a sentence of imprisonment was called for if the accused were, as they were found to be, guilty. The Magistrate found :

"The highhanded manner in which the accused have tried to take the law into their own hands does not require that a lenient view should be taken. I still would not send the accused to jail."

At the retrial which I am going to order the Magistrate will no doubt not allow himself to be prejudiced by the fact that the accused have already been found guilty by another Court. He will similarly exercise his own judgment as to the appropriate punishment should he arrive at a finding of guilty.

Before concluding it is necessary to mention another point on which the learned Judge has referred the case since I am not in agreement with him. The trial Magistrate convicting the five persons under S. 323, I. P. C. held :

"Five men caused serious injuries in a highhanded manner to an old man and their action involved a breach of the peace ; there are, as I have already said, old sores that have not healed up ; there is the S. 498 affair still fresh and the accused have shown a spirit of intolerance. I am of opinion that it is necessary to bind the accused to keep the peace."

He proceeded to bind the accused over under S. 106, Criminal P. C., to keep the peace for one year.

The learned Sessions Judge appears to have been of opinion that that order under S. 106 was illegal. He refers to a decision of a Judge of this Court in *Atma Ram* v. *Emperor* (1). That case followed a decision of the same Judge in *Mohammad Rahim* v. *Emperor* (2). The learned Judge in *Mohammad Rahim* v. *Emperor* said :

"Upon the mere finding that the accused and the complainant were not on good terms it is impossible to maintain the order passed, which does not come within the purview of S. 106, Criminal P. C."

and in the case of *Atma Ram* v. *Emperor* (1), the learned Judge remarked :

"Now S. 323, I. P. C, is not an offence referred to in S. 106, Criminal P. C., but even then an order can be passed after a conviction under this section if it was found by the Magistrate that the offence involved a breach of the peace. But there must be a finding of the Magistrate ; otherwise his order is not justified."

These remarks have been understood by the learned Sessions Judge to lay down a rule that security cannot be demanded under S. 106, Criminal P. C., where there has been a conviction under S. 323 merely on the ground that there is ill-feeling between the parties and that there are old sores not healed up. I am inclined myself to think that the learned Judge's decisions in the case referred to were on their particular facts. For instance he describes the case *Atma Ram* v. *Emperor* (1), in the following words :

"This was a case under S. 323, I. P. C. and it arose simply on account of a sudden altercation over a trivial matter."

If this is all that there was to show that the parties bore ill-feeling towards each other, it may well be that in the opinion of the learned Judge there was no sufficient indication that in the terms of S. 106 it was :

"necessary to require such person to execute a bond for keeping the peace."

But the necessity must be judged in each case. I do not think that either of the two cases throw any doubt on the proposition of law that in all ordinary cases of conviction under S. 323 there is a conviction for an offence involving a breach of the peace, and the desirability of taking security must depend upon how far the circumstances indicate that such a breach of the peace is likely to recur. This is the view upon which Mr. Justice King and I myself acted without hesitation in the case *Sobha Ram* v. *Emperor* (3). It will, therefore, be open to the

(1) A. I. R. 1927 All. 157=49 All. 131.
(2) A. I. R. 1926 All. 144.
(3) Criminal Ref. No. 18 of 1928 decided on 2nd May 1928.

Magistrate at the retrial to take a bond under S. 106 if in his opinion the facts proved indicate the likelihood of a breach of the peace in the future on the part of the accused, of course provided that he has arrived at a conviction within S. 106.

Accepting the reference I set aside the convictions and sentences and direct that the fines, if paid, be returned, and that the five accused persons be retried in the Court of a competent Magistrate in a regular trial, not summarily, upon charges under Ss. 323 and 147, I. P. C. and any other charges that may be disclosed by the evidence.

Let a copy of this judgment be sent to the District Magistrate for his information and for the information of Mr. Sri Krishna Kumar, Magistrate of the 1st Cl. Pilibhit, who decided the original case.

M.N./R.K. *Retrial ordered.*

A. I. R. 1929 Allahabad 351

DALAL, J.

Lachmi Chand Babu Lal — Plaintiffs —Appellants.

v.

Unkar Mal Chote Lal— Defendants— Respondents.

Second Appeal No. 1472 of 1927, Decided on 6th March 1929, against decree of Addl. Sub-Judge, Banda, D/- 31st May 1927.

Limitation Act, S. 5—Reasonable diligence is the test.

Where in case of a belated appeal the delay having been due to the mistake of a clerk, the Subordinate Judge refused to exercise discretion favourably on the ground that the mistake of a clerk is tantamount to the mistake of a party.

Held: that the sole index for the exercise of such discretion is whether the appellant has acted with reasonable diligence: *A. I. R.* 1917 *P. C.* 156, *Foll. A. I. R.* 1923 *All.* 455; *A. I. R.* 1924 *All.* 176; 37 *All.* 267; *A. I. R.* 1926 *All.* 252 and *A. I. R.* 1925 *Oudh* 189 and 374 *Disc.* [P 351 C 2]

Damodar Das—for Appellants.
U. S. Bajpai—for Respondents.

Judgment.—A ruling of any High Court is the greatest calamity that could happen to a subordinate Court as it chokes every pore of his intelligence. This is a second appeal from the dismissal of an appeal by a Court of a Subordinate Judge which refused to exercise its discretion under S. 5, Lim. Act. The Court has stated certain facts, admitted them as correct and then decided by reason of certain rulings that the appeal cannot be admitted under S. 5. No general principle is enunciated, and the Court does not take any trouble to exercise his discretion. If there is any principle enunciated relating to the decision it is to the effect that the mistake of a clerk is tantamount to the mistake of a party.

This general proposition is subject to limitation. What has been accepted as true in the present case is this. The trial Court delivered judgment on 24th March 1926, and the very next day on 25th March the plaintiff delivered costs to his pleader's clerk to obtain a copy of the decree. An application for copy was filed by the clerk on 26th March and the copy was ready on 23rd April. He obtained delivery on 26th April. The clerk, however, got mixed up and forgot that he had received the copy. The plaintiff went to the clerk several times after 26th April to inquire whether the copy had been obtained, and the clerk gave the answer that the copy was not ready by that time. The evidence has been accepted that the plaintiff went to the clerk several times up to 9th May and again on 19th May the clerk gave the same answer. The plaintiff went again on 28th May and insisted on the clerk making proper inquiries, whereupon he promised to make an inquiry, and after a short time informed the plaintiff that the copy had been delivered to him as far back as 26th April. On receiving the copy on 28th May the plaintiff got the appeal filed on 29th. In such a case it can hardly be said that the negligence of the clerk was tantamount to the negligence of the party. The party had been diligent throughout and the finding is one of fact that the party continuously went to the clerk to inquire about the copy, that prompt steps were taken to pay the clerk costs of obtaining copy and that as soon as the party was able to obtain the copy from the clerk the appeal was filed. In this very case if after giving costs to the clerk on 25th March the party had taken no further interest in the matter until he had been informed by the clerk at the end of May that copy had been obtained in April certainly the neg-

lect of the clerk would have been tantamount to the neglect of the party. Their Lordships of the Privy Council quoted with approval the following dictum of a Full Bench of the Punjab Chief Court in *Brij Indar Singh* v. *Kanshi Ram* (1), (*at p.* 104 *of* 45 *Cal.*):

"All that the section requires in express terms as a condition for the exercise of the discretionary power of admission of an appeal presented after time is sufficient cause for not presenting the appeal within the prescibed period. If such can be shown, the Court may in its discretion, which is of course a judicial and not an arbitrary discretion, admit the appeal. We think the true guide for a Court in the exercise of this discretion is whether the appellant has acted with reasonable diligence in prosecuting his appeal, and we think further that he ought ordinarily to be deemed to have acted with ordinary diligence, when the whole period between the date of the decree appealed against, and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal."

In the present case the lower appellate Court has accepted the plaintiff's version that from 24th March when the decree of the first Court was delivered, until 28th May he was diligently trying to obtain a copy of the decree in order to file an appeal. In fact there can be no doubt as to his diligence because the application for copy was filed on 26th April. After that he went on inquiring of the clerk about the copy and he was not informed by the clerk of the delivery of the copy until 28th May and immediately on receiving the copy he got the appeal filed the very next day on 29th. The plaintiff was continuously diligent so far as in him lay. Out of the rulings quoted by the learned Judge of the lower appellate Court two are mine reported in *A. I. R.* 1925 *Oudh at pp.* 189 and 374. In both of them the party left the matter entirely to his counsel and his clerk and never bestirred himself to goad them into activity. In the case of *Mahtab Kuer* v. *Birhmo* (2) the party in delay did not take steps towards obtaining a copy until six weeks after the decree to be appealed against. The copy was not actually applied for till several weeks later, the long vacation having intervened. In the case of *Buddhu* v. *Diwan* (3), another case quoted by the lower Court, the party at fault thought that he had done all that was required of him to be done by giving the papers of the case and a fee of some sort to a legal practitioner. In this Court the learned counsel for the respondent quoted another ruling of a Bench of this Court: *Ahmad Husain* v. *Muhammad Fasih-ullah* (4). In that case the decree appealed against was signed on 2nd April and an application for copy was not put in till 13th. The copy was not taken back till 25th April and the memorandum of appeal was not filed till 3rd May. In that case the lower appellate Court had considered the question of discretion independently of rulings and come to the conclusion that the appellant had shown laches in attempting to procure a copy of the decree which it was essential for him to obtain before he could file his appeal. No application for copy in that case was made until three days before the period of limitation expired. Another ruling quoted was that of my brother Sulaiman in *Ram Rup* v. *Naik Ram* (*A. I. R.* 1926, *All.* 252.) That was a peculiar case where no affidavit was filed in the lower appellate Court and all the circumstances of the case were not disclosed to it. In that case the learned Judge refused to entertain the second appeal on the ground that the appellate Court had exercised the discretion vested in it. In the present case, in my opinion, no discretion has been exercised but merely a string of rulings has been quoted, according to which, the learned Judge seemed to be of opinion that his own discretion was barred.

In my opinion this is a case where discretion should be exercised in favour of the plaintiff. I set aside the decree of the lower appellate Court and remand the appeal to it for admission and trial.

Costs here and heretofore shall abide hs result.

P.R./R.K *Appeal remanded.*

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(1) A. I. R. 1917 P. C. 156=45 Cal. 94=44 I. A. 218 (P.C.).
(2) A. I. R. 1924 All. 176.
(3) [1915] 37 All. 267=28 I. C. 265=13 A. L. J. 286.
(4) A. I. R. 1923 All. 455=45 All. 432.

** A. I. R. 1929 Allahabad 353
Full Bench

BOYS, KING AND NIAMATULLAH, JJ.

Hansraj and *others*—Appellants.

v.

Official Liquidators, Dehra Dun Mussoorie Electric Tramway Co. Ltd.—Respondents.

Letters Patent Appeal No. 100 of 1927, Decided on 30th January 1929, against order of Mukerji, J., D/- 19th July 1927.

** (a) **Companies Act (1913), S. 229—"Rules" include rules in sections, under Act and of practice.**

The phrase "the same rules . . . . . as are in force for the time being under the law of insolvency" in S. 229 is wide enough to include rules contained in the sections of the Provincial Insolvency Act, rules made under any power conferred by that Act and rules of practice unless there is something in the Companies Act itself already providing for the matter in question, or in conflict with the rule which it is proposed to import. [P 356C 1,2]

** (b) **Companies Act (1913), S 229—Secured creditor can stand outside winding up proceedings — He must, however, obtain leave to proceed from winding up Judge—Companies Act, S. 171.**

No secured creditor need, or can be forced to prove his debt, and such a creditor can stand wholly outside the winding up proceedings if he so elects and rely upon his security or his decree if he has obtained one, provided he has obtained leave to proceed from the winding up Judge. [P 360 C 1]

** (c) **Companies Act, S. 171 — Leave can be refused absolutely — Winding up Judge, however, cannot annul secured creditor's security or decree — Except in exceptional cases leave should be refused only for such time as would be necessary to make up his mind either one way or other.**

Although the winding up Judge has jurisdiction to refuse leave absolutely it cannot under colour of refusing leave or otherwise, annul or modify a secured creditor's security or decree. The winding up Judge should refuse leave absolutely only in exceptional cases. Ordinarily he should refuse leave only for such time as may be necessary to enable him in the particular circumstances of each case to determine whether he will direct the liquidator to pay off the claim and thus save unnecessary costs to the estate or whether he will give leave to proceed, or whether he will direct the liquidator to take such steps as may be open to him to get the decree set aside. [P 360 C 1]

* (d) **Companies Act, Ss. 231 and 232—Winding up Court cannot adjudicate upon title of third persons—Liquidator must file regular suit for it.**

Per Niamatullah, J.—A winding up Court, unlike an insolvency Court, cannot take cognizance of and adjudicate on the title of third persons except to the limited extent mentioned in Ss. 231 and 232; and if it is necessary to impeach such title, the liquidators must have recourse to regular suits cognizable by ordinary civil Courts. [P 362 C 1]

Boys, J.—This case arises out of an order of Mukerji, J., dated 19th July 1927, made in winding up proceedings.

A Letters Patent appeal was filed from that order and came up for hearing before Sulaiman, J., and Weir, J. Those two learned Judges were to some extent but not wholly in agreement, and the case has been referred to the present Bench consisting of King, J., Niamatullah, J., and myself for an expression of our

"opinion on the question of law raised in the appeal as regards the extent of the jurisdiction vested in the Company Judge under S. 171 in the matter of granting leave to a mortgagee decree-holder."

This question I shall re-draft presently.

The case has been referred to us for our opinion under Cl. 27, Letters Patent. That clause requires the Judges who have differed to "state the point upon which they differ." In the form in which it has been referred to us we have had to ascertain from the record (there were no less than 10 grounds of appeal), and from the statements of counsel and by comparing the judgment under appeal and the two judgments of the appellate Bench what exactly was the question which we were invited to answer.

I will briefly state the facts which in greater detail appear from the judgments of Mr. Mukerji, J. and Mr. Weir, J. After certain preliminary proceedings the present appellants, who had previously given some indecisive indications of their intention to submit their claim to the receiver, put in a definite application on 12th April 1927 asking to be allowed to proceed to execution of a decree which they had obtained on foot of a mortgage. They also asked to be allowed to proceed with a pending suit. But as to this we have not been addressed This action of the appellants has been understood throughout as an intimation of their intention to stand out of the winding up proceedings and not submit their claims to proof.

Mr. Justice Mukerji had in a previous suit *Union Indian Sugar Mills Co* v. *Brij Lal* (1) held that he was entitled, if he suspected that the claim was not a just claim, to go behind a decree for damages and in proper circumstances to refuse to allow effect to that decree, and

(1) A. I. R. 1927 All. 426=49 All. 728.

to call upon the creditor to establish before him that he had suffered any damage, and the extent of that damage and to disallow finally part or the whole of the claim. The decision of Mr. Mukerji, J. that he had power in the case of a decree for damages to adopt that course was incidentally and generally approved by a Division Bench in *Ram Lal* v. *Kashi Charan* (2).

In the present case it was contended before Mr. Mukerji, J. as set out in his judgment, that

"although under S. 171, Companies Act the decree could not he executed without the permission of the Court, yet the granting of the permission was mere matter of course and should be granted."

This position was founded on the fact that in the present case the applicants for leave were in the position of a "secured creditor" who had the same rights as a secured creditor of an insolvent individual. It was contended that as a secured creditor the applicants had a right to stand out of the winding up proceedings altogether, and to proceed as if those proceedings did not exist, with this single exception that they must draw their claims to the notice of the winding up Judge in order to obtain his mechanical sanction to their proceeding. Mr. Mukerji, J. did not refer in his judgment to S. 28 (6), Pro. Ins. Act, or to any suggestion that that section was imported into the law regulating the winding up of companies by S. 229, Companies Act. I quote the following excerpts from the conclusion of Mr. Mukerji, J.'s judgment:

"(a) Having regard to the conduct of Mr. Belti Shah (the managing director) alone I should hesitate more than once before I accepted an ex parte decree against the company as a bona fide one and above the scrutiny of the Official Liquidators."

"(b) If the decree be found to be supported by good consideration the applicants may be, if they agree, put down as secured creditors with a first charge on the entire or a portion of the assets of the company, and they may thus be put in the same position in which they would be if they could execute the decree by themselves. However, that is a point which has not risen for decision."

"(c) After the consideration of the decree has been enquired into it will be time to see whether the decree should be executed by representatives of Lala Raghu Mal or whether the liquidators should pay them, as a first charge-holder out of the assets of the company or out of such parts of the assets of the company as may have been validly charged by the company."

(d) "I hold therefore, that leave to execute the decree should be refused."

I note here that Mukerji, J., did not say what course he proposed to adopt if, after the liquidators had had time to consider the merits of the case in which the decree had been obtained, he (Mukerji, J.,) was of opinion that the decree or part thereof was not supported by consideration in his opinion good.

As the judgment stands it may be that in that event he would continue to refuse leave to proceed to execution of the decree only until the liquidators had had time to file a suit to get the decree set aside. On the other hand it may be that he would hold that he was entitled to ignore the decree and himself allow only such part of the debt if any, as might find to be justly due.

As Mukerji, J.'s judgment has not definitely stated which of these two courses he would adopt, it was at least open to argument that the appeal from his order, on the main ground on which we are asked to set it aside, is premature.

But it is contended for the appellants that from the statement of Mukerji, J., in an earlier portion of his judgment that he was still of the opinion that he has expressed in *Union Indian Sugar Mills Co.* v. *Brij Lal* (1), and from the general tenor of the judgment, it was a fair inference that he had held that in the case of this decree obtained by a secured creditor he had the same powers, and meant to exercise those powers, as he had already held himself to be entitled to exercise in the case of the holder of a decree awarding damages.

There is something to be said for this view of the judgment under appeal put by the applicants, and it appears to have been so accepted by the Judges who referred the case to us, and I, therefore, think it desirable to deal with the question raised in the appeal. Moreover, both Judges were of opinion that an appeal did lie and therefore that question cannot perhaps be considered as being included in the matter for our consideration.

In order to ascertain the exact point upon which our opinion is really required I have analyzed and compared the judgments of Weir and Sulaiman, JJ.

Weir, J., was apparently of the opinion that the words

(2) A. I. R. 1923 All. 380.

"the same rule . . . . . as are in force for the time being under the law of insolvency"

sufficed generally to import the provisions of S. 28 and particularly S. 28 (6), Pro. Ins. Act, 5 of 1920, but in so far as the immunity given by S. 28 (6) to a secured creditor from being required to obtain leave of the Court was concerned it could not be availed of in winding up proceedings in view of the specific provisions in S. 171, Companies Act. Sulaiman, J., was of the view that the word "rules" must be interpreted in the sense of the General Clauses Act, S. 3 (47), and the use of that word did not suffice to import S. 28 (6), Pro. Ins. Act. It will be seen, therefore, that, though for different reasons, both the learned Judges were of opinion that S. 171 must prevail, and in this respect S. 28 (6), Pro. Ins. Act, would not help the appellants.

Both Weir and Sulaiman, JJ., were in agreement that a winding up Judge has jurisdiction to refuse leave to a secured creditor and were equally in agreement that he has no jurisdiction to order a secured creditor to come in and justify his decree. There is no effective difference, then, in the opinions of the two learned Judges on either of these three points nor was there on certain other minor points.

Weir, J., further held that the winding-up Judge while he has jurisdiction to refuse leave has "jurisdiction" to refuse only temporarily to enable him to decide whether he will :

(a) direct the liquidator to pay up the decree, or ; (b) allow the decree-holder to file a suit to proceed or (c) direct the liquidator to get the decree set aside; that the winding up Judge has no jurisdiction to refuse leave "absolutely" and thus himself virtually tear up the decree and the mortgage-deed on the foot of which the decree was obtained. Mr. Justice Sulaiman on the other hand has held that the winding up Judge has power to refuse leave "absolutely," and this would, of course, include the lesser powers which alone Mr. Justice Weir would allow. It is in this last point that the learned Judges have really differed, and I have, therefore, redrafted the question for our opinion as follows :

Where a person has obtained a mortgage (dated 4th April 1923) on the assets, including moveable and immovable property of a company, and has obtained what was in effect an ex-parte decree (dated 12th January 1926) and winding up proceedings of the affairs of the Company have commenced (on 29th January 1926) on which date also a general stay order was passed under S. 169, Companies Act, and he has applied to the winding-up Judge for leave to proceed to the further enforcement of his security, has the winding up Judge, if on inquiry he is for any reason satisfied that the claim was not a just one, power under S. 169, S. 171 or any other section of or rule made under the Companies Act 7 of 1913 to continue the stay absolutely or to refuse absolutely to grant leave ?

Or has he only power so to stay or so to refuse leave temporarily with a view to determining whether he will direct the liquidator to pay up the decree or allow the decree-holder to proceed or direct the liquidator to file a suit ?

The phrase "refuse absolutely" may be used for the sake of brevity for that which I should prefer, "to meet with an unqualified refusal an application for leave to proceed" or "refuse leave finally and unconditionally."

My brothers, King and Niamatullah, JJ., agree that this is the real question for our consideration.

We have been referred to the following provisions of law by one or other of the counsel :

The Companies Act, S. 169, S. 171, Ss. 228-232 and any other Act, section or Rule which may be held to be imported by S. 229, more particularly with reference to the Provincial Insolvency Act 5 of 1920, Ss. 28 (6) and 47, the Rules under the Companies Act, particularly Rr. 45 to 50 and 104 ; and the practice and procedure in company matters in England so far as imported by R. 104, Companies Act, with more particular reference to the English Companies (winding up) Rr. 1909, Nos. 88 to 92, 103, 104 and 135.

I shall further refer to Ss. 2 (1) (e), 9 (2), 33, 34, 44, 45, 61 and 64, Pro. Ins. Act and R. 21, Pro. Ins. Act Rules and S. 183 (4), Companies Act.

On behalf of the decree-holder appellant's counsel has contended in effect for the view taken by Weir, J. We did not challenge the position that his client must ask for leave to proceed. For the respondent, i. e. for the liquidator, counsel has contended broadly that there is no distinction in winding up matters between the position of an unsecured and a secured creditor, except possibly to this extent that in the case of a secured creditor the winding up Judge may, if he so

desires, give him permission, if he is satisfied that the debt was a good and just debt, to proceed to enforce his security whether by filing a suit or by proceeding to execution of his decree if he has already obtained one.

We were also invited by counsel on both sides to consider the numerous cases quoted in the judgments of Mukerji, J., and Weir, J., together with a few further cases not so mentioned, I will proceed to state as briefly as possible my view.

On the face of them Ss 169 and 171 are wide enough to confer upon the winding up Judge power respectively to stay all proceedings by a secured creditor and to refuse leave to a secured creditor to proceed. The appellant then relies on S. 229. That section provides that in the winding up of an insolvent company (and in this case there is no doubt about the insolvency)

"the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent."

The second portion of the section says that

"all persons who in such case would be entitled to prove for and receive dividends out of the assets ot the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section."

There was much contention before us as to the meaning of the phrase

"the same rules ..... as are in force for the time being under the law of insolvency."

For the liquidator it was contended that the word "rules" must be restricted to the scope given to it by the General Clauses Act S. 3 (47). For the appellant creditor it was contended that the phrase is wide enough to include rules contained in the sections of Provincial Insolvency Act, rules made under any power conferred by that Act and rules of practice.

As to the proper construction Weir, J., and Sulaiman, J., differed, and though they both agreed, though for different reasons, that the secured creditor could obtain no benefit from S 28 (6), Pro. Ins. Act, it is still necessary for us to consider which is the correct interpretation for there are provisions besides S. 28 (6) to be considered in answering the main question.

I am of opinion that the contention of the appellant is correct. The section is copied verbatim from the English Act and prima facie it would be unjustifiable in such circumstances to restrict the word to a meaning given to it by a purely Indian Act. Again by R. 104 Companies Act the Court is instructed to apply

"the practice and procedure of the High Court of Justice in England in matters relating to Companies."

Again the R. 104 just referred to begins :

"In cases not provided for by these rules or by rules of procedure laid down in the Act."

That rule itself, therefore, definitely applies the word "rules" to provisions contained in the Act itself. Finally on the supposition that the word "rules" was to be taken in the sense of rules made under an Act counsel for the respondent was invited to say to what rules made under an Act relating to insolvency the section referred if his interpretation was accepted. There are some rules made under S. 79, Pro Ins. Act, but no rules bearing in any way on the rights of secured and unsecured creditors, and counsel was not able to point to any such and was reduced to acknowledging that if his interpretation of the section was accepted the section was without meaning. I see, therefore, no reason for restricting the word "rules" in S. 229 to the narrower sense of "rules made under an Act." I am, therefore, of opinion that the rules contained in any section of the Provincial Insolvency Act, the rules, if any, made under the Act and any appropriate established rules of practice in insolvency proceedings are imported into the Companies Act, unless there is something in the Companies Act itself already providing for the matter in question, or in conflict with the rule which it is proposed to import.

Counsel for the respondent next contended that even if the wider meaning must be given to the word "rules" in S. 229, the rule by which a secured creditor was given immunity in insolvency proceedings was not intended to be imported but only the rule giving a secured creditor priority. There does not, however, appear to be any justification prima facie for admitting the one class of rule and not admitting the other. Moreover, it is manifest that the rule

giving a secured creditor priority, if and so far as any such rule existed, is not a right given by the law of insolvency.

Counsel was unable to point to any provision in the Insolvency Act or in any rule made under that Act by which priority was given and admitted that the right to priority, in so far as it existed, was given by "the general law." The only relevant sections in the Provincial Insolvency Act and the Companies Act of which I am aware are S. 61 in the former and S. 230 in the latter which have no bearing on priority in this connexion.

If, therefore, the word "rule" in S. 229 is given the wider meaning it is not apapparent what rules there are in insolvency to be imported except the rules contained in S. 9 (2), S. 28 (6) and S. 47, Pro. Ins. Act.

Mukerji, J. is also apparently, though he has not discussed the point, of the view that the rules contained in appropriate sections of the Provincial Insolvency Act are imported by S. 229 for he refers to and relies on S. 34 (2) of that Act at p. 455 (*of* 25 *A. L. J.*) of his jndgment in *Union Sugar Mills* v. *Brij Lal* (1).

If in truth the appropriate sections of the Provincial Insolvency Act are not to be held imported by S 229 we should look in vain for much necessary guidance e. g., where are we to find the definition of "secured creditor" except in S. 2 (1) (e) of that Act?

I should also find it surprising if the principles contained in rules made under an Act were imported (so far as appropriate) and not the principles contained in rules made in the Act.

Giving therefore the wider meaning to the term "rules" in S. 229 I would hold the provisions of S. 9 (2), S. 28 (6) and S. 47 to be imported unless there be something in the Companies Act itself either directly substituted for those provisions or something otherwise showing that the importation of those provisions is inappropriate. I agree, therefore, with Weir J.'s, interpretation of S. 229.

As to whether it is necessary for a secured creditor to apply at all for leave to proceed, it is not necessary for me to express an opinion since both the learned Judges were, though for different reasons, of one opinion that leave must be applied for.

The next and main question is : what, if any, are the special rights of a secured creditor?

Section 229 bears on the face of it a reference to "the respective rights of secured and unsecured creditors." The phrase is in itself sufficient to show that the legislature recognized a difference between the rights of the two classes of creditors. In view of what I have said above as to the scope of S. 229 I see no reason for excluding from importation into winding up proceedings the broad established and admitted principle of insolvency law in the case of insolvency of an individual that a secured creditor can stand outside the proceeding, as evidenced by, amongst other sections S. 9 (2), S. 28 (6) except so far as getting leave is concerned (as to which both the learned Judges of the Division Bench were in agreement) and S. 47 and as evidenced by the prevailing practice.

In this connexion I note that R. 104, Companies Act Rules of this Court, authorizes this Court to be guided by the practice and procedure of the High Court of Justice in England in matters relating to companies so far as they are applicable and not inconsistent with these Rules and the Act. Turning to the English "Companies winding up Rules 1909" we find R. 135 which was incidentally referred to by counsel for the appellant. That was a Rule in reference only to the matter of voting ,but it contains the phrase

"a secured creditor shall, unless he surrenders his security state. . . . . ."

With this may be compared

"where a secured creditor relinquishes his security"

in S. 47, Pro. Ins. Act, and the similar phrase in S. 9 (2). It is clear, then, that the situation is in all three cases contemplated that a secured creditor may choose not to surrender his security. I should find it difficult to reconcile the two positions that a creditor may decide not to surrender his security, while at the same time a winding up Judge may throw that security aside and examine into the justice of the debt exactly as if no security had ever existed. Nor has any principle been suggested to us or suggested itself to me why a secured creditor should be allowed to stand out in the case of the insolvency of an individual and not in the insolvency of a company.

On the other hand I find no difficulty in reconciling the two positions, that a secured creditor can stand on his security but that he must obtain leave to preceed, when we bear in mind the purpose with which the provision in S. 171 was enacted. In reference to the similar provision in S. 87, English Act of 1862, it was pointed out by James L. J. in *David Lloyd* 6 *Ch. Div.* 339 (344) that the object was to enable the winding-up Judge to prevent a multiplication of costs to the detriment of the estate and not to enable him to interfere with "the property" of the mortgagee.

Counsel for the liquidator was driven to contend that no difference is made between a secured and an unsecured creditor and he referred to Rr. 47 to 53 and R. 104 Indian Company Rules and R 103 English Rules. I shall refer by a general observation to these rules later, but a sufficient answer to the broad statement of counsel is that S. 229 on the face of it shows that there is a difference in the rights of the two classes. And if indeed there be no difference between the rights of a secured and an uusecured creditor in the matter of their being liable to be called upon to prove their claims and seeure entry on the schedule, what, in view of the provisions of S 61 (5), Pro. Ins. Act, and S. 183 (4), Companies Act, becomes of the right to priority which at another stage of the argument for the liquidator it was admitted and contended the secured creditor had.

Counsel was further driven to urge that a creditor claiming to be a secured creditor is not a "secured creditor" at all until he has "proved" his security. To this the definition of "secured creditor" in S. 2 (1) (e), Pro. Ins. Act, is a sufficient answer. In fact even an unsecured creditor, in order to seure acceptance of his claim does not necessarily have to do more than send it in under R. 45, which sending in would appear to be equivalent to the state which is described as "notifying" in S. 64, Pro. Ins. Act ; even such a creditor need not "prove" unless called upon vide R. 46 :

In this connexion I note the phraseology of the second part of S. 229, "all persons who would be entitled to prove * * may come in." The word "provable" as used in the Provincial Insolvency Act, does not in my opinion mean "which must be proved." but "capable of proof" or "which may be, i. e., are allowed to be, proved." To appreciate this meaning of "provable under this Act" in S. 28 (2), S. 33 (1) and (3), S. 44 (2) etc., we must look at sections such as the proviso to S 33 (1), S. 34 (1) and S. 45.

But of course the real question of importance is whether "provable under this Act" read with S. 64 means that in the case of all creditors, secured as well as unsecured, if they do not choose to come in (R. 45) and prove if called upon to do so (Rr. 46 to 49) they will lose their claims. That this is not so in the case of secured creditors, in the sense that they must, if called upon to do so, satisfy the winding up Judge that their security is for a just debt, is clear from S. 47, Prol. Ins. Act, the language of which is consistent only with the idea that the secured creditor need not prove at all if he relies on realizing his security.

Here I may note an indication from Rr. 135 and 136, English Company Rules under which, when a secured creditor himself wishes to prove for the purpose of voting, he puts his own value on his security and not the value which the liquidator may choose to allow.

All the rules either in the Indian Companies Act, or in the English Company Rules quoted to us on behalf of the respondent relating to the necessity of proof and which it is suggested are of general application are entirely consistent with the view that they apply only to those creditors who are unsecured or, where they specifically refer to secured creditors, to those secured creditors who have given up their security or who, having endeavoured to obtain satisfaction, have only succeeded in obtaining satisfaction in part and claim to prove for the remainder.

It is not, therefore, necessary to consider how far such rules as Nos. 88, etc., of the English Company Rules (or R. 21 under the Pro. Ins. Act which was not, however, mentioned for the respondent) are imported at all by the Indian Companies R. 104 when there are Indian Companies Rules (e. g.,) R. 45 etc.,) dealing with the same matters.

Similarly there is nothing in *Kashi Prasad* v. *Union Bank of India* (3) quoted for the respondent to show that the decree was a mortgage decree or that

(3) [1919] 41 All. 432=50 I. C. 115=17 A. L. J. 464.

any question of the rights of a secured creditor arose at all.

I have not considered it necessary to consider in detail the English cases to which reference has been made. It is admitted on all sides that not one of the cases whether English or Indian, suggests that the winding up Judge can compel a secured creditor to come into the winding up proceedings or in any way submit his claim to scrutiny. In cases such as *In re Van Laun, Ex-parte Chatterton* (4) it is clear that the secured creditor had exercised his option to come into the winding up proceedings and submit his claim to the winding up Judge. They are no authority for the proposition that the Judge has power to compel him to come in.

The fact that there are no cases in which it has been held that a winding up Judge can compel a secured creditor to bring in his security and that he can scrutinize that security and if he sees fit, in effect tear it up, and no cases in the opposite sense suggests that the practice in England and in this country has been uniform in one direction or the other and has been regarded as not open to question. This uniformity of practice suggests the following consideration. If the practice has been uniform in favour of the secured creditor it would be natural to find that the question of his privilege had never been raised. On the other hand if the practice had been in a sense adverse to the secured creditor it is almost certain that that practice would be found to have been confirmed by some judicial decision or decisions, for it is almost certain that some secured creditor would at one time or another, on the strength of the law and practice applying to bankruptcy proceedings, have challenged the power of the winding up Judge. So far, therefore, as any conclusion can be drawn from the absence of any judicial authority either way that conclusion must be in favour of the secured creditor.

If it be asked why a secured creditor should ever desire to come into the winding up proceedings, it is manifest that there may be cases in which he may feel that his chances of realizing his money in good time, if he depends solely on his security, may possibly be jeopardised if he stands aloof from the winding up proceedings altogether and allows them to arrive at a termination before he has realized his security.

Finally I would note that it would in my view be surprising indeed if the legislature had meant by language merely requiring leave to be obtained to confer power to tear up a decree and also the security upon which it was founded.

In my view our answer must then be guided by the two considerations: the winding up Judge has jurisdiction to refuse leave, but his discretion to refuse leave must be exercised

" with a due regard to the rights of third persons who were not members of the company and who had not to come in and claim to share * * such as a mortgagee": *Per James L. J., in David Lloyd & Co.* (5)."

To say that the discretion is thus limited is in effect to place a restriction on the exercise of his jurisdiction by the winding up Judge, but that is no more than the English Courts have found it necessary to do.

It is clear that in any case the orders of the winding up Judge staying proceedings under S. 169 and refusing leave under S. 171 cannot be operative any longer than the winding up proceedings continue and further it is very difficult to conceive an unqualified refusal to give leave which would not infringe on the rights of the secured creditor. Ordinarily, for a winding up Judge to say to a secured creditor that the merits of his claim are so dubious that leave to proceed is unconditionally and finally refused is going perilously near permitting him to adjudicate on the merits of the claim. It may not be in form an adjudication, but it is a judicial pronouncement and it may have a serious repercussion on the right of the secured creditor to an unprejudiced trial of his claim and also it may induce a purchaser to pay an enhanced price under what may prove to have been a false impression of security created by the action of the Judge. But there may possibly in very exceptional circumstances be a case in which unqualified refusal would be upheld and it may be that Jessel, M. R. (with whom James, JJ. and Cotton, L. J., expressed their agreement) had this possibility in mind when he held in the case to which I have just referred that those who de-

(4) [1907] 2 K. B. 23=76 L. J. K. B. 644=23 T. L. R. 384=51 S. J. 344=14 Manson. 91=97 L. T. 69.

(5) [1877] 6 Ch. D. 339.

sire to restrain a secured creditor from proceedings must offer to pay him off or show some special grounds for restraining him.

I would state the following propositions :

(1) That no secured creditor need, or can be forced to prove his debt, and, that, with the next following exception, such a creditor can stand wholly outside the winding up proceedings if he so elects and rely upon his security or his decree if he has obtained one.

(2) That every secured creditor must obtain leave to proceed from the winding up Judge.

(3) That the winding up Judge has jurisdiction to refuse leave absolutely.

(4) That winding up Judge has not jurisdiction, under colour of refusing leave or otherwise, to annul or modify a secured creditor's security or decree.

(5) That, while there may be some exceptional case in which the winding up Judge may refuse leave only for such time as may be necessary to enable him in the particular circumstances of each case to determine whether he will direct the liquidator to pay off the claim and thus save unnecessary costs to the estate or whether he will give leave to proceed, or whether he will direct the liquidator to take such steps as may be open to him to get the decree set aside.

Where the secured creditor has not yet obtained a decree an alternative consideration may arise as to whether the winding up Judge will direct the liquidator to apply to be made a party to any proceeding that the creditor may have instituted or desire to institute but we have not been called upon to deal with that.

King, J.—I fully agree to the views expressed by Boys, J. and have only one comment to make.

The language of S. 228, Companies Act 1913, seems to me to furnish an additional argument for the view that the word " rules " in S. 229 is not to be construed as having only the narrow meaning given to that word by S. 3 (47) General Clauses Act, 1897.

In S. 228 we find that the law of insolvency " is to be applied " in accordance with the provisions of this Act

" to the winding up of insolvent companies.

" It must be noted that the expression used is "

" law of insolvency " and not " rules which are in force under the law of insolvency."

Now there is no provision of the Companies Act which expressly applies the " law " of insolvency to insolvent companies. S. 229 does, however, provide that " rules " which are in force, on certain subjects, under the law of insolvency shall be observed in the winding up of insolvent companies. S. 229 therefore undoubtedly appears to be the provision of the Act which is mentioned in S. 228, as applying the " law " of insolvency to insolvent companies This leads me to conclude that the legislature did not intend to draw a distinction between " the law of insolvency " (mentioned in S. 228) and " the rules in force under the law of insolvency " (mentioned in S. 229). This implies that the word " rules " in S. 229 must be liberally construed in the sense of " rules of law " including (a) provisions of the Insolvency Act, (b) rules made under that Act, and (c) rules of practice.

Niamatullah, J.—I agree with. Boys, J. to the answer he proposes to make on the question referred to the Full Bench and would add a few observations in support of his conclusions and to emphasize some aspects of the case on which they rest.

The facts of the case so far as they are necessary to make my remarks intelligible are briefly as follows :

The appellants Lala Hansraj and others obtained, on 28th October 1924, an ex parte decree for sale, passed by a learned Judge sitting on the original side of the Calcutta High Court, for a large sum of money (about Rs. 1,77,000) on foot of a mortgage deed dated 25th April 1923, executed by Dehradun Mussoorie Electric Tramway Co. Ltd., which has since gone into liquidation and is being wound up by Mukerji, J. a learned Judge of this Court. Inasmuch as no legal proceedings can be taken except by leave of the Court. i. e., the Judge exercising jurisdiction under the Companies Act (S. 171) the appellants applied for leave to take out execution of their decree. Mukerji, J held that the leave " to execute the decree should be refused." His order, which has been quoted by Boys, J. in the leading judgment has been construed to mean, and

the case has been argued on the assumption, that he ruled, in effect, that after scrutinising the claim of the appellants under their mortgage-deed and the decree obtained by them, the learned Judge should decide what amount of money, if any, is due to them and what part of the company's assets should be charged therewith, or whether the decree should be allowed to be executed. On appeal from this order the learned Judges composing the Division Bench, which heard it, disagreed on a question of law. Sulaiman, J., held that the learned Company Judge had the jurisdiction to refuse leave "absolutely" and "was not bound to suspend the grant of leave for a limited period only." He added :

"I express no opinion on the question whether the present case is or is not a fit case in which leave should have been refused."

Weir, J., the other learned Judge of the Division Bench, maintained that :

"since the appellants have refused to submit their claims to the scrutiny of the liquidators, Mukerji, J. has no jurisdiction to attempt to force them to do so ; though I think that he can stay the execution of the decree for a reasonable period of time in order to enable the liquidators to make up their minds whether they will or will not take other steps to attack the decree. It seems to me that the power to stay execution of a decree, such as this, in a case like the present is limited to the extent which I have indicated."

He ordered accordingly that the execution of the deccee be stayed for six months.

Boys, J. has laid down after a careful analysis of the judgments of the learned Judges composing the Division Bench what question ought to be decided by this Full Bench, and it seems to me that the difference of opinion between those learned Judges reduces itself to the question whether the jurisdiction of the Court refusing leave to a mortgagee-decree holder to execute his decree extends to the power to refuse leave altogether, and it is only a matter of his discretion to refuse for a limited time or altogether, as Sulaiman, J. thinks, or whether his jurisdiction in that behalf is limited to such time as may be reasonable to enable the liquidator to decide if he should attack the decree by instituting a regular suit, as Weir, J. would have it.

That a secured creditor need not prove his debt in winding up proceedings and can stand wholly outside such proceedings relying on his security is conceded by both learned Judges of the Division Bench. Weir, J. has quoted a number of English decisions in support of this view. Sulaiman, J. though he does not consider any of the sections of the Provincial Insolvency Act imported into the provisions of the Indian Companies Act by S 229, of the latter Act, has nevertheless expressed himself as follows :

"Although there is no express provision in the Companies Act protecting secured creditors, their safety rests on well established principles. Under the Transfer of Property Act an interest is transferred to a mortgagee. A mortgagee's estate, so to speak, is carved out of the original estate and vests in the mortgagee, when a company is in liquidation, only the property of the company comes under the control of the Court or the Official Liquidator. The interest which has previously passed to a mortgagee is separate and distinct and is not brought in. It follows that a mortgagee with his well defined interest can keep aloof and remain outside the jurisdiction of the Court. His remedy to realize his security would ordinarily be unaffected by the insolvency of his debtor. He cannot against his will be dragged into the winding up proceedings, or compelled to surrender his security and place himself on the same footing as other creditors by proving his debt. His rights are paramount and remain safe. Of course if he so chooses he may realize his security and prove for the balance, or he may surrender his security and prove for the whole debt ; but he cannot be forced into doing that or to abandon his remedy. The liquidators may redeem the mortgage but cannot prevent him from selling the mortgaged property."

We find no provision in the Companies Act conferring jurisdiction on the Court to adjudicate, in winding up proceedings on the right of third persons whose claims come in conflict with the rights of the company. The only provisions which relate to such third persons, are contained in Ss. 231 and 232, Companies Act, which run as follows :

"231—Any transfer, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up a fraudulent preference of its creditors, and be invalid accordingly."

"(2)—For the purposes of this section the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the Court and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of insolvency in the case of every individual."

"(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void."

"232 (1). Where any company is being wound up by or subject to the upervision of

the Court, in attachment, distress or execution to be in force without leave of the Court against the estate or effects of the company after the commencement of the winding up shall be void."

"(2) Nothing in this section applies to proceedings by the Government."

It will be seen at a glance that Ss. 231 and 232 of the Companies Act are parallel to Ss. 53 and 54 of the Insolvency Act, but it is significant that there is no provision in the Companies Act corresponding to S. 4, Provincial Insolvency Act which lays down:

(1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or a Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

"(2) Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes as between, on the one hand the debtor and the debtor's estate and, on the other hand, all claimants against him or it and all persons claiming through or under them or any of them."

"(3) Where the Court does not deem it expedient or necessary to decide any question of the nature referred to in sub-section (1) it has reason to believe that the debtor has a saleable interest in any property the Court may without further enquiry sell such interest in such manner and subject to such conditions as it may think fit."

It follows from the foregoing remarks and the provisions quoted that a winding up Court, unlike an insolvency Court, cannot take cognizance of and adjudicate on the title of third persons except to the limited extent mentioned in Ss. 231 and 232, Companies Act, and if it is necessary to impeach such title, the liquidators must have recourse to regular suits cognizable by ordinary civil Courts. A mortgagee or a secured creditor qua the interest which has been transferred to him by the mortgage or hypothecation is not a mere creditor but a person in whom the right is vested, and his right can be impeached, if at all, in the same manner as in case of any other person who claims adversely to the company.

It has been said that a claimant, to occupy the advantageous position of a secured creditor, should establish, before the Court in winding up proceedings, the fact that he is a secured creditor. I do not think that any occasion can arise for his doing so. A person claiming to be a transferee of an interest, be he a vendee, donee or mortgagee, can establish it when he desires to enfore his claim and can defend his title if it is attacked before a competent Court. Meanwhile the liquidator is to take note of it in dealing with what he thinks to be the property of the company. The right claimed by a secured creditor may be so palpably illusory that he feels justified in ignoring it and in assuming that the claim will not appreciably influence intending purchasers of the company's property affected by such adverse claim. In other cases the liquidator must either accept it or have the cloud on the title of the company removed by obtaining appropriate relief from a competent Court.

Wherever a mortgagee or other secured creditor has already obtained a decree against the company in enforcement of his claim, it affords an additional strength to his title and can be questioned by the liquidator on the usual ground, such as fraud or collusion. Sulaiman, J. is inclined to think that, as between the liquidator on the one hand and the mortgagee decree-helder on the other, the binding character of the decree is to be judged with reference to the rule of res judicata contained in S. 11, Civil P C., and that the former, being an officer of the Court and representing the interest of the whole body of creditors as well as those of the sbareholders, is not bound by the decree. I take leave to point out that before the rule of res judicata can be invoked by one or the other of the parties, to determine the binding charactsr of the decree, there must be an issue in a suit or proceeding in a competent Court between the parties, and in so far as such an occasion does not arise before a Court in winding up proceedings, there is no room for the application of the rule of res judicata. Such an occasion will, of course, arise when the mortgage or the decree is in question in a regular suit brought by the liquidator to challenge the mortgage or the decree or in any proceedings taken by the mortgagee to realize his security. I doubt if in such a case the liquidator can get over the bar of res judicata by an appeal to his position as a representative of the creditors generally. Prima facie he will, in that contingency, occupy no higher position than the one which an

attaching creditor does under similar circumstances. It is, however, unnecessary to express a decisive opinion on this question.

The next question is whether S. 171, Companies Act, which unquestionably subjects a secured creditor to a disability in enforcing his claim, as he must obtain leave of the winding up Judge to institute a suit or to execute a decree, if he has already obtained one, confers an unlimited power on the winding up Judge to refuse leave. The jurisdiction of the Court is not limited by anything contained in that section which confers the widest power to refuse leave. It does not make it obligatory on the Court to withhold leave in any given case for a limited time only. At the same time it can be confidently expected that the unlimited power to refuse leave will be exercised by a Court of law in furtherance of the ends of justice and not capriciously. No Court will so abuse it as to hold it in terrorem to induce the secured creditor to forgo part of his claim or otherwise compromise his position. If the Court is obdurate in refusing leave to a secured creditor without directing the liquidator to challenge his rights in a proper Court and abide the result, it will cause incalculable harm to the interests of the company and the creditors. It cannot, by merely withholding leave, extinguish the charge, if it otherwise exists, or deprive the decree of its operative effect. The charge will subsist though it cannot be enforced during winding up proceedings. Whoever purchases the property subject to such charge will purchase encumbered property liable to be sold in the hands of the purchaser as, it should be noticed, leave is necessary only for a

"suit or other legal proceeding . . . . . against the company."

Once it is possible to avoid proceeding against the company the secured creditor is free from the trammels of S. 171, Companies Act. A prospect of this kind, and fear of future litigation, are likely to deter purchasers from offering anything like a fair market value of the property which a secured creditor claims to be burdened with his debt. It should be observed that limitation for the secured creditor's suit or application for execution as the case may be, will remain suspended under S. 15, Lim. Act. No Court winding up the affairs of a company will, therefore, ordinarily consider it safe to withhold leave altogether and to court the disastrous consequences likely to follow its action. Cases are, however, conceivable in which the Court may safely refuse leave altogether. The claim of a secured creditor may be so manifestly baseless as not to weigh with it and with the intending purchasers who may be willing to offer full value for the property, confidently relying on their ability to defeat the claim when made. In such a case the Court may deem it desirable to withhold leave absolutely and to dispense with the necessity of the liquidator instituting a suit to vindicate the title of the company. In practice, cases of this kind will be of rare occurrence but are not beyond the range of possibility. The legislature did not consider it expedient or even possible to lay down exhaustively cases in which and the purposes for which leave should be granted and those where it should be refused. Unlimited jurisdiction has been, therefore, conferred by S. 171, Companies Act, on the winding up Judge, to withhold leave for such time and on such terms or altogether as the circumstances of each case may warrant.

Where legislature has advisedly conferred jurisdiction or power on a Court without imposing any fetters thereon, it cannot be limited by enumerating cases, in which alone it can, in our present view, be exercised. It will be tantamount to adding a proviso to S. 171, Companies Act, which the legislature has not thought fit to add.

"By jurisdiction is meant the authority on which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision The limits of this authority are imposed by the statute, character or commission under which the Court is constituted or may be extended or restricted by the like impositions. If no restriction or limit is imposed, the jurisdiction is said to be unlimited; a limitation may be either as to the kind and nature of the actions and matters of which a particular Court has cognizance, or as to the area over which the jurisdiction shall extend or may partake of both these characteristics: see Halsbury's Laws of England Vol. 9, p. 13, para. 10."

Numerous cases have arisen with reference to S. 115, Civil P. C., in which a distinction has been drawn between absence of jurisdiction and erroneous exercise thereof It was observed by their Lordships of the Privy Council in, *Rajah*

Amir Hassan Khan v. *Sheo Bakhsh Singh* (6) *at p* 239 (*of* 11 *I. A*)

"The question then is: did the Judges of the lower Courts in this case, in the exercise of their jurisdiction act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly they did not exercise their jurisdiction illegally or with material irregularity."

If therefore a winding up Judge has jurisdiction to grant leave or not and he withholds it altogether he cannot be said to have acted without jurisdiction even when he erroneously disregarded the rights of a secured creditor.

The dictum of their Lordships of the Privy Council in *Rajwant Prasad Pande* v. *Ram Ratan Gir* (7) *at p.* 176 *of* 42 *I. A* that:

"It is very trite and very familiar that a challenge of the method of the exercise of the jusisdiction of a Court can never in law justify a denial of the existence of such jurisdiction"

has a peculiar bearing on the question which is engaging our attention. If a winding up Judge refuses leave to a secured creditor without the slightest justification "his method of the exercise of the jurisdiction" may be erroneous, but his jurisdiction cannot be questioned.

An order passed without jurisdiction is a nullity and therefore one of the tests of an order being without jurisdiction is to find if it can be treated as not possessing a binding effect Can the order of a winding up Judge refusing leave absolutely be regarded as a nullity? Can it be ignored after a reasonable time such as may be considered sufficient to enable the winding up Judge to decide what steps should be taken with reference to the claim of the secured creditor? I have no doubt as to the answers to these questions. If a winding up Judge has no jurisdiction to refuse leave without specifying a reasonable time, that order ought to cease to have binding effect after a reasonable time. It seems to me that there is a contradiction in terms in the proposition that a Judge has no jurisdiction to refuse leave for all time but can refuse leave for such length of time as he considers reasonable. If the length of time for which he can withhold leave rests with him, he can refuse it absolutely and altogether according to the latter part of the proposition, a power which the first part thereof professes to deny.

For the reasons I have stated, I answer the question referred to the Full Bench in terms set out in the judgment of Boys, J.

R.K. *Reference answered.*

(6) [1885] 11 Cal. 6=11 I.A. 237 (P.C.).
(7) A.I.R. 1915 P.C. 99=37 All. 485=42 I.A. 171 (P.C.).

A. I. R. 1929 Allahabad 364

BANERJI AND SEN, JJ.

Abdul Majid Khan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 846 of 1928, Decided on 7th February 1929, against the order of Asst. Sess. Judge, Bareilly, D/- 3rd November 1928.

Criminal P. C., S. 423—Without misdirection by judge or misrepresentation of jury, Court of revision cannot reverse jury's verdict.

Court of revision like an appellate Court cannot alter or reverse the verdict of jury, until it is of opinion that such verdict is erroneous, owing to misdirection by the Judge or to misunderstanding of the Jury regarding law as laid down by him. [P 364 C 2]

B. Malik—for Applicant.

M. Waliullah—for the Crown.

Judgment.—This is an application in revision, and one of the grounds taken by the learned counsel for the petitioner is that we should set aside the verdict of the jury, as the charge to the jury by the learned Assistant Sessions Judge was erroneous by reason of misdirection by the Judge. The powers that the Court of revision has under the Code of Criminal Procedure, are confined in cases like these to the powers of an appellate Court, and under Cl. 2, S. 423, Criminal P. C., the Court cannot alter or reverse the verdict of a jury, until it is of opinion that such verdict is erroneous, owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him.

Mr. Malik has taken us through the charge to the jury, and we are unable to accept his contention that the charge was not a fair charge and that the Judge had misdirected the jury. Mr. Malik asks us to reduce the sentence, but we are unable to accede to his request.

The application is rejected.

P.D./R.K. *Revision rejected.*

A. I. R. 1929 Allahabad 365

BANERJI AND KING, JJ.

Mangali Pershad and *another*—Plaintiffs—Appellants.

v.

Babu Ram and *others*—Defendants—Respondents.

Second Appeal No. 255 of 1926, Decided on 25th January 1929, against decree of Sub-Judge, Mainpuri, D/- 5th Nov. 1925.

(a) Registration Act, S. 17—Award partitioning property though signed by parties to reference does not amount to partition and is not registrable.

Even where an award purports to partition the property and is signed by the parties to the reference, the award does not amount to partition and therefore does not require registration : 19 *C. L. J.* 123, *Disc.*; 10 *P. R.* 1917 *Foll.* [P 366 C 1]

(b) Hindu Law—Joint family—Relinquishing equity of redemption.

Where father relinquishes the equity of redemption to the mortgagee in possession and the relinquishment is not for necessity or for the benefit of the family, sons are not bound by it. [P 366 C 1]

U. S. Bajpai—for Appellants

N. P. Asthana—for Respondents.

Judgment.—This appeal arises out of a suit for possession of one-third share of a house. The house originally belonged to Mulu and on his death his three sons, Narpat, Ram Sahai and Alkhi became joint owners of one-third share each. Narpat mortgaged his one-third share in 1901 to his brother, Ram Sahai for Rs. 150, with possession. The plaintiffs are the son and grandson of Narpat. They allege that they redeemed the mortgage in 1922 by payment of the mortgage money to Anokhey Lal, son of Ram Sahai. They alleged that in spite of the redemption Anokhey Lal and defendants 2 to 4, who are the sons of Alkhi, refused to allow the plaintiffs to take possession; hence the suit.

The defence set up by defendants 2 to 4 was that in 1909 there was a partition of the house between the three brothers. The partition was in accordance with an arbitration award. According to the terms of the award Narpat relinquished his one-third share in the house in consideration of release from liability to pay the mortgage money, and the two brothers Ram Sahai and Alkhi were allotted a half share each in the house. It is pleaded, therefore, that Narpat surrendered his equity of redemption and the plaintiffs had no right to make the so-called "redemption" in 1922 and are not entitled to recover possession of Narpat's share.

The plaintiffs contend that they are not bound by the award of the arbitrators since they were no parties to it. Their father signed the award but his action is not binding upon them since it amounted to a relinquishment of his interests without legal necessity and without any benefit to the family It was also pleaded that the arbitration award was inadmissible in evidence for want of registration.

The Court of first instance repelled the pleas raised in defence and decreed the plaintiffs' claim. The lower appellate Court took the view that the arbitration award was valid and binding upon the plaintiffs and therefore dismissed their claim in toto. Three principal points are raised by the learned advocate for the appellants.

The first point is that the award is inadmissible in evidence for want of registration since it amounts to a deed of partition. He relies upon the ruling of the Calcutta High Court reported in *Tek Lal Singh* v. *Sripati Chaudhury* (1). In that ruling it was observed that a document which purports to be an award may amount to something more than an award. If the parties to the reference affix their signatures to the award in token of their acceptance of the decision of the arbitrators the award may become thereupon a deed of partition and may as such become compulsorily registrable. These observations, however, were obiter dicta. The Court held that the document in question was an award, and as such was not compulsorily rogistrable.

On the other side we have been referred to a decision of the Punjab Chief Court in the case of *Wazir Ali* v. *Mahbub Ali* (2) which case is very much on all fours with the case before us. In that case also some brothers divided the family property between them and appointed arbitrators to carry out the partition. The award was signed not only by the arbitrators but also by the four brothers. It was contended in that case also that the award was inadmissible for want of registration as it amounted to a deed of partition. It was held that the

(1) [1913] 19 C. L. J. 123=20 I. C. 860=18 C. W. N. 475.

(2) [1914] 10 P. R. 1917=134 P. L. R. 1914=22 I. C. 412=101 P. W. R. 1914.

document signed by arbitrators as their award does not cease to be an award merely because the settlement was arrived at by the parties and was also signed by them. As an award it did not require registration. In our opinion the reasoning of the learned Judges who decided this case was sound and we agree with the view that an award does not require registration merely because it is signed by the parties to the reference and purports to partition the property. The award is therefore admissible in evidence.

The next contention is that the sons, namely, the plaintiffs, are not bound by their father's acceptance of this award. On this point we are in agreement with the learned advocate for the appellants. In the first place, it is clear that there was no substantial consideration for Narpat's relinquishment of his interests in the family property. He was not under any personal liability to pay the mortgage money as the mortgage was for possession. He gained nothing by relinquishment of his right of redemption and such relinquishment must be regarded as without consideration.

In the next place, it is clear that the relinquishment was not made for legal necessity or for the benefit of the family and in that view of the case also it is not binding on the sons. The next point raised is that in any case the plaintiffs' suit should have been decreed as against Anokhey, defendant 1, since he had admitted the alleged redemption of the mortgage in 1922 by receipt of the mortgage money. Here again we agree with the contention of the appellant. Anokhey Lal is the son of the original mortgagee and he is admittedly in possession of half the house in dispute. He admits that the plaintiffs have not lost their right of redemption by reason of the family partition in 1909 and that they have in fact redeemed the mortgage by payment of the mortgage money to him. We see no reason whatever why their claim for one-third of the house should not be decreed as against Anokhey Lal His father accepted liability for the plaintiffs' mortgaged share by receiving Rs. 75 (half the mortgage money) from Alkhi at the time of the partition in 1909, and Anokhey Lal admittedly received the whole of the mortgage money from the plaintiffs in 1922. The plaintiffs are therefore entitled to recover possession of the one-third share out of the half-share which is in the possession of Anokhey Lal.

We accordingly allow the appeal as against Anokhey Lal and decree the plaintiffs' suit for possession of one-third share in the house as against Anokhey Lal only. The appeal as against the other defendants is dismissed with costs throughout. Anokhey Lal never contested the suit or appeals, so no costs are awarded against him.

S.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad. 366

SULAIMAN AND KENDALL, JJ.

Jamna Prasad— Defendant — Appellant.

v.

Mohammad Zahir Uddin Khan and *another*—Plaintiffs—Respondents.

Second Appeal No. 1262 of 1926, Decided on 24th January 1929, against decree of Dist. Judge., Pilibhit, D/- 20th March 1926.

(a) Agra Pre-emption Act (1922), Ss. 11 and 12—Isolated plot.

An isolated plot of land is pre-emptable.

(b) Agra Pre-emption Act (1922), S. 4 (3).

Land includes buildings : *A. I. R.* 1928 *All.* 124. *Rel on.* [P 366 C 2, P 367 C 1]

U. S Bajpai—for Appellant.

O. Carleton, H. S. Mohammad Husain and *Mustaq Ahmad*—for Respondents.

Judgment.—Three points have been urged in this appeal. The first is that an isolated plot of land is not pre-emptible under the act. We are unable to accept this condition. Under Ss. 11 and 12 a right of pre-emption accrues in favour of the cosharers in the mahal even when a petty proprietary interest is transferred.

The second point is that the land covered by buildings is exempted from the operation of the Act. This contention also cannot be accepted. S. 4, sub Cl. (3) makes the Act applicable to land which includes things attached to the earth or permanently fastened to anything attached to the earth, when sold or foreclosed along with the land to which they are attached. This in our opinion, includes buildings which are attached to the earth. We may in this connection point out that the expression " attached to the earth " has been defined in S. 3, T. P. Act. as meaning rooted in the earth or embedded in the earth as in the case of walls or buildings. There is no reason to suppose that that expression

in this Act has a different meaning. It is by virtue of such a definition that house property is treated as immovable property under the Transfer of Property Act and also under the General Clauses Act vide *Abdul Khan* v. *Shakira Bibi* (1). The last point is that opportunity should have been given to the appellant to produce the Executive Engineer or a Tahsildar. No application to examine them was filed in the trial Court. There was a mere request for local investigation by a commissioner. Instead of appointing a commissioner the Munsif went to the spot and inspected the place personally. The learned District Judge has thought that further evidence cannot be allowed in these circumances. We are unable to take a contrary view. The appeal is accordingly dismissed with costs including in this Court fees on the higher scale.

D.D. *Appeal dismissed.*

(1) A. I. R. 1923 All. 124.

** A. I. R. 1929 Allahabad 367

MEARS, C. J.

Md. Inayat Ali Khan—Applicant.

v.

Fazal-ul-rahman Khan — Opposite Party.

Misc. Criminal Appln. No. 125 of 1929, Decided on 12th April 1929.

**** Legal Practitioners Act, S. 13—Refusal to take up case merely with intention of not appearing against professional brother is professional misconduct—General rule for accepting cases enunciated.**

A lawyer must as a general rule take up a case for any member of the public if (1) a fair and proper fee is tendered to him; (2) adequate instructions are given and (3) the case is of a class which the lawyer is accustomed to do. No doubt he can legitimately decline to take up the case if, for instance, he has an out-station engagement, or is engaged in some social function, such as a marriage or is incapacitated by ill health or any reason which a sensible man would recognize adequate. But to refuse to take up a case simply and solely on the ground that the advocate will not appear against a brother practitioner, or to put forward untrue excuses when the real reason is a disinclination to appear against a brother practitioner, is, in each case, professional misconduct and should be dealt with as such. The reason for the rule is that if lawyers as a body refuse to act against lawyers, they would become a class standing above the law and justice would be denied to the public. [P 367 C 2]

Saila Nath Mukerji—for Applicant.

Judgment.—This is an application for the transfer of a case on the very singular ground that local counsel refuse to carry out the obligations which, by their profession, they are bound to do. Quite recently a similar complaint was made by a member of the public, and I then pointed out that the refusal of a lawyer to take up a brief for a member of the public, simply and solely on the ground that he would be appearing against a brother practitioner who was the litigating party on the other side, is professional misconduct; that is, it is a breach of the duty which the acceptance of the status of an advocate demands from every man who becomes an advocate. There is a definite and well recognized rule, which, however, does not seem to be understood in this country, that a lawyer must take up a case for any member of the public if:

1. A fair and proper fee is tendered to him.
2. Adequate instructions are given.
3. The case is of a class which the lawyer is accustomed to do.

That is the general rule but he may of course legitimately decline to take up the case if, for instance, he has an out-station engagement, or is engaged in some social function, such as a marriage or is incapacitated by an ill health or any reason which a sensible man would recognize as adequate. But to refuse to take up a case simply and solely on the ground that the advocate will not appear against a brother practitioner, or to put forward untrue excuses when the real reason is a disinclination to appear against a brother practitioner, is, in each case, professional misconduct and can and should be dealt with as such. The reason for the rule is obvious, and if lawyers as a body refuse to act against other lawyers, they would become a class standing above the law and justice would be denied to the public.

The affidavit sets out the names of two lawyers who are said to have refused to act. The deponent did not himself interview these gentlemen and so I refrain from mentioning their names, but a copy of this order is to be sent to each of them by registered post, and I invite them to consider their decision and also to realize what their position is. Both of them apparently gave the excuse that they were not willing to accept the brief on the ground of other engagements. Now if the conduct of these gentlemen has to be investigated, whether in truth they

had other engagements or not can most easily be ascertained and a Court may come to the conclusion that the "other engagements" were excuses set up to avoid the acceptance of the brief. I propose to get rid of that difficulty by having a copy of this order sent also to Khan Bahadur Ali Sajjad, City Magistrate of Shahjahanpur, and I ask him to be good enough to hear the case on a day to be suggested and 'agreed upon by the counsel on both sides. That will preclude the possibility of any gentleman whom the applicant wishes to appear for him being able to rely upon an excuse of this nature.

There is also another matter which if true has an unpleasant aspect. The case apparently is that Mohammad Inayat Ali Khan, the applicant, assaulted Khan Bahadur Fazalur Rahman Khan. Whether he did so or not must be a relatively simple matter of fact, and and according to the papers before me, a question of fact on which both sides can be heard and a decision given in the course of an hour or two. I am greatly surprised to find in the affidavit a statement that

"most of the leading criminal practitioners are appearing in the case as counsel for the complainant among them being Hafiz Zakir Ali and Mr. B. Nund, Barrister-at-law."

Mr. Saila Nath tells me that he understands that at least five gentlmen have already been engaged on this very simple matter to defend and protect the interests of Khan Bahadur Fazal-ur-rahman Khan. I doubt if this can be correct because it must be perfectly apparent to Khan Bahadur Fazal-ur-rahman Khan that two gentlemen are more than sufficient adequately to present his case, and that if in fact he did engage others, he would lay himself open to the suggestion that he had done so for the purpose of shutting out Mohammed Inayat Ali Khan from obtaining their services or had brought in friends for the purpose of giving them advertisement. Nobody can seriously suggest tha the simple question whether *A* struck *B* at a given place on a given date can require the services of more than one counsel, though it may be reasonable to add a second so that one of them would certainly be present at the hearing.

A copy of this order is also to be sent to Khan Bahadur Fazal-ur-rahman Khan because I am sure that he must wish to act with complete propriety in this matter, and I go further and say that it is his duty, from his position at the Bar, to make it clear to the other members of his profession at Shahjahanpur that they should conform to the rules of the profession and most certainly accept the brief against him if the conditions that I have mentioned are fulfilled by Mohammad Inayat Ali Khan. Nobody with the least degree of level-headedness and good sense could, for a moment, suppose that any brother lawyer would regard the appearance in Court of a brother practitioner against him as a personal matter. It is not personal in the slightest degree. The conduct of a case in Court should be as impersonal as an operation by a surgeon, and for any practitioner to feel that a brother practitioner would be aggrieved on this account, shows a lack of understanding of how people with decent instincts behave to each other.

I direct that a copy of this order be also sent to Mohammad Inayat Ali Khan, and he should write a letter to some gentleman at the Bar at Shahjahanpur, whom he wishes to conduct his case, offering to pay him whatever is the fair and proper fee, and offering to give him full instructions, and asking the question pointedly whether he is prepared to undertake the case on the day which it is hoped the Magistrate will fix to suit the convenience of counsel. If the answer is in the negative, Mohammad Inayat Ali Khan is to forward to me a copy of his letter to the lawyer and the lawyer's reply to him and I will take the matter up and press it to a conclnsion. Mohammad Inayat Ali Khan is not to be deprived of his absolute right to have the services of any member of the Bar that he chooses provided he fulfils the requisite conditions of fee and proper instructions.

The Registrar will send by registered post a copy of this order to the various persons indicated, namely Khan Bahadur Fazal-ur-rahman Khan, Khan Bahadur Ali Sajjad, City Magistrate of Shahjahanpur, Mohammad Inayat Ali Khan, and the two gentlemen whose names are mentioned at lines 2 and 3 of para. 6 of the affidavit.

Meanwhile I stay the hearing of this case in the Court of the learned Magistrate until further order.

R.K. *Order accordingly.*

A. I. R. 1929 Allahabad 369

BANERJI AND KING, JJ.

Malik Iftikhar Wali Khan — Defendant—Appellant.

v.

Sarwari Begam and *another*—Plaintiff and Defendant—Respondents.

First Appeal No. 77 of 1926, Decided on 18th January 1929, against decree of Sub-Judge, Bareilly, D/- 25th January 1926.

Mahomedan Law—Dower — Marriage not consummated — Still dower is payable on wife's death.

Unless the marriage of a Hanafi Mahomedan is proved as irregular dower is payable upon the death of the wife, even if there had been no consummation of the marriage. [P 370 C 1]

B. E. O'Conor, *Iqbal Ahmad*, *Mukhtar Ahmad* and *Mansur Alam* — for Appellant.

Tej Bahadur Sapru and *P. N. Sapru*— for Respondents.

Judgment.—This is a defendant's appeal in a suit for recovery of dower debt of one Mt. Shikoh Ara Begam alias Sajjan Begam, who was the wife of Malik Iftikhar Wali Khan, the appellant.

Mt. Shikoh Ara Begam died on 6th November 1922, and the plainiff in her own right and as purchaser of the share of her husband of the amount due for dower from defendant 1, has instituted this suit for recovery of a sum of Rs. 62,687-8-0. It is admitted by the defendant that the dower debt was fixed at 1,25,000 and 25 sovereigns.

The defence put forward by the appellant was that the plaintiff and her husband caused the marriage of the defendant to be performed by practising fraud, that the fraud was that Shikoh Ara Begam was suffering from phthysis and unable to move about on account of illness. The marriage admittedly took place on 26th August 1921. The 'rukhsat' ceremony took place on 26th March 1921. The case of the defendant is, as set out in his written statement para. 11, that when Shikoh Ara Begam was sent to the defendant's house in 1922 it became apparent to the defendant that Shikoh Ara Begam was suffering from phthysis and unable to move about, that the defendant did not, after he came to know of the fraud, either directly, or indirectly, ratify tne marriage, and that there was no consummation of the marriage, nor was there any possibility of the consummation of the marriage on account of the illness of Shikoh Ara Begam. The defendant further pleaded that in spite of the fact that there was no relation of husband and wife between the defendant and Shikoh Ara Begam, the latter, while she was ill and had no hope of her recovery, remitted the amount of the dower, although the dower would never have become payable. The learned Subordinate Judge framed various issues, but the main issues with which we are concerned in the appeal are issues 1 and 6. Issue 2 relates to the remission of the dower by Shikoh Ara Begam. The learned Subordinate Judge has recorded his finding in favour of the plaintiff and against the defendant, and as regards issue 2 the matter is so clear that it is unnecessary to go into it, nor has the plea taken in the memorandum of appeal about this issue been seriously pressed before us. We therefore find that Shikoh Ara Begam did not remit her dower as pleaded by the defendant.

The case on behalf of the plaintiff was that Shikoh Ara Begam was a strong and healthy girl but that when she returned to her parents' place, Rampur, on or about 1st November 1922, she was suffering from "pain in the sides and fever" and she died on account of it. The case for the defendant is that Shikoh Ara Begam was suffering from phthysis and died of it, and upon the evidence of Dr. Kacker there can be no doubt whatever that the lady died of phthysis on the date it is said she died. Dr. Kacker's evidence is conclusive on the point as he examined the lady on or about 2nd June 1922 when he found tuberculosis germs in the sputum of of "Sajjan" Begam.

The real question for determination in this case is whether the marriage of Iftikhar Wali Khan, the defendant, was brought about by the alleged fraud practised on him by the plaintiff and her husband, namely that Shikoh Ara Begam was suffering from phthysis at the time of the marriage, and that this fact was known to the parents and concealed from the defendant-appellant. It has to be remarked that in this case even on the most trivial point on which there ought to be no controversy, we have got one version given by the plaintiff and quite

a diametrically opposite version given by the defendant, and we have no doubt that neither party has spoken the whole truth about any of the matters in controversy, but at any rate, the burden of proving that the marriage was brought about by fraud as alleged by the defendant was on the defendant appellant. According to the Mahomedan law applicable to a Hanafi Sunni, as the defendant admittedly is, unless the marriage is proved to be irregular, dower is payable upon the death of the wife, even if there had been no consummation of the marriage. The evidence called on behalf of the plaintiff is that there was no consummation of the marriage, but for the purpose of this appeal it is unnecessary to consider the point. The evidence of Dr. Kacker, which is to be found at p. 114, makes it clear that the illness from which Shikoh Ara Begam was suffering was tuberculosis; but we find that neither party has asked Dr. Kacker definitely from what time, or how long according to his estimate the lady had been suffering from tuberculosis. Dr. Kacker states:

"My recollection is Iftikhar Wali Khan's wife was said to have been suffering from short time."

What was the short time neither party tried to clear. But Dr. Kacker goes on to say:

"The duration of the disease varies from few weeks to quite a number of years. So far as I remember when Iftikhar Wali's wife was taken there, her relations were not certain about the diagnosis but they suspected consumption and so she was taken to Bhawali."

The question naturally arises as to who took Shikoh Ara Begam to Bhawali. The plaintiff's case is that the defendant Iftikhar Wali Khan took her up to Bhawali. Iftikhar Wali Khan's case is that his wife was taken to Bhawali by her parents. It cannot be denied by Iftikhar Wali Khan that it was he who hired the house in which his wife lived at Bhawali. The landlord has been examined in this case, Shaukatullah Khan, and he has produced his rent register in which there is an entry in the handwriting of the defendant that the appellant took the house on a monthly rent of Rs. 200. This endorsement is admitted by the defendant to be in his handwriting. The statement on oath of Shaukatullah Khan is that Iftikhar Wali Khan and his wife lived in his house from early June to 26th August 1922. The case for the defefendant is that Shikoh Ara Begam remained at Bhawali up to the end of October when she was removed by her parents from Bhawali to Rampur, staying the night at Bareilly. There is nothing to show that the statement of Shaukatullah Khan about the date of the return was incorrect as the defendant's memory fails about payment of any rent after the end of August. We have further the statement of Dr. Kacker that Iftikhar Wali Khan was with the patient at Bhawali and that Jamil Khan the father of Shikoh Ara went to Bhawali on a short visit. It is impossible to believe the statement of the defendant that it was the parents of the girl who took her up to Bhawali. Whenever any point arises where the defendant may have to give an answer against anything that he was said in the written statement we find that the defendant gives the typical answer of a liar: "I do not remember." We therefore have no hesitation in accepting the plaintiff's case that Iftikhar Wali Khan took Shikoh Ara Begam to Bhawali for treatment and we have no doubt that the relation who gave the information to Dr. Kacker that they suspected Shikoh Ara Begam having consumption must have been Iftikhar Wali Khan and not the parents of Shikoh Ara Begam. If on or about the time when Dr. Kacker examined Shikoh Ara Begam, which was several months after the date of the rukhsat that Shikoh Ara Begam was suspected of suffering from consumption we cannot in the absence of definite evidence of some qualified medical practitioner come to the conclusion that on the date when this marriage took place namely 21st August 1921 Shikoh Ara Begam was suffering from consumption, or was in such a state of health which would naturally lead the parents to conclude that she was suffering from consumption.

It is no doubt true that there was a dispute between the party of the bride-groom and the bride at the time of the rukhsat and the versions as to what the dispute, was, as given by each party are diametrically opposed to one another. It appears to us on a consideration of the whole evidence that at the time of the rukhsat Shikoh Ara Begam was temporarily indisposed, but it is impossible to conclude from that that Shikoh Ara Begam was at that time suffering from

consumption and that everybody about the place knew that she was. The witness Mt. Shaukat Ara Begam who supports the defendant's statement as to illness admits in her cross-examination that nobody enquired what was the nature of the illness of the bride. The evidence of her husband Abdul Hamid Khan is clear and it is that the defendant had probably informed Abdul Hamid Khan that the bride was temporarily ill. The doctor who is alleged to have examined Shikoh Ara Begam the morning after her arrival at Bareilly is Mukhtar Ahmad. He is unable to state what was the nature of the illness of Shikoh Ara Begam. He says that she had some sort of fever and she was under his treatment for two days at the most. This evidence cannot and does not help the defendant. The only evidence as to the state of the health of Shikoh Ara Begam before the marriage is said to be that of Taffazzul Husain at p 21. On a close examination of this evidence it is apparent that if he did see the lady it was either in the month of April or May 1922. He says:

"I might have treated her for one and a quarter month or more before she went to Bhawali."

This evidence cannot help us to decide whether the bride on the date of the marriage was suffering from consumption. We notice that one Dr. N. K. Dar and a lady Mrs. P. Isaac, said to be a lady doctor, had been summoned to give evidence on the date when Taffazzul Husain was examined but they were not examined. Nor did the defendant examine Dr. Mukand Ram and Mr. Abdul Hakim, or Hakim Ilyas who, it was suggested in the cross-examination of the plaintiff, attended to the bride about the time or before her marriage. We therefore are not able to come to the conclusion upon this evidence that at the time of the marriage Shikoh Ara Begam was suffering from consumption, or that any fraud was practised on the defendant to bring about the marriage. Under these circumstances we are of opinion that there is no force in this appeal and we dismiss it with costs.

P.D./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 371

BOYS, J.

Ram Sarup—Appellant.

v.

Girdhari Lal and *others*—Respondents.

Second Appeal No. 1203 of 1927, Decided on 21st February 1929 from decree of Addl. Sub-Judge, Bulandshahr, D/- 19th April 1927.

Transfer of Property Act, S. 8—Presumably existing joint right in the sehdaries and a gateway in a mohalla passes with transfer of individual house.

A joint right in the sehdaries and a gateway in a mohalla regarding the existence of which right there is a reasonable, though rebuttable, presumption, passes with the transfer of the ownership of individual house. [P 372 C 1]

Panna Lal—for Appellant.

Benod Behari Lal—for Respondents.

Judgment. — This is a defendant's appeal arising out of a suit by a number of owners of houses constituting what is described as a mohalla. The mohalla appears to be self-contained with on one side a large gateway with two "sehdaries," one on each side. A person, Man Singh, who formerly owned one of the houses inside the mohalla but who sold it 10 or 12 years ago, has recently claimed to sell the two "sehdaries" to one of the defendants who has proceeded to convert one or both of them into kothas. He is also alleged to have obstructed the flow of water through the gateway. But that is not now in dispute. The plaintiffs brought this suit for a declaration that they had joint rights of ownership in the two "sehdaries." These, before one set of the defendants had proceeded to alter their nature, were apparently in the common form of what are known as "sehdaries," i. e., they are largely open rooms with three doors to them, rooms such as are commonly occupied by watchmen or chaukidars. The mohalla apparently took its name originally from the first set of occupants who used to inhabit it, and who parted with their rights to a second set. There is, as might be expected in such a case as this, no very definite evidence as to who actually built the "sehdaries" and the gateway. There is evidence that the individual houses in the mohalla have been transferred. The question that arose in this

case was whether the transfer of an individual house carried with it any right to a joint share in the two "sehdaries" and the gateway, and whether, if it did not, the right in the "sehdaries" and the gateway remained in the original persons, whoever they might be, who were responsible for their construction; and thirdly, whether the defendants or any of them had succeeded in showing that they or their predecessors built and that they had a title in the "sehdaries" and the gateway. It has also been suggested by counsel for the appellant that this last question would not arise at all unless the plaintiff had given evidence which required to be rebutted by the defence. In other words, that it lay upon the plaintiffs to prove that they had some title to interfere with the defendants before the defendants could be called on to explain their actions. That is to put in a simple way the simple issue that has arisen. The lower appellate Court has held that from the nature of the neighbourhood and the buildings there would, in the absence of any other evidence, arise a presumption that the owners of the existing houses had a joint right in the "sehdaries" and the gateway. This appears to me undoubtedly a reasonable presumption, always bearing in mind that it may only be effective in the absence of other reliable evidence to the contrary and might perhaps be easily rebutted.

Counsel for the appellant first argued that no interest could accrue to any of the present owners of houses by virtue of their sale-deeds unless there was a specification in those sale-deeds that the vendees were acquiring some right in the "sehdaries" and the gateway. The agrument appears to me rather to beg the whole question. Reference is made to S. 8, T. P. Act. That section says:

"unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferrer the interest which the transferor is then capable of passing in the property and in the legal incidents thereof."

It appears to me that if the transferrer had at the time of the transfer of his house actually, by virtue of owning that house, a joint interest in the "sehdaries" and the gateway, that interest in the "sehdaries" and the gateway would be part and parcel of his interest in the property transferred, and we should therefore only be brought back to the original question: Did the owner of a house in that mohalla own by virtue of his ownership of that house also a right in the "sehdaries" and the gateway?

I have stated that it appears to me a most reasonable presumption in the circumstances of the case that the owners of the houses in the mohalla had a joint right in the "sehdaries" and the gateway, and that in the absence of reliable evidence to the contrary effect would have to be given to that presumption. The defence have endeavoured to meet this by trying to set up ownership in the transferrer of the "sehdaries" and the gateway i. e. by leading evidence of their title. The evidence led by them has been disbelieved and it has been characterised by the lower appellate Court as rubbish. The result is that there is no evidence on the record to rebut the presumption to which I have referred. I think therefore that the lower appellate Court was right in giving weight to that presumption, and I dismiss the appeal with costs.

The cross-objection, if there is one but neither counsel can tell me whether there is one or there is not, though its existence is suggested by the cause-list, is dismissed with costs.

P.R./V.V. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 372

DALAL, J.

Israr Hasan Khan and *another*—Plaintiffs—Appellants.

v.

Deo Narain—Defendant—Respondent.

Second Appeal No. 1217 of 1927, Decided on 25th February 1929, against decree of Addl. Sub-Judge, Shahjahanpur, D/- 28th March 1927.

*** Specific Relief Act, S. 22—Specific performance should be refused where agreement is without consideration and due to fear.**

Where a Hindu apprehending danger to his life had executed an agreement without consideration in favour of a Mahomedan to cut down a pipal tree venerated by all Hindus for the convenient passing of tazias.

Held: that specific performance should be refused. [P 373 C 2, P 374 C 1]

M. Waliullah and *Mukhtar Ahmad*—for Appellant.

Harnandan Prasad, *Vishwa Mittra* and *Lakshmi Narain Gupta*—for Respondent.

Judgment.—The judgment of the learned Subordinate Judge, though lengthy, is a creditable performance. He has rightly brushed aside questions as to the joinder and non-joinder of parties. It would have been better and shortened his judgment if he had not directed his mind to whether Government, the owner of the road, was a necessary party or not. In my opinion he has arrived at the truth of the matter that when Deo Narain entered into this agreement the conditions were such that he should not be tied down to specific performance of this contract. He has rightly quoted S. 22, (1), Specific Relief Act:

"Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part, the Court may properly exercise a discretion not to decree specific performance."

The matter may be very shortly put There was communal trouble in the town of Jalalabad in the Shahjahanpur District in September 1924. The Sub-Divisional Officer, a Muhammadan, was at the spot. As usual, the Muhammadans found all trees held sacred by Hindus, too low for the passing of the tazias, and the Hindus were of opinion that they were quite high enough for tazias of a reasonable height. This was an excellent opportunity for the display of communal bias and for the breaking of heads in consequence. On 14th September the District Magistrate Mr. Wallace, a European, went to the spot and passed an order to which the Hindus and Muhammadans submitted, at least outwardly, because it was promulgated by a European. He directed that the branches of trees may be tied up high while the tazias passed and lowered after the passage of the tazias, There may not be much wisdom in this order as a mischief-maker may easily use the branches as catapults to be released exactly when the tazias were under the tree. All the same it is well said :

"*Waqt zarurat chu numanad guroz, dast begired sar shamsher tez.*"

To translate this phrase freely, it means that when a howling mob is round about, one would choose the best means possible to placate the members of the mob whether your order be consistent with wisdom or not. The same was done on 19th September by the Muhammadan gentleman to avert a communal riot. Being a Muhammadan his co-religionists expected too much from him and the Hindus suspected him of bias. This would happen with the most honest and high principled officer in this present unfortunate time. If the angel Gabriel came down on another lady-Day to make an announcement, the Hindus would distrust him if he came in the garb of a Muhammadan and the Muhammadans would distrust him if he came in the garb of a Hindu. On the night of 14th September the Muhammadan Sub-Divisional Officer believed that the Muhammadans would be satisfied if he obtained consent from the Hindus only to lop off the branches which obstructed the tazias.

Subsequently he discovered that this was not enough for the Muhammadans who evidently were in larger numbers and sufficient to overawe the Hindus, and, therefore, on 19th September he obtained the agreement under dispute, according to which, Deo Narain promised to cut the pipal tree, a tree venerated by all Hindus from the root. There was no consideration whatsoever for this promise. In the agreement was stated that for that day the Muhammadans would tilt the tazias and take them out, and the Muhammadans further promised that they would do certain religious acts within a certain time in future. The tilting of the tazias one day was no advantage to Deo Narain. On the other hand, if tazias could be tilted on one day it is obvious that they could be tilted on future occasions also without any religious detriment. As to promise of processions passing out at certain times, the performance thereof lay on the lap of the God. There is no evidence that the Muhammadans of position who signed the agreement could have been in a position to enforce it on the butchers and bakers who are the real persons in power at a time of communal trouble. There cannot be the slightest doubt that Deo Narain executed the agreement as he was overawed by the Muhammadan crowd and feared for the safety of his life. He wanted to tide over that particular evil day. Both because there was no consideration and for reason of the provisions of S. 22,

Specific Relief Act, quoted above, the lower appellate Court was justified in refusing to grant specific performance of the agreement.

The appeal is dismissed with costs.

P.R./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 374

DALAL, J.

Meharban Ali Khan--Petitioner.

v.

Sita Ram—Opposite Party.

Criminal Revn. No. 4 of 1929, Decided on 11th February 1929, against the order of Addl. Sess. Judge, Meerut, D/- 18th October 1928.

(a) Penal Code, S. 193—Instead of taking down the evidence patwari was directed to file statement according to his papers. On false statement patwari is liable under S. 193 and not under Penal Code, S. 218.

Where a patwari, in order to save the trouble of taking down the evidence, was directed by a revenue Court to prepare a written statement according to his papers and file it, and where the patwari made such a statement on oath, the statement cannot be called a public document which it was his duty to prepare, and therefore on proof of patwari's statement being false, he could not be prosecuted for an offence under S. 218 but under S. 193, Penal Code, for giving false evidence : 5 *All.* 553, *Foll.* [P 374 C 2]

(b) Criminal P. C., S. 436—Penal Code, S. 193.

Revision Court cannot direct further inquiry into an offence under S. 193, where the sanction of the Court in which that offence was committed is wanting. [P 375 C 1]

S. Mohammad Husain—for Applicant.

M. L. Chaturvedi—for Opposite party.

Judgment.—This is an application in revision from the discharge of a patwari of an offence under the provisions of S. 218, I. P. C. The learned Judge is wrong both in law and fact. In my opinion the Magistrate arrived at a correct decision on the question of law. In a certain revenue suit brought by a tenant against the zamindar Sajjad Ali Khan for commutation of rent in kind into cash rent the patwari Sita Ram was examined as a witness. The revenue Court is generally in a hurry, and to avoid taking down a statement in detail the patwari was directed to prepare a written statement (fard) according to his papers and file it. He prepared a "fard" and made a statement on oath :

"I file "fard" exhibit A. It is prepared by me according to settlement rates and the papers of 1333 Fasli."

The suit was heard ex parte, so there was no cross-examination. It appears that in the village record of 1333 Fasli a rent of Rs. 110 payable by the plaintiff-tenant was entered. The zamindar subsequently appealed to the higher revenue Courts on the ground that no commutation of rent was necessary as the rent payable was already payable in cash at the rate of Rs. 110 a year.

Subsequeutly the zamindar prosecuted Sita Ram for preparing a wrong record in terms of the provisions of S. 218, I. P. C. The trial Court of the Magistrate rightly pointed out that on proof of Sita Ram's statement being false he could be prosecuted for an offence under S. 193 for giving false evidence, but that no offence under S. 218 was made out. The provisions of that section are :

"Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, and with a certain intention, is said to commit an offence under that section."

The patwari was undoubtedly a public servant, and possibly his intention may be presumed to cause loss to the zamindar, but the patwari as such patwari was not charged with the preparation of the "fard." This "fard" was prepared to save trouble to the revenue Court of writing down the patwari's evidence in detail. It is not a "fard" which he was bound to supply to a tenant on demand. In that case it may have been termed a "fard" with the preparation of which he may be said to have been charged. In no sense can the statement be called a public document which was his duty to prepare. The learned Judge of the lower appellate Court has quoted a Punjab ruling which is not before me. There is, however, a ruling of this Court in *Empress* v. *Mazhar Husain* (1) which supports the interpretation which I place on the terms of S. 218. A clerk in the office of a municipality in charge of certain records having been required to produce them, and being unable to do so, fabricated and produced similar documents. This Court held that such fabricated documents not being records or writings with the preparation of which the clerk was charged, he could not be

(1) [1883] 5 All. 553=(1883) A. W. N. 133.

legally convicted of an offence under S. 218.

On the facts also the Judge is wrong. The finding of the Board of Revenne that rent was payable in kind in no way affects the question whether the patwari made a false statement on oath or not, that according to the papers of 1333 Fasli no rent in cash is payable by the tenant. It is not possible for me to direct further inquiry into an offence under S. 193 because the sanction of the Court in which that offence was committed is wanting. This application is dismissed.

P.D./R.K. *Application dismissed.*

A. I. R. 1929 Allahabad 375

ASHWORTH, J.

Rang Lal—Appellant.

v.

Lilawati and *others*—Respondents.

Second Appeal No. 945 of 1927, Decided on 1st March 1929, against decree of Addl. Sub-Judge, Farrukhabad, D/- 25th February 1927.

(a) Civil P. C., O. 41, R. 27—Additional evidence should not be accepted if it cannot be used for the purpose for which it is tendered.

In second appeals decisions of fact cannot be impugned and hence it is futile to admit evidence which is tendered to impugn a question of fact and which therefore should be rejected: *A. I. R.* 1926 *Cal.* 941 (943), *Foll.* [P 375 C2]

(b) Civil P. C., O. 47, R. 1—A condition precedent for making an application for review, is that there has been no appeal preferred—Subsequent appeal is no ground for refusing the application.

There is nothing in O. 47, R. 1 or in other provisions of Civil Procedure Code which would justify the Courts in refusing to entertain an application for review merely on the ground that subsequent to the making of the application, an appeal has been filed. The policy of the Code appears to be that a person cannot after filing a second appeal be allowed to obtain a review of judgment in the lower Court which should have the effect of altering the judgment and decree from which he has appealed. [P 376 C 1]

(c) Civil P. C., O. 47, R. 1—The only remedy for the applicant, to correct the order of the lower appellate Court postponing consideration of the application for review is revision under S. 115, Civil P. C.

When the lower appellate Court has postponed the consideration of an application for review, there is no appeal as the order cannot be construed as a final order. Again such an order is not included in the list of appealable orders in O. 47, R. 1. Hence the only remedy revision under S. 115. [P 376 C 1,2]

N. P. Asthana—for Appellant.

U. S. Bajpai—for Respondents.

Judgment.—This second appeal arises out of a suit in which the plaintiff asked for an injunction. The defence was that the plaintiff had no title. The suit has been decreed by the lower appellate Court which found in favour of the plaintiff-respondent in this Court, having sufficient title to sue. The defendant appeals. Before deciding the appeal it is necessary to consider the appellant's application for the production in this Court of further evidence. He has alleged by an afidavit that he became aware, subsequent to the decision of the lower appellate Court, of the existence of evidence showing that Anokhey Lal from whom the plaintiff derived her title had entirely disposed previously of his interest in the property. The application for production of further evidence purported to be under O. 41, R. 27.

There is no doubt in my mind that, if this were a first appeal, this Court could allow the further evidence to be produced under O. 41, R. 27 (b). It has been laid down by their Lordships of the Privy Council in *Inderjit Partab* v. *Amar Singh* (1) at p. 684 (*of* 2 *Pat.*) that this provision will cover the case of the production of evidence, even though that evidence is not required by the appellate Court to enable it to pronounce judgment, but is only tendered on the ground of fresh discovery. But it is urged by counsel for the respondent that O. 41, R. 27 only applies to first appeals, and that the Privy Council decision also can only be construed to have reference to a case where further evidence is tendered in a first appeal. But O. 42 declares that the rules of O. 41 shall apply so far as may be to second appeals. There is, therefore, in my opinion, no reason for holding that the additional evidence could not be accepted by this Court. It is, however, another matter whether, having accepted that evidence, this Court could consider it. In second appeals decisions of fact cannot be impugned. It is clear that this evidence is tendered in order to impugn a question of fact. I hold that it would be useless for this Court to accept the evidence if it cannot use that evidence for the purpose for which it is tendered, and I further hold that it cannot. This was

(1) A. I. R. 1923 P. C. 128=2 Pat. 676=50 I. A. 183 (P.C.).

the view taken in *Shamshuddin Biswas* v. *Molannessa Bibi*, *A. I. R.* 1926 *Cal.* 941 at 943. The same view was adopted in *Wali Mohammad* v. *Mohammad Baksh*, *A. I. R.* 1924 *Lahore* 444 at 445. Where a party wishes to produce further evidence affecting a matter of fact, it must get that evidence produced before a Court which can decide a question of fact. It is useless for him to tender that evidence before a Court which is confined to questions of law. But it appears that the appellant did tender this further evidence to the lower appellate Court and asked for a review of judgment. The application of the appellant to this effect was dated 16th April 1927. This appeal was filed on 17th May 1927, before the review case came up for hearing before the lower appellate Court. The lower appellate Court passed a somewhat curious order on the application. It neither accepted the application for review nor rejected it, but stated that, as an appeal had been filed before its consideration of the application, the application would be held pending. It is not clear what advantage there could be in postponing decision instead of rejecting the application.

I am of the opinion that the order of the lower appellate Court on the application for review was not a proper order. O. 47, R. 1, governs the procedure to be adopted on an application for review of judgment. A condition precedent prescribed by that rule for making such an application is that there has been no appeal preferred. At the date when the application was made this condition was satisfied. There is nothing in O. 47, R. 1, or in other provisions of the Civil Proeedure Code, so far as I am aware, which would justify ths lower appellate Court in refusing to entertain the application for review merely on the ground that subsequent to the making of the application an appeal had been filed. The policy of the Code appears to me to be that a person cannot after filing a second appeal allowed to apply to obtain a review of judgmeut in the lower Court, which should have the effect of altering the judgment and decree from which he had appealed. The Code has not contemplated a case where having applied for review tha same person appeals. It might be deemed a good reason in such a case for rejecting the appeal, but, as an application for review has been filed no sufficient ground appears to me to exist by reason of the subsequent filing of an appeal for rejecting the application. Consequently I hold that the lower appellate Court should have proceeded to deal with the application for review.

The next question is what remedy has the applicant to correct the order of the lower appellate Court postponing consideration of the application for review. No appeal from such an order lies as it cannot possibly be considered a final order. On the other hand, such an order is not included in the list of orders contained in O. 43, R. 1 from which an appeal is allowed. The only method, then by which this Court can interfere is by revision under S. 115 of the Code. It appears to me that in refusing to proceed with the application for review the lower appellate Court failed to exercise a jurisdiction vested in it, and therefore I can interfere. As regards the appeal, it is obvious that decision on it should be held over pending the decision by the lower appellate Court on the application for review. Accordingly it is ordered that this appeal be postponed for three months, and it is ordered that the lower appellate Court be directed to take up again the appellant's application for review, dated 16th April 1927, and dispose of the same on the merits. It will not be open to that Court to hold that the application will not lie on the ground of the filing of an appeal in this Court, but it will be open to that Court to consider whether the application is in order having regard to the other provisions and conditions imposed by O. 47, R. 1, including the provision that if a review is asked for on the ground of discovery of fresh evidence, it must be shown that the applicant could not with due diligence have been aware of the existence of that evidence.

As regards costs in this case it appears to me that the appellant is to blame. He should not have filed his second appeal but should have deferred doing so until his application for a review had been decided. This being so I consider that the appellant should bear the cost of counsel on the other side for today's proceedings. This cost will be reckoned at Rs. 32, the amount of fee certified as paid to the respondent's counsel. Any other or subsequent costs in connexion with this appeal will abide the result of the appaal.

P.R./R.K. *Appeal postponed.*

* A. I. R. 1929 Allahabad 377

DALAL, J.

Makhan Lal—Decree-holder— Appellant.

v.

Narain Das and *another* — Surety Judgment-debtor—Respondents.

Execution Second Appeal No. 1336 of 1928, Decided on 22nd February 1929, against Decree of Dist. Judge, Jhansi, D/- 23rd April 1928.

*** Civil P. C., S. 55 (4)—Judgment-debtor failing to apply within one month—Option as to whether security should be realized or judgment-debtor committed to prison lies not with decree-holder but executing Court.**

Where the judgment-debtor fails to apply for insolvency within one month from his release, the option as to whether the security should be realised or the judgment-debtor should be committed to civil prison lies not with the decree-holder but with the Court executing the decree : *A.I.R.* 1926 *Mad.* 286 and *A.I.R.* 1924 *Bom.* 428, *Ref.*[P 377 C 2; P 378 C 1]

H. C. Mukerji—for Appellant.

N. C. Vaish—for Respondents.

Judgment.—The question in dispute relates to execution sought by the decree-holder against a surety who became a surety under the provisions of S. 55 (4), Civil P. C. On 29th March 1927 the judgment-debtor Bindraban was produced before the execution Court under arrest and he was released on Narain Das standing surety for him according to statute (1) that the judgment-debtor will apply to the insolvency Court within one month of the date of release and (2) that the judgment-debtor will appear when called upon to do so.

The lower appellate Court has suggested that the vernacular security bond is not in these terms, but that is not a point for consideration because the surety ought to have known the law and what he contracted for under the law. Application for insolvency was not made within one month and so there certainly was default. It was represented on behalf of the respondent surety that the Court had extended time for making this application. There was no such extension of time ; it is true that the judgment-debtor appealed from the decree and execution was stayed from time to time, but this order of the appellate Court did not extend the time fixed to apply for insolvency. It appears that when the appeal was finally dismissed, the execution Court of its own motion, on 11th August 1927, issued a notice to the surety to produce the judgment-debtor on 25th August 1927. The surety mistook this date for 29th and this mistake is accepted by the lower appellate Court. The 29th August being a holiday, the surety produced the judgment-debtor in Court on 1st September 1927. On that date the decree-holder applied that his decree may be executed against the surety (1) because an application for insolvency was not made within one month of 29th March 1927 and (2) because the judgment-debtor was not produced on 25th August. The non-production of the judgment-debtor has been explained and the explanation accepted by the lower appellate Court. Such non-production therefore did not amount to a breach of the surety bond. There was, however, a breach as already stated, on the failure of the judgment-debtor to apply for insolvency within one month of the date of the judgment-debtor's release and the decree would have been capable of execution against the surety, if the option lay with the decree-holder and not the Court whether to take out execution against the surety or to commit the judgment-debtor to the civil prison in execution of the decree.

The counsel for the decree-holder appellant quoted a ruling of the Madras High Court. *Venkobanna* v. *Myachand Venichand A. I. R.* 1926 *Madras*, 286. There is a still earlier judgment of a Bench of two Judges of the Bombay High Court of 1924, in the case of *Makanji Manji* v. *Bhukan Das Nagar Das* (1), in which it was held that on the judgment-debtor failing to apply for insolvency within one month of his release, the surety may be called upon to pay the amount of the decree. Neither judgment, however, decides the question whether the option lay with the Court or with the decree-holder. In both cases the trial Court had exercised its option against the surety and the High Court held that such option was within the authority of the trial Court to exercise. The point was not raised whether a decree-holder can compel the Court to exercise option in a particular manner. The words of statute are that :

" on default the Court may either direct the security to be realized or commit him (i. e.

1) A. I. R. 1924 Bom. 428=48 Bom. 500.

the judgment-debtor) to the civil prison in execution of the decree."

The language leaves no doubt that the option lies with the Court executing the decree and not with the decree-holder. In the present case the Court started proceedings against the judgment-debtor, required his presence in Court and did not proceed in execution against the surety. After hearing arguments the Court discharged the surety and directed the decree holder to take action against the judgment-debtor, who was at the moment present in Court. The Court not having proceeded against the surety and having proceeded against the judgment-debtor, decree-holder is not permitted by statute to proceed against the surety. This appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 378

DALAL, J.

Tayyab-un-nissa — Plaintiff — Appellant.

v.

Nasarullah and *others*—Defendants—Respondents.

Second Appeal No. 1172 of 1927, Decided on 15th February 1929, against decree of District Judge, Allahabad, D/- 26th March 1927.

(a) Agra Tenancy Act (1901), S. 201 (3)—Presumption arising under S. 201-(3) will not be removed by inferential decisions of civil Courts by reason of res judicata.

The presumption arising under S. 201 (3) is removed only where there exists a definite civil Court decision regarding the property in suit, but such decisions should not be permitted to cover any inferential decision of the civil Court by reason of res judicata : 31 *All.* 257, *Disc.* and *Dist.* [P 378 C 2 ; P 379 C 1]

(b) Agra Tenancy Act (1901), S. 164—Scope.

A revenue Court order subsequent to the presentation of the plaint will not affect the plaintiff's right to sue for the profits for the years during which his name was entered in the village record : *A.I.R.* 1921 *All.* 396, *Foll.* [P 379 C 1]

S. Majid Ali—for Appellant.

Mukhtar Ahmad—for Respondents.

Judgment.—The decision of the lower appellate Court is somewhat summary. He referred to a deed of gift, when really the gift alleged by the defendants is an oral one. The plaintiff Mussammat's name is entered in the village record, and on the basis of that entry she sued certain persons for recovery of her share of the profits. The defence was that under a civil Court decision the plaintiff had been held not to be the owner of the property in suit. This is not accurate. There has been no civil litigation with respect to this property. The civil litigation related to a suit for possession brought by the plaintiff female in the civil Court against the same defendants, in which it was held that a gift of her property had been made by the plaintiff's mother Mt. Mariam in favour of the plaintiff's brother Saif Ullah. That suit, however, related to property in another village, and not to property in the village in the present revenue Court suit. It is urged that that finding will act as res judicata in the present suit. Whatever considerations there may be, if a suit with respect to this property is brought in the Court of a Munsif, in my opinion, the judgment of the Munsif cannot act as res judicata in this suit in the revenue Court. It has not been decided definitely by any civil Court that the property in suit here does not belong to the plaintiff. It may be that on a suit brought by either party the judgment in the previous suit may be held to be res judicata, and a decision may be given against the plaintiff by reason thereof. That fact, however, in my opinion, cannot prevent the operation of the presumption under S. 201 (3) of the Tenancy Act of 1901.

It has been held by this Court in various rulings that when a civil Court has decided the question of proprietary title to the property in suit there is nothing left for the revenue Court to presume under the provisions of S. 201 (3) of the Tenancy Act of 1901 : *Gobindi* v. *Saheb Ram* (1). This has been subsequently followed in various other rulings of this Court. In all those cases, however, there was a definite pronouncement by a civil Court with respect to the property in suit in the revenue Court, and it was not desired by either party to plead a civil Court decision by way of res judicata. In my opinion this Court has removed the presumption only so far as there existed a definite civil Court decision regarding the property in suit, and such decisions should not be permitted to cover any inferential deci-

(1) [1909] 31 All. 257=1 I.C. 885=6 A.L.J. 138 (F.B.).

sion of the civil Court by reason of res judicata. For instance, the circumstances may be such, though I am told that they are not present here, that the next civil suit may be brought in a Court of higher jurisdiction than that of a Munsif, and the principle of res judicata by reason of the difference of Courts may not arise in such subsequent civil suit. I am of opinion that when statute law directs a definite presumption to be drawn, .it should be drawn, unless, as in cases already referred to of this Court, no occassion arises for drawing any presumption.

The references by the District Judge to subsequent revenue Court proceedings are not of any avail either in fact or in law. In fact the revenue Court order relating to the removal of the plaintiff's name from the village record has been set aside on appeal, and in law the decision in the case of *Lachman Prasad* v. *Shitabo Kunwar* (2) will apply, that the revenue Court order subsequent to the presentation of the plaint will not affect the plaintiff's right to sue for the profits for the years during which her name was entered in the village record. In the result I set aside the decrees of both the subordinate Courts and remit the suit to the trial Court for further trial of the rest of the issues and decision. Costs here and heretofore shall abide the result.

S.N./R.K. *Case remanded.*

(2) A.I.R. 1921 All. 396=43 All. 177.

A. I. R. 1929 Allahabad 379

SULAIMAN AND KENDALL, JJ.

Zalim Singh and *another* — Defendants—Appellants.

v.

Raghunandan and *others* — Plaintiffs and Defendants—Respondents.

Second Appeal No. 1784 of 1926, Decided on 23rd January 1929, from decree of Addl. Dist. Judge, Cawnpore D/- 29th June 1926.

Agra Pre-emption Act (1922), Ss. 3 and 5 —Village of three mahals—Wajib-ul-arz of two only recording custom of pre-emption—Property sold from third mahal—No wajib-ul-arz of this mahal or village prior to the Act recording custom of pre-emption—Right of pre-emption cannot be enforced.

A village consisted of three mahals. Wajib-ul-arzes for only two recorded a right of pre-emption, and the third mahal in which the property sold was situated did not record any right of pre-emption. In a suit for pre-emption,

Held : that it was iucumbent on the plaintiff to show that there was a wajib-ul-arz prepared prior to the commencement of the Act in respect of this particular mahal or village out of which it was formed which recorded such a custom or right. The mere fact that the wajib-ul-arz of the other two mahals recorded a custom of pre-emption was not sufficient. [P 379 C 2, P 380 C 1]

K. N. Katju and *S. N. Seth*—for Appellants.

P. L. Banerji and *R. K. Malaviya*—for Respondents.

Judgment.— This is a defendants' appeal arising out of a suit for pre-emption. The first Court dismissed the claim, but on appeal the lower appellate Court has decreed it, holding that there is no right of pre-emption in the mahal in which the property is situated. There are three mahals, in this village. Wajib-ul-arzes for all the three mahals have been produced and only two record a right of pre-emption, and the third mahal in which the property sold is situated does not record any right of pre-emption at all. It only states that it is owned by a single proprietor.

It is quite clear that the Act being applicable to the village in question, S. 3 allows the right of pro-emption only in accordance with the provisions of this Act. Under S. 5 a right of pre-emption is to be deemed to exist only in mahals or villages in respect of which any wajib-ul-arz prepared prior to the commencement of the Act records a custom, contract or declaration. No wajib-ul-arz prepared of the mahal in question records any such right. Thus there is no record of rights in respect of the area covered by this mahal which contains any such declaration. In our opinion the mere fact that there are wajib-ul-arzes for other mahals would not be sufficient to allow of a right of pre-emption in this mahal.

No earlier wajib-ul-arz of the village before there was a partition has been produced in this case. The lower appellate Court thought that because the wajib-ul-arzes of the other two mahals recorded similar customs, the wajib-ul-arz of the parent mahal or village must also have recorded a similar right. In our opinion such a presumption is by no means justified inasmuch as it is quite possible that the entry of such a right

was made for the first time at the time of the partition when the three mahals were formed. In any case it was incumbent on the plaintiff to show that there was a wajib-ul-arz prepared prior to the commencement of this Act in respect of this particular mahal or village out of which it was formed which recorded such a custom or right. As the plaintiff failed to show that, the suit ought to have been dismissed.

We accordingly allow the appeal and setting aside the decree of the Court below dismiss the plaintiff's suit with costs to the appellants.

R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 380

BANERJI AND KENDALL, JJ.

Ghasi Khan—Defendant—Appellant.

v.

Thakur Kishori Ramanji Maharaj and *others*—Plaintiffs—Respondents.

Second Appeal No. 1043 of 1926, Decided on 22nd February 1929, against decree of Sub-Judge, Muttra.

(a) Limitation Act, S. 20—One co-mortgagor, making payment of interest, keeps mortgage alive—Limitation Act, S. 21 (2).

Payment of interest by one of two mortgagors keeps alive the mortgage and not only the personal liability of the person who actually pays interest : 8 *A. L. J.* 605, *Dist.* [P 381 C 1]

(b) Transfer of Property Act, S. 67—Either of two properties mortgaged is ordinarily liable for whole debt and mortgagee can proceed either against whole property mortgaged or any part of it.

Ordinarily the rule is that if two properties are jointly mortgaged for the same debt each of these properties is liable for the whole, and it is open to the mortgagee either to proceed against the whole mortgaged property or against a part of such property although there may no doubt be special cases where an exception may be made : 44 *Bom.* 223 and 33 *Cal.* 613; *Expl.*; 35 *All.* 441, *Rel. on.* [P 381 C 2]

S. C. Das—for Appellant.

N. P. Asthana—for Respondents.

Judgment.—This is a defendant's appeal in a suit for sale on a mortgage of 31st July 1910 executed by the appellant and Zabar Khan in favour of the respondent. The defence to the suit by the appellant among others was that the claim of the plaintiff was barred by limitation and that no money had passed to them.

The mortgage was for a term of six years, and it was provided in the deed that upon failure of payment of interest for one year the mortgagee would be entitled to recover the whole of the mortgage money without waiting for the expiry of his stipulated time. It is, therefore, clear that no interest having been paid for one year the mortgagee was entitled to recover the money by suit on foot of the mortgage. The present suit having been brought after 12 years from that date the claim of the plaintiff must be held to be barred unless the plaintiff proved either payment of interest or principal, or claimed that the suit was not barred by reason of an acknowledgment. The plaintiff claimed that the two mortgagors had made certain payments, but the Courts below have found that the payment of any interest by Zabar Khan had not been proved, but that payment of interest by Ghasi Khan had been proved and the claim as against him was not barred by time. The Court of first instance having decreed the suit against Ghasi Khan alone, the plaintiff preferred an appeal and the present appellant Ghasi Khan filed cross-objections. At p. 15 of the paper book will be found the points that were contested before the learned Judge. The result of the findings was that the Court accepted the findings of fact arrived at by the first Court, namely that the alleged payment by Zabar Khan had not been proved, but that the payment of interest by the appellant had been proved. As the Court of first instance had reduced the amount of interest as provided for by the deed, the learned Judge in appeal modified the decree of the first Court as against Ghasi Khan.

Ghasi Khan has come up in appeal before us. Two points have been argued by the learned advocate for the appellant. The first is that payment of interest by one of the two co-mortgagors does not keep alive the mortgage but only the personal liability of the person who actually pays interest. The second point taken is that the appellant should not be made responsible for the whole debt when the claim as against his co-mortgagor had been dismissed. It may, however, be mentioned that these grounds were not definitely taken in the memorandum of appeal and were not taken and argued before the lower appellate Court.

The learned advocate has cited in support of the first proposition argued by him the case of *Chunni* v. *Hukum Singh* (1). This case in our opinion is no authority for the proposition, but the learned advocate argued that we should accept the converse of what has been laid down in that case. The case of a mortgagee is different from that of a mortgagor, and we cannot accept that everything that applies to a mortgagee must apply to a mortgagor. Their rights and liabilities are different.

It is further submitted that as S. 21 (2), Lim. Act, provides that the acknowledgment of a debt or payment of interest by one of two debtors only keeps the debt alive as against the person who acknowledges the debt or pays the interest, the liability of the co-mortgagor had ceased by reason of the fact that he had made no payments. A mortgage deed is not the same as a simple debt and we think that the liability which attaches to a mortgagor by reason of his having executed the mortgage and paying interest cannot be got rid of by saying that the payment of interest was of a simple debt as such.

Mr. Das has referred to the case of *Budhmal Kevalchand* v *Rama Yesu* (2) as authority for the proposition that his client should be only made responsible for a proportionate amount of the debt. That case follows a decision of the Calcutta High Court reported in *Imam Ali* v. *Baijnath Sahu Ram* (3). In the case of *Sanwal Singh* v. *Ganeshi Lal* (4) a Bench of this Court considered the case reported in *Imam Ali* v. *Baijnath Sahu Ram* (3) and has referred to cases of the other High Courts and held that the rule in that case was intended to govern the particular facts of that case on the point and not to lay down any general rule. Having examined that case we are of the same opinion and we think that no general rule was laid down either in the case reported in *Budhmal Kevalchand* v. *Rama Yesu* (2) or in the case reported in *Imam Ali* v. *Baijnath Sahu Ram* (3). We see no reason to differ from the view of this Court in the case of *Imam Ali* v. *Baijnath Sahu Ram* (3) and no materials have been laid either before the Court below or before us from which we could say that the ordinary principle applicable to mortgages does not apply to the facts of this case. Ordinarily if two properties are jointly mortgaged for the same debts each of those properties is liable for the whole, and it is open to the mortgagee either to proceed against the whole mortgaged property or against a part of such property. There may no doubt be special cases where an exception may be made, but in our opinion, in this case there is nothing shown which would lead us to depart from the ordinary rule. We are, therefore, of opinion that there is no force in this appeal and we dismiss it with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1911] 8 A. L. J. 605=10 I. C. 238.
(2) [1920] 44 Bom. 223=55 I. C. 327=22 Bom. L. R. 68.
(3) [1906] 33 Cal. 613=3 C. L. J. 576=10 C. W. N. 551.
(4) [1913] 35 All. 441=20 I. C. 41=11 A. L. J. 630.

A. I. R. 1929 Allahabad 381

ASHWORTH AND SEN, JJ.

Asghari Begam and *others*—Defendants—Appellants.

v.

Maula Baksh—Plaintiff—Respondent.

Second Appeal No. 461 of 1926, Decided on 13th February 1929, against decree of 3rd Addl. Sub-Judge, Aligarh, D/- 5th December 1925.

Transfer of Property Act, S. 10—Transfer deed transferring property but by subsequent clause imposing condition restraining transferee from transferring interest to any person except transferrer—Condition amounts to absolute restraint on right of transfer.

Where a deed of transfer at first absolutely transfers property to another, but by a subsequent clause makes the clause subject to a condition restraining the transferee from parting with or disposing of that interest to any person other than the transferrer, the condition amounts to an absolute restriction on the right of transfer and so is void.

[P 382 C 1]

Panna Lal—for Appellants.

Mukhtar Ahmad—for Respondent.

Judgment. — This second appeal arises out of a suit brought by the plaintiff-respondent for sale of a certain property on the basis of a mortgage. The mortgage was in respect of two kinds of property ; one was land and the other was a certain money charge created on other property. It is with the latter only that we have to deal in this second appeal.

The question is solely one of interpretation of a certain deed. This deed

was executed by one Kishori Lal, a zemindar, in favour of two minor children in consideration of the mother of these children having given up her rights to claim an exproprietary tenancy.

The important portions of the deed are as follows :

"Therefore, in consideration of the relinquishment of their exproprietary rights Rs. 150 a year for maintenance in favour of Mohammad Abdul Hafiz Khan and Mohammed Abdul Aziz Khan minor sons of Mt. Alun-nissa, daughter of Ch. Mohammed Hidayat Ali Khan deceased resident of qasba Balram have been fixed for ever and after them to their descendants and successors-in-interest generation after generation and womb after womb."

This is followed later on by the following provision :

"The minors during their minority or after attaining majority shall have right to transfer this fixed maintenance to me at any time, but they shall have no right of transfer in favour of a stranger (shaksh gair)."

Now the first question is whether these two clauses are repugnant and irreconcilable. We agree that they can be reconciled by supposing that it was the intention of the grantor that the minors during their lifetime should have no right to transfer the charge or annuity, but that after their lifetime their descendants should have such a right.

The second question, however, is whether the subsequent clause was void under S. 10, T. P. Act. Here we find that a charge on land is transferred subject to a condition restraining the transferees from parting with or disposing of that interest to any person other than the grantor. This clearly amounts to an absolute restriction on his right of transfer. The provision that the grantees may transfer back to the grantor has no effect. It would be the same if the deed provided that on transfer by the grantees the grant should be at an end.

It is true that we have to look at the substance and not the form. But this deed clearly indicates that the minor grantees should have an unfettered right to the charge. The deed gives that right but it cuts it down by the later clause. This is exactly what we conceive S. 10, T. P. Act, was designed to obviate. No decision exactly on all fours with this case has been shown to us, but there are numerous decisions which justify it being held that such a restriction of a grant as is made by Cl. 2 in this deed would be construed as a

"condition or limitation absolutely restraining the transferee from parting with or disposing of his interest in the property."

"His interest" means interest conferred by the earlier portion of the deed. For the above reasons we hold that the decision of the lower Court was correct and we dismiss this appeal with costs.

S N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 382

ASHWORTH, J.

Municipal Board, Pilibhit—Defendant—Appellant.

v.

Khalil-ul-rahman—Plaintiff—Respondent.

Second Appeal No. 87 of 1929, Decided on 25th February 1929, against decree of Dist. Judge, Pilibhit, D/- 18th September 1928.

(a) U. P. Municipalities Act (2 of 1916), Ss. 116 (g) and 223—Land on either side of road belongs to municipality.

The land on either side of a road up to the defined boundary belongs to the Municipality as such land is covered by the definition of "street." [P 383 C 2]

(b) Easements Act (5 of 1882), S. 15—To apply 60 years rule Government ownership must exist on the date when easement is claimed.

To claim 60 years rule of easement, there must be Government ownership on the date when the easement is claimed and not at some antecedent period. [P 383 C 2]

(c) Easements Act (5 of 1882), S. 15—Bye-law passed by Board and sanctioned by Government signifying the Board's intention to let out the sides of roads to hawkers does not create Board's ownership to those sides but merely extends its power of user.

A bye-law, passed by the Board and sanctioned by the Government, signifying the intention to let out the spaces at the sides of roads to hawkers, does not create Board's ownership to those sides but merely extends its power of user, the ownership being already created by S. 116, Municipalities Act of 1916, or a similar provision in the previous Act. [P 384 C 1]

(d) Easements Act (5 of 1882), S. 15, Expl. 2—Mere obstruction is not sufficient but further acqueiscence for one year must be proved.

Under Expl. 2, S. 15, it is not sufficient to prove that there was obstruction for a period of one year, but it is also essential that such obstruction should be acquiesced in for the same period by the claimant. [P 384 C 1]

Sailanath Mukerji—for Appellant.

Judgment. — This second appeal arises out of a suit brought by the plaintiff-respondent against the defendant-appellant for an injunction, restraining the defendant from allowing the margin of a public road to be used by traders for the vend of merchandise. The plaintiff owns a shop and also an open space in front of that shop. This open space borders a public road. The defendant is the Municipal Board of Pilibhit. By a bye-law, passed on 27th June 1917, the Municipal Board signified its intention to let out the spaces at the sides of roads to hawkers, and it has allowed hawkers to stand or sit and sell their goods on the side of the road in question. This prevents the public having free access to the shop booths allowed by the plaintiff on his vacant strip of land, and hence this suit.

The trial Court found that the plaintiff had failed to prove that the public had enjoyed for 20 years free access from the road to this piece of land. It also found that the suit was barred by limitation as not brought within two years when the Municipal Board began to let out the side of the road to hawkers.

In first appeal the Subordinate Judge found that the plaintiff's witnesses did prove use of the land by the plaintiff for stalls for over 20 years. It also found that there was no evidence to show that the side of the road had been used by licensees or lessees of the Board at a date more than two years before the filing of the suit.

The memorandum of appeal by the Municipal Board contains two clauses. The first plea is that as the land at the side of the road belongs to the Board, it can use it in any way it likes, and the second plea is that the plaintiff has no right to interfere with the use of the defendant's land. When, however, the case came to be argued, the point taken up was that the findings of the lower appellate Court both as to the establishment of a right of easement and as to the limitation were wrong. By no stretch of construction can these pleas be found to be included in the two pleas taken in the memorandum of appeal. Those two pleas entirely ignore the findings of the lower appellate Court as to an easement or as to limitation. They assert the right of the owner of land to deal with his land as he wishes, which right was never denied by the lower appellate Court. The pleas in the memorandum of appeal appear to mean that no owner's right can be destroyed by any easement, which I do not understand to be maintained by the appellant's counsel.

At the same time, as I hold that the pleas now argued are equally untenable, it appears more satisfactory to dismiss this appeal on all the merits rather than on the remark that the pleas taken in the memorandum of appeal are not sustainable.

As regards the question of easement, it is argued that where land belongs to Government, an easement can only be established by 60 years enjoyment of the right claimed: see the last paragraph of S. 15, Easements Act 5 of 1882. But this land was not Government land. It was land belonging to the Municipal Board. S. 116 (g), Municipalities Act (U. P. Act 2 of 1916) vests in the Board all public streets and the expression "street" is defined in S. 223 to include the land on either side of a road up to the defined boundary of any abutting property. So at the date of suit the land belonged to the Board. The provision in S. 15 requiring 60 years use to establish an easement refers to the date when the easement is claimed. It would not therefore be open to the appellant to plead that at some period antecedent to the bringing of the suit the road belonged to Government. Even if this might be argued, it has not been argued, and there is no evidence to show the date when under any Municipal Act for the time being in force streets vested in the Board, or when this particular street came into existence. What is argued by counsel for the appellant is that it was only on 27th June 1917 that a bye-law was made by the Board and approved by Government declaring the Board's intention to let out the sites in the streets. He urges that it was only from this date that the side of the road became the property of the Board. Even if this were so, it does not appear to me that the last paragraph in S. 15, Easements Act would assist the appellant, but the view that the bye-law vested this road in this Municipal Board is not correct. The road was vested in the Board by S. 116, Municipalities Act of 1916, or by any previous Municipal Act, containing a provision similar to S. 116 of the present Act. From the date that

the road became vested in the Board the Board was owner, but its power of dealing with the road was restricted. It could not merely by right of ownership be entitled to use the land for purposes other than that of a road. It was by the bye-law that its power of user became extended or rather by the fact of Government sanctioning the bye-law. Consequently the road was properly vested in the Board, and under S. 15 an easement could be established by 20 years user.

As to limitation the plea now argued is that at the date when the suit was brought the plaintiff had been obstructed in his enjoyment of the right of access from the road for a period extending over one year. It was, therefore, argued that under Expl. 2 the plaintiff could not prove 20 years enjoyment without interruption. This plea ignores the fact that there is no evidence or even allegation that the plaintiff acquiesced in the Board's action in letting out the side of road. Expln. 2, S. 15, will not therefore apply.

It appears to me possible to have raised the contention, and indeed, when the memorandum of appeal was drafted, this may have been what it was intended to mean that the power acquired by the Board by reason of the sanction by Government of the bye-law for letting out this street for the use of hawkers was a power that would override any private right of property or of easement. It will be observed that in the bye-laws a reservation is made in favour of certain private owners probably because those private owners had long exercised a certain right. If this contention had been raised it would have been argued. But as it was not specifically raised in the memorandum of appeal and has not been argued at all, I do not think it proper now to consider it. For the above reasons, this appeal is dismissed.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 384

SULAIMAN AND SEN, JJ.

Umrao Singh and *others*—Appellants.

v.

Sultan Singh and *another*—Respondents.

First Appeal No. 146 of 1927, Decided on 25th February 1929, from decree of Sub-Judge, Etah, D/- 31st January 1927.

(a) Transfer of Property Act, S. 60—Mortgage bond—Stipulation to the effect that the mortgagor would not be entitled to possession without redeeming prior mortgages, is unavailing after a considerable lapse of time when the property referred to in the prior mortgages is not definitely specifiable specially when no previous claim for specific enforcement of the deed was made.

Where it was sought to refuse the possession of mortgaged property to the mortgagors on the ground that there was in the mortgage deed a condition to the effect that unless the prior existent mortgages were redeemed the mortgagors would not be entitled to possession, and where the property referred to in the prior mortgages was not specifically definable and where on previous occasions no rigorous adherence was exacted :

Held : that the stipulation was unavailing specially after a considerable lapse of time, [P 385 C 1]

(b) Transfer of Property Act, S. 67 — Mere oral evidence regarding arrears is inconclusive.

It is the duty of the mortgagees who take possession to keep clear full and accurate account of all amounts received by them as mortgagees. Mere oral evidence that some amount of the arrears remained outstanding would be wholly inconclusive. [P 385 C 1]

K. N. Laghate—for Appellants.

U. S. Bajpai—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit for redemption of a mortgage dated 17th February 1909. The defendants contested the suit on two grounds only. Firstly, that there was a previous mortgage of 11th April 1865 without redeeming which the plaintiffs were not entitled to take possession of the property ; secondly, that under a clause in the mortgage deed the plaintiffs were bound to pay all the arrears remaining outstanding against the tenant before redemption. The bond dated 11th April 1865 is printed at p. 15. No specific property is expressly mentioned therein but it is recited that the mortgagor would not have the right to redeem a property previously mortgaged to the mortgagee until the amount due under this bond was paid with interest. Even the date of the previous mortgage deed is not mentioned in the deed. It is imposible therefore to trace the property. All we know is that there was some share of the mortgagor in mouza Hasan Alipur Bisai but we do not know the extent of that share nor is it clear whether the whole share of the mortgagor was mortgaged or only a part of it. The deed is described as Mashrutul rahan but that by itself does not operate

to create a charge on any specific property. The defendants therefore cannot be allowed to insist on the payment of this amount after the lapse of so many years. Furthermore, we find that the condition was that the mortgagor would not be allowed to redeem the earlier mortgage without paying the money due on the bond of 1865. Assuming for the sake of argument that the reference in this bond was a reference to the earlier deed of 1861 we find that that was paid off by the execution of the fresh deed in 1867 and at that time the mortgagees on their own showing did not insist on the payment of the money due on the bond of 1865. But as a matter of fact the recital in the mortgage deed of 1865 goes to suggest that the amount due on the mortgage-deed which was tacked on to that of 1861 and which amounted to Rs. 200 was also paid off by that deed. If the assumption made by the learned advocate for the appellants is correct and the reference to the unnamed mortgage is that to the deed of 1861 it would follow that the mortgage deed of 1865 (said to have been tacked on to that of 1861) was also paid off by the deed of 1867. In any case the defendants are not entltled to claim the money due on this deed.

As regards the right to claim the outstanding arrears if any, it is quite clear that under S. 67, sub-Cl. (g), T. P. Act, it was the duty of the mortgagees who took possession to keep clear, full and accurate accounts of all the amounts received by them as mortgagees. It is admitted by their witnesses that they kept regular account books but they have chosen not to produce them. The Court below has accordingly presumed against them that if they were produced it would have gone against the defendant's case. Mere oral evidence that some amounts of the arrear remained outstanding would be wholly inconclusive in the absence of the regular account books particularly as the entries made in the patwari's siyaha cannot be said to be necessarily complete or exhaustive. In our opinion the view taken by the Court below was correct. The appeal has no force. It is dismissed with costs.

P.R./V.V. *Appeal dismissed.*

1929 A/49 & 50

A. I. R. 1929 Allahabad 385

SULAIMAN AND KENDALL, JJ.

Lalta Prasad—Plaintiff— Appellant.

v.

Chunni Singh and *another*—Defendants—Respondents.

Second Appeal No. 1642 of 1926, Decided on 18th January 1929, against decree of Dist. Judge., Budaun, D/-14th August 1926.

(a) Agra Pre-emption Act (1922), Ss. 12 and 5—Right of pre-emption recorded in wajib-ul-arz must be deemed to exist—Who are entitled to that right is to be determined according to S. 12 and not wajib-ul-arz.

Although when a right of pre-emption is recorded in a wajib-ul-arz of the mahal, it must be deemed to exist under S. 5, still the question as to what persons are entitled to exercise this right is to be determined by reference to S. 12 and not to the recitals in the wajib-ul-arz. [P 385 C 2]

(b) Agra Pre-emption Act (1922), S. 4 (7)—Muafi plots.

Holders of specific muafi plots are petty proprietors when they do not own any land jointly with the cosharer in mahal in the administration of the affairs of which they are not entitled to take a part. [P 386 C 1]

P. L. Banerji and *S. B. Johari*—for Appellant.

S. P. Sinha for *N. P. Asthana*—for Respondents.

Judgment.—In this case part of the resumed muafi land comprised in one khewat and assessed to Government revenue has been sold. The plaintiff is a cosharer in this very khewat. An earlier wajib-ul-arz prepared for the village records a custom of pre-emption, but there is also a recital in it to the effect that the cosharers of the village have no concern with the resumed muafi. The defendants are strangers. The Court of first instance decreed the claim for pre-emption, but on appeal the District Judge has dismissed it, holding that having regard to the recital in the wajib-ul-arz there is no right of pre-emption in muafi lands. We are unable to concur in this view. When a right of pre-emption is recorded in a wajib-ul-arz of the mahal, a right must be deemed to exist, in view of the provisions of S. 5, of the Act. The question as to what persons are entitled to exercise this right is to be determined by reference to S. 12 of the Act and not to the recitals in the wajib-ul-arz. Under the last mentioned section when a petty proprietary interest is sold, coparceners in that interest have the first right of pre-emption,

The holders of these resumed muafis are holders of specific plots in the mahal and are obviously not entitled to take part in the administration of its affairs and do not own any land in the mahal jointly with the cosharers. They are accordingly petty proprietors within the meaning of S. 4, sub-Cl. (7). The plaintiff therefore has the first right of pre-emption. We accordingly allow this appeal and setting aside the decree of the lower appellate Court, restore that of the first Court with costs in all Courts including in this Court fees on the higher scale.

S.N./R.K. *Decree set aside.*

A. I. R. 1929 Allahabad 386

ASHWORTH, J.

Khuda Baksh—Appellant.

v.

Jai Shankar and *others*—Respondents.

Second Appeal No. 117 of 1929, Decided on 25th February 1929, against decree of Addl. Sub-Judge, Agra, D/- 9th November 1928.

(a) Landlord and Tenant—Zamindars can get rid of grave made in abadi without their knowledge as soon as they come to know of it.

The zamindars, who are paramount owners of a village, can interfere to get rid of a grave made without their knowledge in the vacant site of the abadi as soon as they come to know of it. [P 386 C 2]

(b) Principal and Agent—Agent's acquiescence.

An agent's acquiescence cannot be pleaded when the other party knows that he has not authority to acquiesce [P 386 C 2]

(c) Evidence Act, S. 115—Tenant making grave on abadi—Zamindar's servants standing by and not objecting—That does not amount to agent's acquiescence.

Where a tenant without zamindar's permission makes a grave on the abadi, the mere fact that the servants of the zamindar stood by and did not object cannot amount to agent's acquiescence so as to estop Zamindar from interfering with the grave. [P 386 C 2]

M. A. Aziz—for Appellant.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-respondents as zamindars of a village for the removal of a dead body from certain land against the defendant-appellant. It appears that the father of the appellant had a house in the village and used to sit on a bit of vacant land in front of it. He expressed a desire to his son that he should be buried there, and the son did bury him there during the absence from the village of the zamindars. This suit was resisted on the ground that the place where the grave was made was within the area of the site granted in the abadi to the defendant's father, and that in any case the zamindars had acquiesced in the making of the grave and the burial, their present suit being dictated by some disagreement which had subsequently arisen. Both the Courts have found that the land was vacant land and not subject to any title of the defendant. They have also found that there was no acquiescenee on the part of the Zamindars even if their servants stood by and allowed the grave to be made.

Various pleas are taken in the memorandum of appeal. It is urged that demolition of a tomb two or three months after the burial of a person in it, should in no way be allowed. This plea is obviously bad. If the zamindars, who are paramount owners of a village, cannot interfere to get rid of a grave made without their knowledge as soon as they come to know of it, village sites might be converted into grave-yards with great injury to the residents.

A second plea is that the fact of two servants, of the zamindars not having interfered and indeed, it is said, having supplied bricks amounted to acquiescence by the zamindars. It is sufficient to say that the defendant could not have believed these servants to be acting within the scope of their duties in standing by and not objecting. An agent's acquiescence cannot be pleaded when the other party knows that he has no authority to acquiesce. In any case it is clear that the making of a grave would be such an unusual incident that it would not fall within the apparent scope of a servant's duties to express acquiescence or the reverse.

Another point taken is that the appellant's family being Faqirs it would be quite proper for them to use their courtyard or land adjoining their house for the burial of the members of their family. This plea apparently means that if a house is given to a Faqir to live in, the grant must be presumed to extend to granting the land for use for burial. This is untenable on the face of it, and in this case it was not even proved that the land was granted to the defendant for any purpose.

Another plea taken is that certain questions were wrongly disallowed. The questions were designed to prove a wrong motive on the part of the plaintiffs in bringing the suit. The motive which induces a man to insist on his rights is immaterial. For the above reasons there is no force in this appeal and is dismissed.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 387

ASHWORTH, J.

Banwari Barhi & others—Appellants.

v.

Ram Ratan Pandey—Respondent.

Second Appeal No. 29 of 1929, Decided on 18th February 1929, against decree of Addl. Sub-Judge, Ballia, D/- 30th August 1928.

(a) Agra Tenancy Act (2 of 1901), S. 273—Revenue Court deciding lease to be valid—Civil suit for avoiding it can lie.

The revenue Court's decision that the defendant was a tenant, cannot prevent under S. 273 the plaintiff from bringing a civil suit for avoidance of lease. [P 387 C 2]

(b) Hindu Law—Alienation—Father—Perpetual lease is not in ordinary course of management.

Lease is in ordinary course of management where land cannot be cultivated more profitably by manager himself or through hired servants. But perpetual lease is not in ordinary course of management. [P 387 C 2]

(c) Lease—Perpetual lease by person beyond his powers does not entitle lessee to possession. (*Obiter*).

Perpetual lease from a person beyond his power cannot be construed as an ordinary lease from year to year entitling the lessee to possession : *A. I. R.* 1928 *All.* 617, *Diss. from.* [P 387 C 2]

(d) Contract Act, S. 65—Suit for cancellation of lease granted by another—Plaintiff cannot be put on terms.

In a suit for cancellation of lease granted to the defendant the plaintiff cannot be put on terms, and made to refund consideration before getting cancellation. [P 388 C 1]

Mahmudullah and *A. M. Khwaja*—for Appellants.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-respondent for cancellation of a perpetual lease of a fixed-rate holding by his father on the ground that the lease was executed by his father as manager but for no legal necessity.

The trial Court dismissed the suit on a finding that a question of tenancy right arose and as the revenue Court had decided that the defendant was tenant, the civil Court could not deal with this suit.

In appeal the lower appellate Court held that S. 273, Tenancy Act, could not apply to oust the jurisdiction of the civil Court in a case like this. No doubt the defendant was a tenant if the lease were a valid lease, and it would be a valid lease until avoided by the son. The revenue Court's decision could not prevent the plaintiff bringing a suit for avoidance of the lease. It found that the alienation was not for legal necessity and decreed the suit.

In the present appeal five pleas are taken. The first plea is that S. 273 did apply. This plea was rightly been rejected for the reasons stated by the lower appellate Court.

The second plea is that the lease was granted in the ordinary course of management. In other words, this amounts to a plea that the father was bound to give the holding to somebody in the ordinary course of management. This plea would depend upon proving that the father could not deal with the land more profitably himself, i. e., by hired servants. No evidence of this was offered, but at any rate a perpetual lease was clearly not necessary. Two other pleas are pressed. One is that as the father being manager was entitled to give an ordinary lease to the defendant, the lease should be construed as an ordinary lease from year to year. I have been referred to a recent decision of a Bench of two Judges of this Court : *Basdeo Narain* v. *Sheikh Muhammad Yusuf* (1), refusing to give possession to a plaintiff's son in a case where the father had given a perpetual lease without legal necessity on the ground that he could have given a year to year lease which would have entitled the defendant in that case to possession. It is difficult to see how if an alienation by way of a permanent lease is void it can give the so-called lessee any right to possession, but it is sufficient for the purpose of this case to say that this is not a case of giving possession. The plaintiff has only sued for cancellation alleging that he is still in possession and the lower appellate Court has accepted the suit as such. So the decision quoted has no relevance.

Another point urged is that as part of the consideration was actually paid, the plaintiff should be put to terms before getting the cancellation. It is not neces-

(1) A. I. R. 1928 All. 617.

sary in this case to consider whether S. 65, Contract Act, applies. If it does apply, the manager or the family, whichever used the money paid by the defendant, might be liable to restore it. If so, the defendant .can bring a suit to that effect. What we are dealing at present is the cancellation of a lease which the plaintiff is entitled to avoid. The cancellation of the lease is obviously a condition precedent to any right on the part of the defendant to recover any of the money paid for the lease. He cannot therefore complain of a decree for cancellation.

For the above reasons the appeal is dismissed.

P.D./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 388

BANERJI AND KING, JJ.

B. Narsingh Prasad Singh and *another*—Appellants.

v.

Rupan Singh and *others* — Respondents.

Second Appeal No. 617 of 1926, Decided on 21st February 1929, against decree of Dist. Judge, Benares.

*** Transfer of Property Act, S. 60 — Mortgage-deed providing that, if mortgage was not redeemed on expiry of mortgage period it would not be redeemable for further 20 years—No material to show design to make redemption very difficult — Condition was held not clog on redemption.**

The mere fact that the mortgage-deed contained a condition that, in case the mortgage was not redeemed on the date on which mortgage period expired, the mortgagor would not be able to redeem it for another 20 years, would not amount to a clog on the equity of redemption in the absence of material to show that there was a design to make redemption very difficult, if not impossible : 10 *I. C.* 243 and 36 *All.* 551, *Rel on.*

[P 389 C 2]

K. Verma—for Appellants.

Gadadhar Prasad—for Respondents.

Judgment —This is a defendant's appeal. The suit out of which this appeal arises was brought by Rupan Singh, respondent 1, for redemption of an usufructuary mortgage of 6th April 1895, for a sum of Rs. 325, executed by Bindesh Singh and others in favour of one of the appellants and his predecessor-in-interest. The mortgage-deed was a usufructuary mortgage, and a very small share of mauzas Kori, Gurdaspur, Jadupur, Posi, and Lalapur in pargana Kaswar Raja, district Benares, was mortgaged. The mortgage provided that it was to be in force for 20 years and that the mortgagor had the right to redeem that mortgage on 19th September 1914, and if redemption was not eflected on that date it was not to be redeemed for another period of 20 years. The original mortgagors or their heirs, on 20th March 1914, executed a deed in favour of Rupan Singh and left a sum of Rs. 325 for payment of the mortgage, which is the subject of redemption in the present case. Rupan Singh has instituted the present suit for redemption on 17th March 1925 and in the plaint which he filed he stated that in October 1915 he deposited the money under S. 83, T. P. Act, but the mortgagee did not take the money. It appears that he withdrew the mouey in the year 1917. The defence of the appellant is that under the terms of the mortgage it was not redeemable for a term of 20 years after 14th September 1914.

The plaintiff never pleaded that any sum over and above Rs. 325 was ever claimed by the defendants at the time when they are alleged to have offered to redeem the mortgage. The Court of first instance held that the tender made by the plaintiff was not a legal tender and it also disbelieved the allegation of the plaintiff that he, as a matter of fact, ever tendered the mortgage money to the defendant as alleged. It appears that at the time of argument in the case it was argued by the learned vakil appearing for the plaintiff that, on the terms of the mortgage, the stipulation that the mortgage was not redeemable for a further term of 20 years was a clog on the equity of redemption, and therefore must be ignored. This plea found favour with both the Courts below and the plaintiff's suit for redemption was decreed.

The defendants have come up in appeal before us and it is argued by the learned advocate for the appellant that in each case when the Court wants to give relief to a mortgagor against the terms put in a mortgage-deed, there must be materials laid before the Court to come to the conclusion that the mortgagee was trying to overreach the mortgagor, or at any rate, the conditions

were such that they made redemption almost impossible. It must be observed that in the present case, although the mortgage-deed when read might suggest that the conditions were such as to make it difficult for the mortgagor to calculate what was the amount of money he would have to deposit to redeem the mortgage, it is nobody's case that any sum beyond Rs. 325 was due on the mortgage on 19th September 1914 the date fixed for the mortgage. It appears to us clear that as far as the mortgagors themselves were concerned they did not consider the terms of the mortgage to be either harsh, or that it was impossible for them to have found out what was the correct mortgage money. In fact on 20th March 1913, over a year before the due date, they arranged with the present plaintiff that he should deposit the money when it fell due. There is not a word to be found to be on the record why the present plaintiff never deposited the sum of Rs. 325 on 19th September 1914.

No hard and fast rule can be laid down as to what condition entered in a mortgage-deed amounts to such a contract which requires a Court of equity to give relief when it finds that it had made the redemption of a mortgage difficult, or when it has made the calculation of the mortgage money uncertain. In this case there is no such allegation, we have stated, and merely because the mortgage-deed provides that in case of there being arrears a certain accounting had to be done the contention that the agreement regarding the extension of the mortgage for another 20 years was illegal or unenforcible cannot be accepted. It seems to us the case of *Rambaran Singh* v. *Ram Kher Singh* (1) is in point. As observed in the case of *Sarbdawan Singh* v. *Bijai Singh* (2) it is impossible to lay down a hard and fast rule as to what should and what should not be regarded as an improper restraint or fetter on the right of redemption. The decision in each case must depend upon its own circumstances. We are of opinion that in the present case the plaintiff as a subsequent mortgagee has not placed sufficient materials before us to come to the conclusion that the postponement of redemption for another 20 years must be regarded as an improper restraint or fetter on the right of redemption. We are therefore of opinion that unless materials are laid before the Court from which a Conrt can come to the conclusion that there was a design to make redemption very difficult if not impossible, the contract entered into by the parties cannot be ignored. The plaintiff's suit must therefore fail. We therefore allow the appeal and set aside the decree of the Court below and dismiss the plaintiff's suit with costs throughout.

S.N./R.K. *Decree set aside.*

(1) [1911] 10 I. C. 243.
(2) [1914] 36 All. 551=24 I. C. 705=12 A. L. J. 927.

A. I. R. 1929 Allahabad 389

BANERJI AND KING, JJ.

Jiwan Singh—Appellant.

v.

Dalip Singh and *others*—Respondents.

Second Appeal No. 662 of 1926, Decided on 20th February 1929, against decree of Addl. Sub-Judge, Bulandshahr, D/- 5th January 1926.

Evidence Act, S. 68—No attempt to prove attestation of mortgage-deed — Document cannot be used as evidence.

Where no attempt is made to prove a mortgage-deed either by calling in an attesting witness or even by putting any question to the scribe of the deed, who was examined as a witness, regarding the attesting witnesses or attestation, the document cannot be used as evidence. [P 390 C 1]

A. Sanyal—for Appellant.

Sailanath Mukerji—for Respondents.

Judgment.—This is a defendant's appeal. The suit out of which this appeal arises was filed by one Dalip Singh, a purchaser of a mortgage dated 6th January 1912, executed by the father of defendants 1 to 5, in favour of defendant 6.

Defendant 7 held a subsequent mortgage and put up the property for sale in execution of his mortgage. Defendant 8 bought the property at the sale at the instance of Niranjan Sarup, defendant 7.

Plaintiffs claimed a sum of Rs. 626 as due on the mortgage of 6th January 1912, the amount of the mortgage money being Rs. 65. Twelve years having elapsed since the date of the mortgage the plaintiffs claimed that a bond dated 27th March 1914 acknowledged the mortgage in suit and they therefore claim that the suit though filed on 6th March 1925, was not barred by limitation. The two lower

Courts have repelled the contention of defendant 8 that the claim was barred by limitation. Defendant 8 has come up in appeal before us and it is contended by the learned counsel for the appellant that the plaintiff's claim is barred by time as the document dated 27th March 1914, not having been proved according to law, was not admissible in evidence. It is not denied that the document of 27th March 1914 was a mortgage-deed and thus it was a document which for its validity had to be attested. The contention of Jivan Singh was repelled by the learned Subordinate Judge in appeal on the ground that

"Under the present prevailing practice and law the evidence of Ram Chandra to prove the execution of the deed by Zaharia was enough and sufficient to prove the deed."

The learned advocate for the respondents is unable to refer to what the learned Subordinate Judge calls the present prevailing practice, nor can he refer to any law which lays down that to prove a mortgage-deed you have only to call the scribe and the scribe has only to identify the signature of the executant. S. 68 Evidence Act, in our opinion, lays down that a document which is required by law to be attested cannot be used as evidence until one attesting witness has been called, or, if no attesting witness is alive, by other means set out in the following sections of the Evidence Act. In this case no attempt was made to prove the document by either calling in an attesting witness, or, even putting any question to Ram Chandra regarding the attesting witnesses or attestation. We are therefore, of opinion that the plaintiffs' suit is barred by limitation and that this appeal must succeed, We dismiss the plaintiffs' suit with costs throughout.

S.N./R.K. *Suit dismissed.*

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* A. I. R. 1929 Allahabad 390

SULAIMAN AND SEN, JJ.

G. Atherton & Co. — Decree-holder— Appellants.

v.

S. Habib Baksh — Judgment-debtor— Respondent.

Execution First Appeal No. 107 of 1928, Decided on 25th February 1929, against decree of Sub-Judge. Jhansi, D/- 9th January 1928.

*** (a) Civil P. C., O. 21, R. 50 (3) — Ex parte order granting leave to apply for execution does not have the force of decree— Civil P. C., S. 2 (2)—Civil P. C., S. 47.**

An ex parte order granting leave to apply for execution is not a decree nor has it the force of a decree because sub-Cl. (3) indicates that only such order, granting leave as is passed after dispute and after the question has been tried and determined as if it were an issue in a suit is to have the force of a decree. [P 391 2 ; P 392 C 1]

(b) Civil P. C., S. 39—Sending decree to another Court for execution is not itself execution of it—Lim. Act, Art. 182.

The sending of the decree for execution to another Court is not by itself an execution of the decree, though an application for such a transmission may amount to taking step-in-aid of such execution. [P 392 C 1]

N. C. Vaish—for Appellants.
Iqbal Ahmad—for Respondent.

Sulaiman, J.—This is an appeal by the decree-holder arising out of an execution proceeding. It appears that on 7th March 1922, the Bombay High Court on the original side passed a decree for a sum of money against S. Johnson and Co. That decree was transferred for execution to the Jhansi Court and an application for execution of that decree was filed by the decree-holder on 25th September 1922. The decree was sought to be executed against Habib Bakhsh, who was described as son and heir of Rahim Bakhsh, alleged to be a former partner of S. Johnson and Co. An objection was raised on behalf of Habib Bakhsh that the decree was a nullity inasmuch as the suit had been instituted at a time when the sole partner Rahim Bakhsh was dead. The execution Court at Jhansi on 13th December 1923, held that Rahim Bakhsh was the sole proprietor of the firm known as S. Johnson & Co., and that he was dead on the date of the institution of the suit at Bombay. The application for execution was accordingly dismissed and on appeal to this Court the order of the Subordinate Judge was confirmed on 25th March 1925 and the findings of fact namely that Rahim Bakhsh was the sole proprietor of S. Johnson & Co. and that he was dead on the date when the suit was filed in the Bombay High Court were affirmed. It was further held that Habib Bakhsh was not bound to apply to the Bombay High Court for having the decree against a dead man formally set aside and that consequently an infructuous application

made by him under O. 9, R. 13, Civil P. C., was no bar to his plea that the decree was a nullity. This order became final and the execution proceedings in the Court of the Subordinate Judge at Jhansi were accordingly dropped.

It appears now that on 1st September 1926 the decree-holder made a fresh application in the Bombay High Court accompanied by an affidavit. Neither the application nor the affidavit is before us, but a copy of the order passed by the Bombay High Court, dated 12th November 1926, is on the record. Under that order leave was granted to the decree-holder to execute the decree against Habib Bakhsh as a partner of the firm of S. Johnson & Co. Curiously enough that order does not even refer to the findings arrived at by this High Court in a judgment inter partes. Although the order does not specifically mention it, one may presume that it was passed under O. 21, R. 50, Civil P. C., and that leave was granted to the decree-holder under sub-Cl. (2) of that rule. This order was followed by the transmission of the decree to the Jhansi Court afresh. I may note that although notice had been issued to Habib Bakhsh by the Bombay High Court a second time, he for some reason or other did not choose to appear and the order dated 12th November 1926 was passed ex parte.

When the matter was taken up by the Jhansi Court in the execution department a fresh set of objections were filed by Habib Bakhsh reiterating the previous two pleas that Rahim Bakhsh was the sole proprietor of S. Johnson & Co., and that he was dead at the time when the original suit in the Bombay High Court was instituted. There was a further plea that the orders passed by the Subordinate Judge and affirmed on appeal by the High Court in 1923 and 1925 respectively were a bar to a fresh execution of the same decree which had been held to be a bullity. The learned Subordinate Judge has accepted the objections of Habib Bakhsh and has dismissed the application; hence this appeal.

The first question which has been strenuously pressed before us by the learned advocate for the appellant is that the order granting leave to execute the decree against Habib Bakhsh as a partner of S. Johnson & Co., is an order which, independently of O. 21, R. 50, Civil P. C., comes within the scope of S. 47, Civil P. C., and is operative as a decree and is therefore a bar to the present objection. It seems to me that this contention cannot be accepted. It is not every order which is passed by an execution Court that automatically comes under S. 47. Only such orders as decide a question between the parties to the suit or their representatives, relating to the execution, discharge or satisfaction of the decree, come under it. And reading S. 47 with S. 2, Civil P. C., it is also clear that such orders must amount to a formal expression of an adjudication which conclusively determines the right of the parties in regard to the matters in controversy. A grant of leave to apply for execution does not prima facie amount necessarily to a conclusive adjudication of the rights of the parties. It seems to me that by itself such an order would not be a decree by virtue of the provisions of Ss. 2 and 47, Civil P. C. This view is confirmed by the circumstances that the legislature has thought fit to confer expressly a right of appeal in a special case under O. 21, R. 50, sub-Cl. (3), presumably because such an order would not have necessarily come under S. 47, Civil P. C.

The substantial question before us is whether by virtue of the provisions in sub-Cl. (3), R. 50, in O. 21 an ex parte order granting leave amounts to a decree or has the force of a decree. Examining sub-Cl. (2) of that rule carefully one finds that it has to be split up into two parts. When the decree-holder claims to be entitled to a decree to be executed against a person whose name does not appear in the decree and who does not come under sub-Cl. (1) it is his duty to apply to the Court which passed the decree for leave to execute it. If "the liability is not disputed" the Court has discretion to grant such leave. If "such liability is disputed" the Court has to order that the liability of such person be tried and determined in the manner in which any issue in a suit may be tried or determined. Sub-Cl. (3) specifically provides that where the liability of any person has been tried and determined the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. The language of sub-Cl. (3) is narrow in its scope and cannot be extended so as to

B. N. Das
Advocate High Court

cover both classes of orders passed under sub-Cl. (2). It seems to me that the way in which sub-Cl. (3) is drafted indicates that only such order granting leave as is passed after dispute and after the question has been tried and determined as if it were an issue in a suit, is to have the force of a decree. But an ex parte order passed without the question having been specifically tried and determined has not the force of a decree. It follows therefore that the order of the Bombay High Court dated 12th November 1926, which was an ex parte order granting leave and under which the question of the liability of Habib Bakhsh was never tried and determined, has not the force of a decree.

The next contention of the appellant is that the order transmitting the decree for execution is itself an order in execution and is binding on the Jhansi Court which cannot go behind it. This contention cannot be accepted. Under S. 39 the Court which passed the decree may send the decree for execution to another Court. The sending of the decree for execution to another Court is not by itself an execution of the decree, though an application for such a transmission may amount to taking steps in aid of such execution. It is therefore impossible to hold that the order transmitting the decree is itself final and precludes Habib Bakhsh from raising the question either that the decree transmitted is a nullity or that the question of nullity has been previously decided by the High Court which is binding on the parties.

It therefore seems to me that subsequent order passed by the Bombay High Court cannot supersede the orders passed in execution by the Subordinate Judge in 1923 and the High Court in 1925, which being orders under S. 47 amounted to decrees and have force as such.

Of course if the recent order passed on 12th November 1926 had amounted to an order passed in execution under S. 47, it would have superseded the previous orders in execution even though it had been passed in the teeth of such orders. It is the last order which would have been operative so far as the question of res judicata is concerned. I would, therefore, dismiss this appeal.

Sen, J.—The facts of the case which have given rise to this appeal lie within a very small compass. The appellants obtained a decree from the original side of the Bombay High Court against S. Johnson & Co. on 7th March 1922. The decree was trasmitted for execution to the Court of the Subordinate Judge of Jhansi and an application was presented for attachment and sale of the property of Habib Bakhsh as son and heir of Rahim Bakhsh who was alleged to be the original proprietor of the defendant-firm. Habib Bakhsh opposed the application for execution on the ground that he was not a partner of the firm against which the decree was passed, that the firm was owned by single proprietor Rahim Bakhsh, that at the time of the passing of the decree Rahim Bakhsh was dead and that the decree obtained against the dead man was an absolute nullity and could not be executed against him. These contentions were upheld by the executing Court which dismissed the application for execution and the order was upheld in appeal by this Court on 25th March 1925.

On 1st September 1926, the decree-holders applied to the Bombay High Court for leave to execute the decree against Habib Bakhsh as a partner of the firm against which the decree was originally passed. This application was presumably made under O. 21, R. 50, Civil P. C. Notice was issued to Habib Bakhsh but he did not appear in the Bombay Court to contest the application and an order was passed granting leave to the plaintiff firm to execute the decree against Habib Bakhsh as partner. This order was made on 12th November 1926. Pursuant to this order the decree-holders applied for execution of the decree against Habib Bakhsh in the Court of the Subordinate Judge of Jhansi and were met by the plea that the application was in the teeth of the decision of the executing Court dated 13th December 1923 confirmed on appeal by the High Court on 25th March 1925. It was contended that the said decision operated as res judicata. This plea has found favour with the Court below and the application has been dismissed. The decree-holders come up to this Court in appeal. The sole question is as to whether the order dated 12th November 1926 which was passed by the Bombay Court has the force of a decree within the meaning of S. 47, Civil P. C. read with S. 2. of the said Code.

Order 21, R. 50, Civil P. C., could not be of any avail to the decree-holders inasmuch as an ex parte order granting leave to the decree-holders does not amount to a decree within the meaning of O. 21, R. 50, Civil P. C. There was no dispute as to the liability of the respondent before the Bombay Court; no order was made for the trial of an issue relating to this ; and the liability of the said person was not tried and determined. It was never in the contemplation of the legislature to invest an ex parte order of the description such as has been passed against the respondent with the force of a decree within the meaning of O. 21, R. 50 (3), Civil P. C. A distinction has been clearly drawn between an ex parte order granting leave where the matter is not disputed and an order granting leave after contest. It is the latter order which has been placed on the same footing as an order under S. 47, Civil P. C. on questions relating to execution, discharge or satisfaction of a decree.

It has been argued that the ex parte order is a decree within the meaning of S. 47 coupled with S. 2, Civil P. C. The answer to this contention is quite obvious. There was no question raised between the parties or their representatives relating to the execution, discharge or satisfaction of the decree. The order passed by the Bombay Court was an ex parte order, no order having been passed regarding the rights of the parties relating to the execution, discharge or satisfaction of the decree as the result of a contest upon an issue raised. An order merely granting leave to a party to execute the decree is not an order relating to the execution of the decree. There is no getting away from the fact that the order passed by the Subordinate Judge of Jhansi on 13th December 1923 was an order inter partes relating to the execution of the decree in which it was held that the decree obtained against S. Johnson & Co. was not against the firm but was a decree against Rahim Bakhsh personally and that the said decree was a nullity because it had been obtained against a dead person. The order in question was a decree within the meaning of S. 2, Civil P. C. and the parties are bound by it. The later order dated 12th November 1926 is not operative as a decree and it does not preclude the respondent from pleading the former decision as a bar to the present application under the rule of res judicata. The Court below has arrived at the correct conclusion. I have no hesitation in holding with my learned colleague that the appeal should be dismissed.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 393

ASHWORTH, J.

Parmeshri Kunwar and *others*—Defendants—Appellants.

v.

Dhuman Kunwar—Plaintiff—Respondent.

Second Appeal No. 34 of 1929, Decided on 18th February 1929, against decree of Addl. Sub-Judge, Gorakhpur, D/- 23rd August 1928.

(a) Civil P. C., O. 41, R. 4—Appellate Court can grant decree in favour of all plaintiffs on appeal by one of them.

The appellate Court is entitled to pass a decree in favour of all the plaintiffs on an appeal filed by only one plaintiff: *A. I. R.* 1923 *All.* 211, *not Foll.*; *A. I. R.* 1927 *All.* 311, *Ref.* [P 394 C 1]

(b) Cosharer—Building on common land—One cosharer alone can sue another for action prejudicial to his joint possession without proving special damage.

Any one cosharer without joining others, is entitled to complain of the action of another cosharer which is prejudicial to his joint enjoyment without proving special damage or inconvenience: (1900) *A. W. N.* 55, *Dist.* [P 394 C 1, 2]

Haribans Sahai—for Appellants.

Judgment.—This second appeal arises out of a suit brought by the respondent and other persons as plaintiffs for the demolition of certain constructions made by the defendants-appellants on a vacant space in the abadi. The defence was that these constructions were only on the old foundations of previous constructions which had been enjoyed by the defendants, so that the defendants' enjoyment of the land occupied by them was established and could not be interfered with. The trial Court also held that as the plaintiffs had not joined with themselves all the cosharers who might have complained of the constructions and as the plaintiffs had not shown that they particularly suffered by reason of the constructions they could not be given a decree. The lower appellate Court in appeal, by one

only of the plaintiffs, preferring the report of an amin to that of defendants' oral evidence, decided against the constructions being on the foundations of old constructions and against the defendants' contention that they had long been in possession of this land. It also held that there was no necessity for the plaintiffs to show special damage to themselves to justify their getting a decree for joint possession.

In this second appeal the first plea taken is that the lower appellate Court could not grant the appeal in favour of all the plaintiffs on an appeal filed by only one of the plaintiffs. Reliance is placed on a decision of a two Judge Bench of this Court *Ambika Prasad* v. *Jhinak Singh* (1). But as pointed out by a single Judge in a more recent decision (*Maha Mangal Rai* v. *Kishan Kandu*, *reported in A. I. R.* 1927, *All.* 311), that decision, although quoting with approval a Calcutta decision to the effect that a single plaintiff cannot proceed with an appeal without making other plaintiffs parties to the appeal, did not require this view of law for the particular case, which was decided on another ground. It seems to me impossible to support any such contention in the face of the clear language of O. 41, R. 4. I hold that the Court was entitled to pass a decree in favour of all the plaintiffs.

A second plea taken up is that the lower appellate Court was not justified in coming to a finding that the constructions were new merely on the ground that the amin could not find the old foundations. The finding as to the newness of the construction was a finding of fact and the report of the amin was relevant. Whether that report was sufficient reason for rejecting the plaintiffs' oral evidence or not is a matter that cannot be raised in second appeal.

A third plea taken is that when the action of any cosharer in appropriating his own property is impugned, the suit must be brought by all the other cosharers, or at any rate the plaintiffs could not bring the suit without evidence of special damage or inconvenience to themselves. For the former proposition I have been shown no authority. Any one cosharer is entitled to complain of the action of another cosharer which is prejudicial to his joint enjoyment. For the second proposition that he must in such a case show special damage I am referred to the decision of *Ganesh Singh* v *Kaushal Singh* (2). That decision is only authority for holding that a mandatory injunction being within the discretion of the Court, it will not ordinarily interfere to order the removal of a building which has been completed unless the plaintiff can show special damage. But this was a case where the buildings had been completed sometime before. In this case it has not been shown to me that the plaintiffs did not bring their suit within reasonable time of the constructions. These constructions are kachcha and the principle of the decision quoted can in no way apply to a kachcha building which can be raised in a few hours. There is no doctrine of special damage applicable to a cosharer complaining of an invasion of his rights. It is true that a Court has a discretion to refuse or order an injunction and may refuse to do so when it considers that the remedy of injunction is too severe to meet the necessities of the case and is unnecessary to afford adequate relief to the plaintiffs. But this is a very different thing from saying that a cosharer complaining of the action of another cosharer has to prove special damage. The action of a cosharer in such a case is based on common title and an invasion of his right of joint enjoyment. If a construction by one cosharer is of great benefit to that cosharer, and does not to any appreciable extent interfere with such joint enjoyment as the other cosharer would be likely to exercise, the Court may refuse an injunction, But where land is unoccupied, any one cosharer has a right to require that any occupation of it should either be joint or should be with his consent. For the above reasons, I dismiss this appeal.

S.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1923 All. 211=45 All. 286.

(2) [1900] A. W. N. 55.

* A. I. R. 1929 Allahabad 394

ASHWORTH, J.

Gauri Datt Pandey—Plaintiff—Appellant.

v.

Bandhu Pandey and *others*—Defendants—Respondents.

Second Appeal No. 1231 of 1927, Decided on 27th February 1929, against decree of Addl. Sub-Judge, Jaunpur, D/- 21st March 1927.

(a) Transfer of Property Act—Construction.

Transfer of Property Act is to be read in the light of the Contract Act. [P 395 C 2]

(b) Interpretation of Statutes—Unlawful.

It is seldom that an Act can be construed to declare something unlawful unless that Act provides a penalty for breach of the provision. [P 396 C 1]

*** (c) Agra Tenancy Act (1901), S. 20 (2)—Mortgage of occupancy holding not being unlawful but merely inoperative, mortgage of such holding along with other property is not wholly unlawful and other property will be liable for whole debt.**

The Tenancy Act of 1901 does not make the mortgage of an occupancy holding unlawful but merely inoperative, and so where an occupancy holding along with another property is mortgaged, the mortgage as a whole will not be unlawful but the other property, mortgaged along with the holding, becomes liable for the whole debt : 39 *All.* 539, *Rel. on.*; *A. I. R.* 1922 *All.* 134; 18 *All.* 121 and *A. I. R.* 1925 *All.* 543, *not Foll.* [P 395 C 2; P 396 C 1]

(d) Contract Act S. 23 — Void contract cannot be validated by parties acting on it.

A contract which is void because it is forbidden by law cannot become valid even if the parties act according to the contract : 39 *All.* 539, *not Foll.* [P 395 C 2]

B. Malik—for Appellant.

Mukhtar Ahmad—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-appellant against the defendant-respondent for damages. The plaintiff is mortgagee under a deed dated 8th March 1916 wherein the mortgagor purported to give with possession two properties, one an occupancy tenancy and the other a grove. He asked damages because his peaceful occupation of the grove has been interfered with by his mortgagor.

Both the lower Courts have dismissed the suit on the ground that it was unlawful for the mortgagor to agree to the mortgagee having possession of his occupancy holding as security for the land. It may be mentioned that the amount advanced was secured by the mortgage of both properties and was not divided so as to show what amount was secured by possession of one property and what by possession of the other property.

The correctness of the decision of the lower Courts has been contested in this appeal on various grounds. One ground is that the mortgage as a whole can only be deemed unlawful by invocation of Ss. 23 and 24, Contract Act, and that the Contract Act does not apply to transfers. It appears to me that it is too late in the day to take up the position that the principles of the Contract Act are not to be applied to transfers. The fact is that the Transfer of Property Act does not deal with such matters as good consideration, fraud, misrepresentation and it seems to show that the Act assumed the principles of the Contract Act, being applicable. Indeed S. 4, T. P. Act, provides that the chapters and sections of the Transfer of Property Act which relate to contracts shall be taken as part of the Contract Act of 1872, a provision which suggests that the Transfer of Property Act was to be read in the light of the Contract Act. The appellant's counsel has endeavoured to draw a distinction between a contract, which has still to be executed, and a transfer which has taken full effect. Some such distinction was drawn by Richards, C. J., in the case of *Rajendra Prasad* v. *Ram Jatan Rai* (1), but this is in effect to hold that a contract, which is void because it is forbidden by law, bacomes valid if you act according to the contract. Such a position appears to me indefensible. Lastly the appellant's counsel contests the position that the mortgage of an occupancy holding can be regarded as unlawful or forbidden by law. He admits that there have been certain decisions which suggest this, but he would distinguish them on one or other grounds. I do not consider that they can be distinguished. They are undoubtedly decisions that such a mortgage is unlawful and forbidden by law. The question is whether I am bound to follow them. I can find no decision of a Full Bench to this effect. There is the case of *Har Prasad Tewari* v. *Sheogobind Tewari* (2), which held that the entire contract of mortgage was void where an occupancy holding was mortgaged. It purported to follow the case of *Bhawani Prasad* v. *Ghulam Muhammad* (3). Again there is the later decision of *Sital Rai* v. *Ram Khelawan Pandey* (4). On the other hand, there is a decision already referred to *Rajendra Prasad* v. *Ram Jatan Rai* (1), which in effect decided that a transfer of an occupancy holding by a mortgage was not unlawful but merely inoperative so far as it disposed of the holding.

There, thus being divergence in the decisions of this Court I feel at liberty to

(1) [1917] 39 All. 539=39 I. C. 785=15 A. L. J. 544.
(2) A. I. R. 1922 All. 134=44 All. 486.
(3) [1896] 18 All. 121=(1896) A.W.N. 12.
(4) A. I. R. 1925 All. 543=47 All. 780.

allow my own view in the matter. I have never been able to understand on what ground it could be maintained that the Tenancy Act of 1901 could be construed to forbid a mortgage of an occupancy holding. The Act merely states that such a tenant shall not be competent to transfer his holding : see S. 21. Now a minor is not competent to make a valid transfer and yet no one could say that it was unlawful for him to attempt to do so. Indeed where the Act makes the doing of a thing impossible it does not appear that there is any room for a declaration that the doing of it is unlawful. A person cannot do what is impossible. The object of the Tenancy Act was to render innocuous such transfers. Reference is made to such a transfer in S. 6 (1), T. P. Act, which provides that nothing in that section shall be deemed to authorise a tenant having an untransferable right of occupancy to assign his interest as such. S. 24, Contract Act, refers to agreements to do something which the law has forbidden to be done. This is a very different thing from an attempt to do a thing which the law merely declares to be inoperative. It is quite conceivable that at a future date the legislature finding that much trouble and litigation is caused by attempts to mortgage occupancy holdings might declare the attempt to do so to be unlawful. In such a case it would have to provide a penalty. It is seldom that an Act can be construed to declare something unlawful unless that Act provides a penalty for breach of the provision.

Taking this view of the matter I hold that in the case of the present mortgage the parties with their eyes open (for ingorance of the law excuses no one) agreed to two properties being transferred by the one to the other as security for a debt. As they knew that the transfer of the holding would be inoperative, they must have intended in the eyes of the law the whole debt to be secured by the transfer of the other property, i. e., the grove. The consequence is that this appeal must succeed. The case having been decided on a preliminary point is remanded to the trial Court for re-admission and decision on the merits. Costs will abide the result. Leave to appeal is given in this case.

S.N./R.K. *Case remanded.*

A. I. R 1929 Allahabad 396

DALAL, J.

Ram Ghulam Singh—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1065 of 1928, Decided on 20th February 1929, against order of Addl. Sess. Judge, Cawnpore, D/- 11th December 1928.

(a) Penal Code, Ss. 463 and 464—False certificate is not forgery.

A false certificate of not very great importance is not a forgery as it is not made on affidavit. [P 397 C 1]

(b) Penal Code, Ss. 463 and 464—Entry of excess payment in muster-roll.

An entry of excess payment in a muster-roll would not make the muster-roll a forged document. [P 398 C 1]

(c) Penal Code, Ss. 463 and 464 — Scope.

The "making of a part of a document" must be the making of a part of a false document and in the making of a part of a document not only the intention or purpose must be proved but the fact that the document was false must also be proved. [P 397 C 2]

C. Ross Alston and *Kumuda Prasad*—for Appellant.

Sankar Saran—for the Crown.

Judgment.—Young Sessions Judges get so excited at the evidence of roguery that they miss the main consideration in Sessions trial which is to prove the specific charge against an accused person. Possibly when the learned Judge reaches my age he would be more tolerant.

The appellant Ram Ghulam Singh a zamindar has been convicted of an offence under S. 468 I. P. C. The long and very able judgment gives information about everything except the charge against Ram Ghulam Singh. After reading the judgment no doubt can remain in any one's mind as to the corruption prevailing in the District Board of Hamirpur, and the corrupt practies of every official connected with that unfortunate body. The reader, however, will be bewildered at these extraneous matters and will fail to discover how the charge of forgery is brought home to the appellant. It, therefore, became the duty of this Court to investigate this matter without the help to which it is entitled of the opinion and relevant observations of the learned Judge. The provisions of S. 468 are :

"Every person who commits forgery, intending that the documents forged shall be used for the purpose of cheating shall be punished."

The first consideration, therefore, must be whether the prosecution has succeeded in proving that the documents produced in Court are forgeries. The documents are seven in number and written on printed forms of "muster-rolls of labourers employed on for the period" and have all the columns filled up. Every form is signed at the bottom by the appellant, who is described in print as the officer in charge of the work. He was selected by the District Board to supervise the work of labourers who were repairing a public road and his duty was to make payment to the labourers and to recover the money from the District Board. It is not apparent for what emoluments or honour he was undertaking this task. He had to prepare these rolls to show which workmen worked on what dates and what payments were made to them. It appears that the labourers worked from 1st to 16th December. The rolls are made up in two parts. One part dealt with labourers from 1st to 7th and the second part with labourers from 8th to 16th. They purport to have been paid according to their presence at rates 0-8-0 or 0-4-0 per day on 7th and on 16th. Rolls have heen signed as if signed according to the date on the rolls on 7th and on 16th. As information was not available in the judgment of the learned Judge, I enquired of the learned Government Pleader in what respect the documents were forged. His opinion was that the date was different from the date on which they were prepared. That may be so, because it is said by the accused that they are copies from the original. It is, however, not proved that the amount which is represented to have been paid on 7th was paid on some other date.

The next point put forward by him was that Ram Ghulam Singh signed under the printed certificate :

"certified that all the labourers shown in the above statement were actually employed on the work of the Board and that their wages entered in his muster rolls were paid in his presence."

Ram Ghulam Singh himself admits that the labourers were not paid in his presence, but in the presence of his nephew, so it is argued that the document is a forgery. A false certificate is nowhere defined as a forgery. The certificate is not made on affidavit and no man in charge of work would attach any importance thereto when he considers that a reliable person has made payment. So far as I can make out the charge is limited to this ; certain persons who are alleged to have been paid 0-8-0 and 0-4-0 were really paid at the rate of 0-5-0 and 0-3-0. Certain labourers were examined on behalf of the prosecution to depose that they were not paid at the rates entered against their names in the rolls. It is not suggested that they did not work at all and the entry of payment is entirely fictitious. The question, therefore, is reduced to an enquiry whether an entry of excess payment in a muster roll would make the muster roll a forged document. As laid down in S. 463, I. P. C. :

"Whoever makes any false document or part of a document with a certain intention and for other purposes commits forgery."

This is not a complete definition but it is carried forward in the next S. 464 where the short statement of S. 463, the making of any false document or part of a document is defined. I do not accept the arguments of the learned Government Pleader that the making of a part of a document need not necessarily be making of a part of a false document and that in the making of a part of document only the intention or purpose need be proved and not that the document was false. The third definition of the false document may be disregarded for the purpose of this case. The first two clauses are :

"A person is said to make a false document : First. Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed ; or Secondly : Who without lawful authority, dishonestly or fraudulently, by cancellation or otherwise alters a document in any material part thereof, after it has been made or executed either by himself or by any other person".

There is no cancellation and there is is no allegation of cancellation here, so the second part of the definition may also be disregarded. Examining the 1st part the matter to be proved in the main is either that the authority was wanting or that the date was purposely fictitious. I have already commented on the date. No question of authority here arises because it is admitted that the appellant

had authority to prepare this document. In cases under the Indian Penal Code where definitions are somewhat difficult of comprehension, illustrations are added for elucidation of such definitions. I have gone through every illustration given in S. 464 both under the main definition and under the explanations, but have failed to discover any case where a document would become a forged document if a wrong entry of payment happens to be made therein. The learned Judge has taken great pains to prove that the appellant embezzled the money of the District Board. That, however, is not a matter which can be made the subject of enquiry in this prosecution. Possibly the officials of the District Board selected Ram Ghulam Singh for the work in order to make money through him. Cheating and embezzlement, however, are distinct offences from those of forgery. No charge of forgery is made out and so the appellant will be acquitted. I set aside the conviction and sentence and order that the appellant be released. If he is on bail, the bail bond shall be cancelled.

S.N./R.K. *Conviction set aside.*

* A. I. R. 1929 Allahabad 398

SULAIMAN AND MUKERJI, JJ.

Afzal Husain—Plaintiff—Appellant.

v.

Huran Bibi and *others*—Defendants—Respondents.

Second Appeal No. 1492 of 1926, Decided on 22nd February 1929, against decree of Dist. Judge, Allahabad, D/- 6th July 1926.

*** (a) Civil P. C., O. 41, R. 33—Pre-emption suit alleging vendor's want of title to part of property sold but offering to pre-empt even whole property—Trial Court decreeing pre-emption only as regards part of property—Pre-emptor submitting to decree but vendee in appeal urging that whole suit was bad for partial pre-emption—Although pre-emptor did not appeal appellate Court can consider claim to pre-empt whole property and can decree suit.**

A pre-emption suit alleged in the first place that the sale of a portion of the property sold was invalid and in the second place claimed possession by pre-emption of the whole property or any part thereof as the Court may think proper. The trial Court decreed the claim for pre-emption in respect of only a part of the property, holding that as regards the rest the vendor had no title. The pre-emptor submitted to the decree but the vendee appealed and urged that the whole suit should be dismissed for defect of partial pre-emption.

Held further : that although the pre-emptor-plaintiff did not appeal from the lower Court's decree, still the appellate Court had power to consider the alternative case to pre-empt the whole property and to decree the whole suit. [P 399 C 1]

(b) Pre-emption—Pre-emptor alleging vendor's want of title to part and alternatively offering to pre-empt whole—Such alternative prayer is not fatal—Pleadings.

Where pre-emptor claims partial pre-emption alleging vendor's want of title to the rest, and in the alternative offers to pre-empt the whole property if Court holds that the vendor had title to the whole, his putting forth such alternative cases is not fatal. [P 399 C 1]

(c) Pre-emption—Court cannot inquire vendor's title.

In a pre-emption suit the Court cannot inquire into the title of the vendor for the pre-emptor must take the same risk as the vendee did and must pay the same price. [P 399 C 1]

S. C. Goyel—for Appellant.

Krishna Bahadur for *S. Majid Ali*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for pre-emption. The widow of Abdul Karim acting for herself and as guardian of her minor daughter sold a half-share in 10 bighas 19 biswas zamindari property belonging to her deceased husband ostensibly for a sum of Rs. 1,250. It appears that previously the widow had applied to the District Judge for permission to sell the share of her minor daughter and that permission was refused. The present plaintiff filed this suit for pre-emption and alleged that the widow had no power to sell more than one-eighth share which the plaintiff stated was owned by her. In para. 11 of the plaint it was specifically mentioned that the sale in respect of more than one-eighth share was unlawful. Then in para. 13, the plaintiff offered to pre-empt that portion of the property sold which the Court held was valid according to law and added that if the sale of the whole half-share was found to be valid he was prepared to pre-empt the whole. In para. 16 he offered to pay any price which the Court may determine. The relief claimed was for possession by pre-emption of the property detailed or any portion thereof as the Court may think proper. On a perusal of the plaint we are of opinion that the learned District Judge is quite right in holding that the plaintiff had put forward two alter-

native cases. In the trial Court he alleged that the sale of any share in excess of one-eighth was invalid and offered to pre-empt the whole only if the Court found that the sale of the whole property was valid. We further agree with the learned District Judge that this way of putting the case in the alternative was not fatal to the plaintiff's suit for pre-emption because he had also expressed his readiness to pay the whole price and to pre-empt the whole property.

It would not be proper to decide in this case the exact extent of the share owned by the widow or her right to transfer the property. In the absence of any specific allegation of fraud the plaintiff is not entitled to put the widow to the proof of her title. He should step into the shoes of the vendee and must take the same risk as the latter has taken, and pay the same price.

The Court of first instance, however, decreed the claim for pre-emption of one-fourth of the half-share of the property sold on payment of the proportionate amount of Rs. 292-8-0, having found that the consideration was really Rs. 1,170 and not Rs. 1,250.

The plaintiff submitted to the decree, but the defendant appealed. On behalf of the defendant an objection was taken that inasmuch as the plaintiff had not appealed from the decree dismissing the rest of his claim the whole suit ought to be dismissed on account of the defect of partial pre-emption. It is this plea which found favour with the learned Judge. The learned Judge has thought that in the circumstances he was limited to only one course namely to decree the appeal and dismiss the whole suit. He thought that he could no longer take into consideration the plaintiff's alternative case to pre-empt the whole property and that inasmuch as there was no appeal on behalf of the plaintiff the learned Judge could not help him.

We are of opinion that the view taken by the learned District Judge was not correct. He had ample power to decree the whole claim under O. 41, R. 33, Civil P. C. The plaintiff had offered to pre-empt the whole property. It was the Court which declined to give him possession over more than one-fourth of one-half. That being so his suit should not have been dismissed on appeal on the mere ground of partial pre-emption.

We think that before the appellate Court either the defendant should have waived her objection to partial pre-emption or should have insisted on the plaintiff agreeing to pre-empt the whole property. Mr. Krishna Bahadur who holds the brief of Mr. Majid Ali states before us that his client would prefer to submit to the pre-emption of the whole property by the plaintiff than to his pre-empting a part only.

The defendant in her appeal before the District Judge had challenged the finding of the Court of first instance that the real consideration was Rs. 1,170 only. The balance of Rs. 80 was said to have been paid to one Imtiaz whose receipt was filed by the defendant and who was examined as her witness. The Court of first instance felt doubtful as to the truth of this witness's statement. Having examined the evidence we are of opinion that there was no good ground for disbelieving him. We therefore think that Rs. 1,250 should be taken to be the true consideration.

In these circumstances we allow the appeal and set aside the decrees of both the Courts below and decree the plaintiff's suit for pre-emption of the whole property sold on payment of the whole amount of Rs. 1,250. In the special circumstances of the case we direct that the parties should bear their own costs throughout. We fix the period of 60 days from this date for payment. If the amount is not paid within the time allowed the suit will stand dismissed with costs in all Courts.

S.N./R.K. *Suit decreed.*

A. I. R. 1929 Allahabad 399

MEARS, C. J., AND YOUNG, J.

Natho and *another*—Applicants.

v.

Babu Ram—Opposite Party.

First Appeal No. 204 of 1927, Decided on 19th February 1929, against the order of Sub-Judge, Muzaffarnagar, D/- 27th August 1927.

Practice—Appeal called on — Appellant going to call his pleader who was arguing case in another Court—Case should be stood over for a few minutes in order that parties may have their case decided on merits.

Whilst Courts of law have a right to insist that parties and their pleaders shall be ready when the case is called on, allowance must

at times be made for an inevitable happening and some indulgence shown in order that the parties may have their cases decided on the merits. Accordingly if, when an appeal is called on, the appellant goes to call his pleader who happens at that time to be arguing his case in another Court, it would be proper to have stood over the case for a few minutes : 24 *I. C.* 826, *Ref.*

Hyder Mehdi and *Zafar Mehdi*—for Appellants.

K. C. Mital—for Respondent.

Judgment. — On 22nd July 1927, Nathu and Sarju were appellants in a case fixed to come on before the Subordinate Judge, Muzaffarnagar. Nathu and Sarju were both present and they had engaged a pleader, B. Mulchand. At the moment when the case was called on, B. Mulchand, in the ordinary course of his profession, was then arguing a case in the Munsif's Court near by. According to the affidavit of the appellants, Sarju went across to the Munsif's Court to call his pleader, and when the pleader returned after some 10 or 12 minutes the appeal had been struck off. An application to restore it was heard and disposed of adversely to Nathu and Sarju on 27th August 1927, and the Judge's order is as follows:

"The appellants had gone to call their pleader when the appeal was called on for hearing on 22nd July 1927. It was their duty to attend in time or to engage a pleader who could attend in time. This view is supported by *Majid-un-nissa Bibi* v. *Ammessa* (1).

We think the Judge has taken much too narrow a view of this matter. The Judge must have been satisfied that Nathu and Sarju were in fact in Court on the 22nd July. He must also have been satisfied that they had duly engaged a pleader. He must have been aware that it is the practice of pleaders to earn their livings in other Courts than his and that B. Mulchand was legitimately at the moment carrying on his profession in the adjacent Court of the Munsif. When the case was called on the Judge should have asked whether Nathu and Sarju were present and if they were, whether they had engaged counsel. Had he done this, we have no doubt that he would have learnt that B. Mulchand was their counsel but was at that moment engaged before the Munsif. Under these conditions it would have been the proper course to have stood the case over for a few minutes to enable B. Mulchand to attend. An application for restoration was in fact drafted on the afternoon of the very day, the 22nd July, but there is nothing on the documents before us which indicate whether B. Mulchand made any oral application to the Judge. We are of opinion that he should have done so, and that immediately on returning from the Munsif's Court he should have told the Judge what had happened and asked the Judge to restore the case to his list and proceed with it. Had that application been made we conceive that it would have been the duty of the Judge to have at once restored the case to the list and heard it on that day, if possible. Whilst Courts of law have a right to insist that parties and their pleaders shall be ready when the case is called on, allowance must at times be made for an inevitable happening such as this and some indulgence shown in order that the parties may have their cases decided on the merits. We therefore set aside the order of Pandit Raj Rajeshwari Sahai and order that the appeal be restored to the Court of the Subordinate Judge of Muzaffarnagar and be heard and disposed of according to law.

S.N./R.K. *Case remanded.*

(1) [1914] 24 I. C. 826.

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* A. I. R. 1929 Allahabad 400

ASHWORTH, J.

Rafiq-un-nissa Bibi—Appellant.

v.

Abdul Shakur Khan and *others*—Respondents.

Second Appeal No. 2149 of 1927, Decided on 20th February 1929, against decree of 2nd Addl. Sub-Judge, Gorakhpur, D/- 12th September 1927.

(a) Civil P. C., S. 11—Title –Meaning of—Word "Title" has nothing to do with the particular cause of action on which party sues or is sued—It refers to capacity or interest of party—Words.

The term "title" refers to the capacity or interest of a party, that is to say whether he sues or is sued for himself, in his own interest or for himself as respresenting the interest of another or as representing the interest of others along with himself. It has nothing to do with the particular cause of action on which he sues or is sued. [P 401 C 2]

*** (b) Civil P. C., S. 11, Expl. 4—When failure to plead specific cause of action is due to wrong view of law Expl. 4 will apply though it can seldom apply where such**

failure is due to plaintiff's honest belief as to fact or series of facts—Sub-mortgagee, wrongly suing a assignee of mortgagee — His subsequent suit as sub mortgagee will be barred by Expln. 4.

Where failure to plead a specific cause of action, either as the sole course or as an alternative course, is due to a wrong view of the law, Expln. 4 will certainly apply. Where such failure, however, is due to the plaintiff having an honest belief as to a fact or series of facts, being sufficient to entitle him to the relief claimed, it will seldom be held that he was bound to raise a different cause of action or an alternative cause of action. Each case must be decided on its merits.

Where a person, who was a sub-mortgagee, at first wrongly sued as an assignee of the mortgagee and his suit was dismissed, another suit by him on the basis that he was a sub-mortgagee will be barred by Expln. 4.

[P 402 C 2, P 403 C 1]

K. N. Katju and *Haribans Sahai*—for Appellant.

A. P. Pande—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-respondent for recovery of a sum of Rs. 359, principal and interest on foot of a mortgage-deed, dated 20th June 1922. This mortgage-deed was a deed by which Mt. Rafiq-un-nissa, defendant 1 had mortgaged her mortgagee rights. The plaintiff, therefore, sues on what is known as a sub-mortgage. Mt. Rafiq-un-nissa had become mortgagee under a mortgage executed on 4th April 1915 by one Abdul Razzaq. The plaintiff asks to recover his money by sale, if necessary, of the actual property and not merely by sale of the mortgagee rights. In his plaint he has indicated that he desires a decree in form No. 9, appendix (d), Sch. 1, Civil P. C. that form being made a statutory form imposed by O. 48, R. 3, which provides that the forms given in the appendices shall be used for the purposes therein mentioned. Both the lower Courts have decreed the suit. The objection was taken in those Courts that this suit was barred under the rule of res judicata by a previous suit. It appears that in a former suit the plaintiff sued for recovery of the money under his mortgage deed by sale of the mortgaged property, and set up then that the mortgagee rights had been actually assigned to him under the deed of 20th June 1922. Of course if he was assignee of the mortgagee rights, he was exactly in the same position as if he was mortgagee and could do so. That suit was dismissed on a finding that the plaintiff was not an assignee of the mortgage rights but only a sub-mortgagee. In the judgment of the Subordinate Judge in the previous suit dated 20th October 1926 the Subordinate Judge went on to consider whether the plaintiff could have got the relief he claimed by suing as a sub-mortgagee and not as an assignee of the mortgagee rights, and held that he could, if his suit had been so framed and if the proper Court-fee had been paid.

Now the lower appellate Court carefully considered whether S. 11, Civil P. C. did bar the present suit. It held that it did not for two reasons. One reason was that the causes of action of the two suits were different. This reason appears to me to have no force. Nowhere in S. 11 is the term "cause of action" used. The other reason given is that the plaintiff was not suing under the same title in each suit. It is clear from the judgment that the Subordinate Judge considered that a person suing as an assignee of a mortgagee right was a person litigating under a different title from a person suing as a sub-mortgagee. If he was right, then there was no bar.

The expression "title" has been constantly misinterpreted. That term, as used in S. 11, Civil P. C.. refers to the capacity or interest of a party, that is to say whether he sues or is sued for himself, in his own interest, or for himself as representing the interest of another or as representing the interest of others along with himself. It has nothing to do with the particular cause of action on which he sues or is sued. The instance given in the well-known authority on Res Judicata by Bower, 128 of the 1924 edition, is that of a man suing on one occasion as an individual, in his personal interest, and on another occasion suing in a representative character where his interest is shared with that of other persons. It appears to me desirable to quote the whole passage :

"A party who, though identical in name, litigates in different characters in the two proceedings, is, in contemplation of law, and in the correct sense of the civilians, two separate and distinct persons, so that a decision for, or against a man who appears in a representative character, is not conclusive in favour of, or (as the case may be) against the same man appearing in subsequent proceedings as an individual, or in a different representative character. Conversely, two persons distinct in name, but substantially identical

in title and interest, constitute in law one and the same party for the purposes of estoppel by res judicata, as for all others."

That the legislature attached the same meaning to the word "title" in S. 11 appears to me to be perfectly clear from Expln 4. This Explanation enacts that where a representative sues, the person that he represents shall be bound by a decision against the representative. This Explanation thus uses as an instance of "title" the same instance as is used by Bower.

The question of the cause of action is immaterial to a question of title, though it has constantly been confused with it in text books in this country. One instance is to be found in Agarwala's Indian Practice 1926, p. 90. There a case is discussed where on the death of *K*. *A*. claimed land as its real owner on the allegation that *K* was a mere benamidar for him, and the suit was dismissed. *A* then sued to recover the same land as the heir of *K*. The suit was held not to be barred in a single Judge's decision of the Punjab High Court on the ground that the two titles were inconsistent. The commentator disagreed with this decision but not on the ground that "a cause of action" was a different thing to "title." He invoked Expln. 4, S. 11 as an explanation which qualified the meaning of title. Expln. 4 runs,

"Any matter, which might and ought to have been made ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit."

But it is clear that Expln. 4 is an explanation attaching to the word "matter" used in the inducement to the section and is not an explanation that can affect the word "title" The correct ground for dissenting from the Punjab decision should have been that whether a man is suing on the basis of a transaction, where the purchaser was acting for him, or whether he is suing as an heir of *K*, in each case he is suing as an individual, and therefore his title is the same. It would of course be different if he had brought the second suit as representing all the heirs.

Counsel for the respondent maintained that in the former suit the plaintiff sued as mortgagee and in the latter suit as sub-mortgagee. He therefore, urged that the decision of the first suit that the plaintiff had no right as mortgagee was a decision on a different matter to that involved in the present suit, the present suit being concerned with the question whether the plaintiff had any rights as sub-mortgagee. He appears to me to be correct in this contention ; but his contention ignores Expln. 4 of the section. The question is whether the plaintiff should in the former suit have raised the contention that he had a right to sell the property as sub-mortgagee and not as mortgagee. His failure to claim as sub-mortgagee rather than as mortgagee in the former suit can only be ascribed to want of proper legal advice. His mortgage-deed of 20th June 1922, clearly was a sub-mortgage and not an assignment of the mortgagee's interest. Now it seems to me impossible to hold that a person, who, if he had received proper legal advice, would have brought a suit on one cause of action, but has brought it on a wrong cause of action, that such person ought not to have sued in the proper way. Expln. 4 will, therefore, apply and render his second suit barred.

The counsel has put before me certain decisions as favouring his contention that this suit was not barred by S. 11. One of these was a case where an owner had sued a person for possession of a property on the ground that the lease had determined. The suit was dismissed on the ground that there was no lease proved. It was held that he was not barred from bringing another suit as owner against the same defendant as trespasser. It may well have been in this case that there was no duty on the part of the plaintiff in the suit based on the lease to raise an alternative plea for possession as owner against a trespasser. To have done so might have weakened his case based on the lease. It might have involved a large amount of extra evidence. The suit on the lease was of a simpler character than one which would raise the question of the plaintiff's title. There was nothing, therefore, in Expln. 4 which would apply.

Generally speaking where failure to plead a specific cause of action, either as the sole course or as an alternative course, is due to a wrong view of the law, Expln. 4 will certainly apply. Where such failure, however, is due to the plaintiff having an honest belief as to a fact or series of facts being sufficient to entitle him to the relief claimed, it will seldom be held that he was bound to raise a different cause of

action or an alternative cause of action. Each case must be decided on its merits. [illegible] above reasons, I hold that the For the[illegible] this suit was barred, and I bringing of [illegible] with costs throughout. allow this appeal[illegible] counsel has asked for The respondent's cou[illegible] he should be leave to appeal. I think [illegible] after [illegible] death given leave. [illegible] property and

S.N./R.K. *Appeal allowed.*

A. I. R 1929 Allahabad 403

BANERJI AND KENDALL, JJ.

Banarsi Das and *others*—Applicants.

v.

Sagar Mal—Opposite Party.

Misc. Case No. 1128 of 1928, Decided on 22nd February 1929.

(a) Civil P. C., O. 49, R. 2—Scope.

Order 41, R. 31 and O. 20 and the rules thereunder do not apply to the Chartered High Courts as the rules relating to judgments were in force when the Civil Procedure Code was enacted. [P 403 C 2]

(b) Allahabad High Court Rules, Ch. 7, R. 3—Non-compliance with R. 3 is only irregularity merely on account of which re-hearing of case cannot be asked for under Civil P. C., S. 151.

Non-compliance with R. 3, Ch. 7 of the Rules, which requires that, when a written judgment is pronounced by one of the Judges it has to be signed by both Judges, is merely an irregularity which does not affect the merits and S. 151, Civil P. C., cannot be invoked to ask to re-hear the case merely on account of such technical irregularity. [P 404 C 2]

S. M. Husain and *K. D. Malaviya*—for Applicant.

Tej Bahadur Sapru and *M. N. Raina*—for Opposite Party.

Judgment.—This is an application purporting to be under S. 151, Civil P.C. in First Appeal No. 358 of 1925. The prayer in this application is to be found in para. 8 which runs as follows:

"That considering that the judgment was not delivered for a considerably long time after the hearing of the argument and that it was possible to miss important points advanced in argument and considering the technical defect in delivery of judgment which makes it a nullity, it is prayed that the case may be treated as undecided and may be re-heard or in the alternative if the judgment may be considered to be a legal judgment it may be revised."

This application is signed by a counsel who did not appear in the case, and Mr. K. D. Malaviya on behalf of Mr. Muhammad Husain asked us to postpone the hearing as Mr. Muhammad Husain was not in Court. We did not consider that a sufficient reason for postponing the hearing when the counsel must have known that this Bench was constituted specially to hear the application today.

The points urged by Mr. Malaviya are that the judgment of this Court was not [illegible]ly signed and delivered. because to succeed to [illegible] on 8th August 1928, the property [illegible]ted that the adoption[illegible]ead out in according to him[illegible] and legal. It was decomplete judgment was not [illegible] that the Court and was not signed by either of us on that date, that under O. 41, R. 31, Civil P. C., every judgment of this Court in appeal had to be in writing, and had to be signed when it was pronounced and the Judges had to date it. He further submits that under Ch. 7, R. 3 of the Rules of the High Court when a written judgment is delivered in an appeal it had first to be signed by the Judges who heard the case and only then could be pronounced by one of such Judges. It is urged by Mr. Malaviya that the non-compliance of the rules in view of the affidavit filed by his client makes the judgment a nullity, and therefore the case must be treated as not disposed of and an undecided case, and therefore he prays that his client should be given an opportunity of re-arguing the case before this Bench.

An application was presented to Dalal, J., who was the vacation Judge on 14th August 1928 supported by an affidavit that the judgment had not been signed by us and that there was no judgment in the office of the High Court. Dalal, J., directed this application to be laid before one of us with an office report on the points raised in the application. The office has submitted a report which is dated 14th December 1928.

Sir Tej Bahadur Sapru who appears on behalf of the opposite party, viz, the appellant in the case, submits that O. 41, R. 31 and O. 20 and the rules thereunder do not apply to the Chartered High Courts when the rules relating to judgments were in force when the Civil Procedure Code was enacted. He has referred to O. 49, R. 2, and we accept his contention that in view of the fact that before the present Code was enacted the rules were in force, viz., the rules of Court of 18th January 1898, the provisions of O. 20 and that of O. 41, R. 31 do not apply to the High Court. He has further submitted that if the Judges had

agreed to a judgment under the rules of the Court it was not necessary that the judgment should be signed by both the Judges before pronouncing the judgment. It is necessary to state exactly what happened in the case. The appeal was argued by Sir Tej Bahadur Sapru on behalf of the appellant and by Mr. O'Conor and Dr. Katju on behalf of the respondent. This hearing lasted several days as an instance. The conclusion [illegible] the same instance days and at the Bower. [illegible]ion of the hearing we reserved our judgment. Thereafter we met in chambers several times, discussed the points that had to be decided, discussed the value to be attached to the evidence called, both oral and documentary. and we agreed to what the decision on such point raised in the case was to be. There were really three points in the case. The first question was as to whether the plaintiff had proved the pedigree he had set forward, the second was whether the defendant had proved his adoption, and the third point was whether Bhagwan Das and Hira Lal were members of a joint Hindu family. As one of us proceeded on casual leave there was delay in writing out the judgment and on the 8th August the Court sat for the last time before the long vacation. By a mistake of the office the case was listed in Court No. 5 and was by an order transferred to Court No. 1. The judgment on the first question had been typed out and contained the result of the joint consultation between us. On the 8th August, the note made by the officer of the Court whose duty is to record proceedings was as follows:

"Judgment delivered today: parties present: appeal allowed: judgment with Hon'ble Banerji."

Orally it was stated in open Court, what was our finding on the two other points that we had to decide, but the reasons for the decision of the second and third point had not been recorded. The complete judgment was signed by one of us and then sent to the other for signature, but on account of his absence from the station on duty the judgment was not sent into the office until 22nd August 1928 duly signed by both of us.

It thus appears that although one of us had pronounced in open Court the joint findings arrived at by us, the record of our reasons was not in Court on 8th August 1928, and the judgment had not been duly signed by both of us on that date.

Rule 3, Ch. 7, of rules of the Cour[illegible] as our opinion, requires that when [illegible]urt, in judgment is pronounced [illegible] a written Judges it has to be [illegible] by one of the Judges but this [illegible] signed by both the irregularity [illegible]s, in our opinion, is a mere contention th[illegible] and does not in any way affect the merits and in our opinion S. 151, Civil P. C., cannot be invoked to ask us to re-hear the case merely on account of a technical irregularity.

The 8th August 1928, being the last date of sittings the office could not arrange that both of us should be sitting together to deliver the judgment orally. It was for the convenience of counsel that in case the parties wanted to appeal to His Majesty in Council that we pronounced our judgment on the 8th to enable counsel to prepare the application for leave to appeal at leisure. Although Mr. Malaviya suggests that the judgment would not be illegal if we had the last page copied out and we signed the last page and then pronounced the judgment, it appears to us that no useful purpose would be served by adopting that course. There is no force in this application, and we dismiss it with costs. We assess counsel's fees for today's hearing at Rs. 200.

S.N./R.K. *Application dismissed.*

A. I. R. 1929 Allahabad 404

SULAIMAN AND KENDALL, JJ.

(*Sah*) *Dharam Narain* and *another*—Plaintiffs—Appellants.

v.

Gur Saran and *others*—Defendants—Respondents.

First Appeal No. 480 of 1925, Decided on 20th December 1928, against decree of Sub-Judge, Muttra, D/- 21st August 1925.

(a) Trusts—Line of succession to trusteeship to be according to terms of wakf-deed—Legal heir of last trustee cannot acquire trusteeship by adverse possession against person legally entitled—Even if so acquired trustee would be bound by terms of the deed—Adverse possession.

One *M* on attaining majority ratified a wakf-deed executed during his minority by his father and uncle. Under the provisions of the deed a trustee could appoint his successor during his lifetime, could adopt before attaining tbe age of 25, a boy if he had no natural born son, and could make a will

authorizing his widow to adopt. The executants of the deed could modify or alter its terms but if in future no mutawalli was alive the proper authority could appoint as mutawalli a person from the executant's family. *M* became a truste and died after the age of 25 without appointing a successor from his family but appointed by a will his wife as his successor and gave her an authority to adopt, a boy from his brotherhood. After *M's* death his widow managed the trust property and adopted her sister's grandson.

Held: in suit by certain persons alleging to be *M's* reversioners for a declaration that they were entitled to the trusteeship, that either the devolution of trusteeship or the right to nominate one did not devolve on *M's* widow as the legal heir of executant and so her position was not adverse to any person entitled to the office and even if she has perfected her right as a trustee by adverse possession, she can only become a trustee under the deed and would be bound by its provisions. [P 407 C 1]

(b) Specific Relief Act, S. 42—Declaration of a right which plaintiffs do not possess even as spes successionis of a reversioner cannot be granted.

The succession to an office of trusteeship was not to go by inheritance but depended entirely on the selection made by proper authority which was the Court. A widow as the heir of the last trustee was managing the trust property.

Held: in a suit for declaration by the alleged reversioners for a declaration that they were entitled to trusteeship after the widow's death, that they had no right of suit, as they had not even a spes successionis of reversioner to the office of the trusteeship the appointment to which post wss solely in the hands of the Court. [P 408 C 1]

Tej Bahadur Sapru, P. N. Sapru, P.L. Banerji, I. B. Banerji and *Sarup Chandra*—for Appellants.

B. E. O'Conor, Iqbal Ahmad, K. N. Katju and *N. P. Asthana*—for Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit by the reversioners of Sah Madhuri Saran for a declaration that the adoption of defendant 1 by defendant 2 his widow was invalid and that he has thereby acquired no right, nor can acquire any right in any waqf property under the management of the parties. The plaintiffs alleged that the widow had no authority from her husband to adopt a boy, that she had become a sanyasi and had no power left to adopt and lastly that under the custom of the family no outsider can be adopted. As the amended plaint stands, the plaintiffs' case further appears to be that the adoption was not in accordance with the intention and directions of the creators of the endowment, and that the adoption of the defendant qua that property was invalid and he was not entitled to succeed as a mutawalli after the death of the widow. The defendants in their written statement did not allege that Gur Saran has become by virtue of his adoption entitled to succeed to the sebaitship immediately, but asserted that the adoption was in every way valid and legal. It was denied on behalf of the defendants that the plaintiffs had any cause of action or locus standi to maintain the suit.

The Court below has found that plaintiffs had no cause of action to maintain the suit and that the adoption of the defendant was in every way valid and in accordance with the directions contained in the deed of waqf. The Court has further found that even if those conditions were broken the widow of Madhuri Saran has by adverse possession acquired the rights of trusteeship and is now in a position to create a new line of succession and that therefore the plaintiffs can neither challenge the adoption of Gur Saran, nor can they deny his right to succeed to the sebaitship.

The pedigree is printed at p. 5 of the paper-book. Madhuri Saran was the surviving son of Kundan Lal and an uncle of his was Phundan Lal. On 17th September 1866, Kundan Lal and Phundan Lal executed a deed of waqf dedicating considerable property to Thakur Sri Radha Ramanji Maharaj installed in a temple at Brindaban, and laid down a number of conditions for the guidance of successive trustees. Under Cl. 4 power was given to a trustee to appoint his successor in his lifetime. Under Cl. 13 power was given to a trustee who had no natural born son to adopt a boy in his lifetime before attaining the age of 25. Under Cl. 12 there were directions laid down for making a will authorizing the widow of a trustee to adopt a boy according to certain conditions. Cl. 14 empowered the executants to make modifications and alterations in the terms and the conditions of the deed from time to time. Cl. 17 laid down that if in future no mutwalli appointed according to the terms given in the document were alive and in existence, then in that case the proper anthority (hakim-e-waqf) should have power to appoint as mutawalli and manager of the waqf

property a person from the family of the executants.

At the time when this deed was executed Madhuri Saran was a minor member of the family. It has not been seriously disputed before us that he would be interested in the family property. Had he in his lifetime challenged the validity of this dedication, a question would have arisen whether his father and uncle were competent to endow a part of the family property when a minor member was alive. But on 19th July 1881, after having attained majority, Madhuri Saran ratified this endowment and agreed to abide by its conditions and further conjointly with his uncle executed a supplementary deed of waqf dedicating some more property for the same purpose and expressly providing that all the conditions given in serial order in the earlier waqfnama should be applicable to that deed, and would be binding upon the executor and the mutawalli for the time being. There is no doubt therefore that Madhuri Saran himself in his lifetime did not repudiate this dedication but accepted it. He continued to be the trustee till his death in 1894.

It is an admitted fact that no child was born to Madhuri Saran. It is also not disputed that in his lifetime Madhuri Saran did not act according to the provisions of Cl. 4 in the deed of waqf and appoint anyone from among the descendants of his ancestors as his successor. On the other hand by a will dated 16th December 1891, he appointed his wife as his future successor, and further authorized her to adopt any boy from among the relations and members of his brotherhood. This will was followed by another of 20th October 1894, under which he again declared that his wife Mt. Ram Dei would be the mutawalli and manager of the endowed property and temple in his place, and authorized her to make an adoption in case no male issue were born or if born did not survive him. The translation of the last portion of this will as originally made by the translation office was slightly inaccurate, but a correct translation of it is to be found in Cl. 3 at p. 3 of the supplementary book.

The learned Subordinate Judge has expressed the opinion that inasmuch as the property endowed was family property and the waqf became operative only after Madhuri Saran gave his consent to it on his attaining majority, he must be deemed to be one of the founders of the waqf and therefore under Cl. 14 of the document he was entitled to modify its conditions. Assuming that the position of Madhuri Saran was one of a founder it is quite clear that he did not in his lifetime profess to make any modification or alteration of the conditions of the deed. He left those terms in fact to be binding on the future successors. All that he can be said to have done was to act contrary to it. It is also doubtful whether such modification or alteration could have been done by one of the three executants only.

Under the deed there was no provision for appointing his wife as his successor. His duty was to adopt a boy in his lifetime before attaining the age of 25. But he did not do that, and left a will in favour of his wife limiting her choice by the conditions laid down in para. 12. Without doubt he gave her much wider power to adopt if the two wills left by him are to be read together. In this way he exceeded the conditions which were laid down in the deed of endowment. The logical result, therefore, was that on the death of Madhuri Saran there was in existence no proper successor who was entitled as of right to succeed to this shebaitship under the terms of the original deed of endowment His widow, however, stepped into the place and began to manage the trust property as trustee, and her management has remained undisturbed since 1894, and her position as trustee has not been challenged even in the plaint.

In this connexion it would be convenient to dispose of one finding of the Subordinate Judge that Mt. Ram Dei by virtue of having acquired title to the shebaitship by adverse possession is now in a position to create a new line of succession in contravention of the terms of the deed. In our opinion it is very difficult to hold that she acquired adverse possession of the office of the shebait ever since her entry into possession. No doubt there is authority for the proposition that in the absence of any express terms to the contrary the right to the shebaitship or the right to nominate the shebait may devolve on the heir-at-law of the original founder. But here

we have in Cl. 17 an express provision that if at any time no mutawalli, appointed according to the prescribed directions be alive and in existence then the proper authority should nominate a trustee In the face of such a clear position it is impossible to hold that either the devolution to the shebaitship or the right to nominate a shebait would devolve on the legal heir of the executant. Thus the position of Mt. Ram Dei cannot be considered to have been adverse to any person entitled as of right to succeed to the office.

We are are further of opinion that even if she has perfected her right as a trustee by means of such adverse possession she can only acquire the rights of a full-fledged trustee and no more. Even then she would in her own capacity as trustee be bound by the directions of the deed of endowment, and cannot claim a right to act contrary to it. We are therefore unable to agree with the view expressed by the Court below that she is in a position to lay down a new line of succession.

The position of the plaintiffs, however, is not that of reversioners to the estate of the original founders. So far as their claim to have it declared that the adoption of Gur Saran himself was invalid was concerned, they had a locus standi to maintain the suit and satisfy the Court either that no adoption took place or that the adoptive mother had no authority to adopt or that under the custom of the family such an adoption was invalid. The Court below has found that the wills said to have been executed by Madhuri Saran were duly executed. Those documents do confer an authority on the widow to adopt, and no satisfactory evidence has been produced to show that there is any custom in the family which takes away her right to adopt. Under these circumstances the plaintiffs have not succeeded in showing that the adoption itself was invalid.

Even assuming that the widow in adopting Gur Saran has acted in a manner quite contrary to the directions contained in the deed of endowment, it cannot be held that the adoption of Gur Saran per se is illegal and invalid Her act has been in accordance with the directions given by her own husband and those directions did not necessarily limit her choice in any way. She, so far as adopting a boy to herself and her husband is concerned, was in no way bound by the terms laid down by her father-in-law and his brother. The adoption of Gur Saran, having been made under an authority conferred upon her by the husband which was in no way limited, was therefore perfectly valid, and the plaintiffs are not entitled to a declaration that the adoption itself is invalid. The first part of relief A cannot therefore, be granted. In these circumstances it is unnecessary to consider whether the claim for a declaration that the adoption was invalid was within time. The Court below has held that the plaintiffs are entitled to get an extension under S. 14, Lim. Act, and it is not necessary to reverse that finding. The fact is that the plaintiffs are not at all entitled to get this declaration.

The latter part of relief A was directed to securing a declaration that the defendant by virtue of the adoption can acquire no right in any of the endowed properties. This when paraphrased means that he cannot by virtue of his adoption claim a right to succeed to the shebaitship after the death of Mt. Ram Dei.

The Court below has held that the plaintiffs have no cause of action for claiming this relief. No doubt reversioners have been allowed to come to Court and ask for a declaration that a certain adoption made by a widow was invalid or in fact did not take place. But the position of the reversioners is such that if the widow were to die immediately they would by right succeed to the estate. They are also allowed under S. 42, Specific Relief Act, to claim a declaration that alienations made by a Hindu widow are not justified and would not be binding on the reversioners. But there too the effect of the alienation is to infringe the right of the whole body of the reversioners to succeed to the estate after the death of the widow. The position of the present plaintiffs is by no means similar to that of reversioners. We have already pointed out that in view of the provisions of Cl. 17 there would be no actual devolution of shebaitship on any heir-at-law of the founders. The succession to the office would not go by inheritance, but would depend entirely on the selection

made by the proper authority, which may be the District Judge. Thus the present plaintiffs have not even a spes successionis such as reversioners possess and they have not even a definite hope that they would themselves be selected by the District Judge, in case there is a vacancy in the office of sebait. They cannot claim to succeed to any right inherent in themselves, but their selection would be a matter of choice and selection by the District Judge. The power of the District Judge to select a mutawalli is not confined even to the nearest reversioner or to the eldest member of the family. He can select anyone from the family whom he considers fit and honest. The position of the plaintiffs therefore is much worse than that of reversioners, and it is very difficult to see how they can be regarded as having any legal character which entitles them to maintain a suit for declaration. They certainly have no vested or contingent right to any property, and at best have only a faint hope that the District Judge may when the time arrives happen to select one of them as successor to the sebaitship. In this view of the matter we agree with the Court below that the plaintiffs have no cause of action to maintain a suit for declaration that the present defendant would not be entitled to succeed to the sebaitship after the death of the widow. We have already mentioned that neither in the written statement nor in the deed of adoption is there any assertion that the defendant has by virtue of his adoption become entitled to succeed to the sebaitship. For aught one knows he may not survive the present sebait. In this view of the matter we would hold that the plaintiffs cannot ask this Court to grant them a declaration that the defendant will not be the successor to the sebaitship after the death of the widow. They have no right to this property, and no legal character to maintain such a declaratory suit.

As the question has been fought out in the Court below at great length and it is desirable that the remaining issue should be disposed of rather than left out we think it necessary to consider the question whether the widow has in fact acted in a manner contrary to the directions contained in the will. Even if her husband had given her wider power she was not bound to act, inconsistently with the directions of the deed of waqf. The learned advocate for the respondents has contended that the true interpretation of Cl. 12, of the deed is that the choice of a boy from the persons belonging to the three classes in the prescribed order of propriety was not mandatory but merely directory, that is to say, that if that condition was broken it would not invalidate the right to succeed. Support is sought from the provisions in Cl. 14 where a power was reserved to the executant to make modifications and alterations. The Court below, however, has not accepted this view. Having examined the language of Cl. 12 we are unable to accept this contention. The deed laid down the details of the conditions which the mutawalli and manager should on his behalf enter in the will in favour of his wife. It provided that: "if he leaves no son after him his widow shall have power to adopt a boy at first from amongst the descendants of Sah Kundan Lal and Phundan Lal, then from the family of the said Sahs and from the descendants of Mangal Sen and if none of them is available she should adopt a boy whom she could adopt according to the Hindu law."

The language of this provision in our opinion is imperative, and it was intended that she should have power to adopt a boy according to the Hindu law only if no boy from the two previously mentioned classes was available. We must, therefore, hold that if the widow proceeded to adopt a different boy while one from either the first or the second class was available she was not acting according to the conditions of the deed of wakf. (The judgment then discussed the evidence on the issue and concluded.) We must accordingly hold that there being no other suitable boy available Mt. Ram Dei was justified in adopting Sah Gur Saran who was her sister's grandson and was eligible to be adopted under the Hindu law. For these reasons we dismiss this appeal with costs.

M.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 409

BOYS AND ASHWORTH, JJ.

Raghunath Singh and *others*—Appellants.

v.

Sheo Partap Singh and *others*—Respondents.

Second Appeal No. 403 of 1926, Decided on 6th February 1929, against decree of Dist. Judge, Ghazipur.

(a) Civil P. C., S. 11—Previous redemption suit dismissed for failure to pay sum decreed for redemption does not bar subsequent suit for redemption—T. P. Act S. 60.

The fact of a previous redemption suit being brought and being dismissed for failure of the mortgagors to pay the sum decreed for redemption will not operate under the rule of res judicata to prevent the bringing of a subsequent suit for redemption. 24 *All.* 44 (*F. B.*); *A. I. R.* 1922 *All.* 377, *Foll.* [P 410 C 2]

(b) Civil P. C., S. 11—Scope.

Any matter arising in a previous redemption suit which was dismissed for failure to pay decretal amount, and decided in that suit, cannot be reopened in a subsequent redemption suit. 43 *Bom.* 334 and *A. I. R.* 1925 *P. C.* 63, *Rel. on*; and *A. I. R.* 1922 *All.* 377, *not Foll.* [P 411 C 1]

(c) Transfer of Property Act, S. 60—Mortgagee becoming owner of some of the properties mortgaged — Mortgagor can claim redemption of remaining properties for proportionate amount.

Where the mortgagee of several properties becomes owner of some of them and consequently the integrity of the mortgage is broken, the mortgagors are entitled to claim redemption with regard to the remaining properties for a proportionate amount to what would be required to redeem all of them. [P 411 C 2]

Tej Bahadur Sapru, *M. L. Agarwala*, and *Baleshwari Prasad*—for Appellants.

Iqbal Ahmad and *Janaki Prasad*—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-respondents against the defendant-appellants for redemption of two mortgages both dated 22nd June 1864. One of them was a mortgage by conditional sale. The property mortgaged was shares in five villages, and the money secured was Rs. 6,999. It was a condition that the usufruct should be held equivalent to interest on the money. The second deed was of the same date and secured a loan of Rs. 1,600 which was to carry interest at 12 annas per cent. per mensem. So far as the present appeal is concerned the parties admit that this second deed operated as a further charge.

The facts of the case, which it is necessary to give for the purpose of this appeal, are briefly as follows :

In 1877 foreclosure proceedings were taken by the mortgagees, but they proved abortive, because the mortgagees did not pursue the matter to an end by the necessary legal process. In 1880 there was a partition between the mortgagees of certain villages. The defendants were parties to that partition. Two out of the five villages formed part of the property which was the subject-matter of that partition suit. The mortgagees in that partition suit claimed that they were absolute owners of the shares in the two villages which the plaintiffs are now asking to redeem. It is clear that they claimed an absolute title on the ground that the foreclosure proceedings in 1877 had given them an absolute title by foreclosure. It is also clear that the defendants either did not contest this proposition or that the point was decided against them. In 1892 the plaintiffs brought a suit similar to the present one for redemption of the five villages. It was then held, after the matter had come up to this High Court, that they could not claim to redeem the two villages which were dealt with in the partition proceedings of 1880. The High Court having held this, remanded the case to the Subordinate Judge to decide the question of the redemption of the three remaining villages on its merits. The Subordinate Judge, thereupon, allowed redemption of the three villages for a sum that was arrived at by taking the proportionate value of the three villages (the proportion being reckoned according to the respective revenue payable on the three as against the five villages). He did not allow any interest on the Rs. 1,600 secured by the deed of further charge. We have looked into his judgment, and we find that no reason was given by him for ignoring the question of interest. Against this decision of the Subordinate Judge there was an appeal by the plaintiffs, that is to say the mortgagors, who wished to be given the property without payment of any sum, their contention being that the usufruct had sufficed to liquidate the principal and (possibly) the interest. On the other hand, the mortgagees filed a cross-objection complaining that the Subordinate Judge had allowed them no interest on the money advanced under the

deed of further charge. The appellants withdrew their appeal, and under the law then in force the cross-objection automatically was rejected. It may be mentioned that under the law the mortgagees could have filed a cross-appeal, but did not do so. The decree of the Subordinate Judge allowed the plaintiffs to redeem the mortgage on payment of the proportionate amount of the principal money secured by the mortgages provided that they paid that amount (i. e Rs 4,208) within six months, and the decree went on to say that if the money was not paid within that period, the suit would stand dismissed. The money was not paid.

We now have this present suit brought in 1924, i. e. 32 years after the previous suit was brought. The plaintiffs claim in it to have a right to redeem the three villages. They take up the position in the plaint that the previous suit settled the amount of mortgage money due at that date, and that this sum has been realized in full by the defendants by the profits of the mortgaged property.

The defence to this suit was as follows: Firstly, it was pleaded that the right of the plaintiffs to redeem was barred by the dismissal of their previous redemption suit in 1892. Secondly, if this were held not to be so, at any rate the plaintiffs could not rely upon the decision in that suit as to the amount required to redeem but were bound to pay what should be found to be due on a consideration of the matter independently of the decision in that case. Thirdly, it was argued that there should be no reduction of the amount of mortgage money with interest recoverable by the mortgagees by reason of the mortgagees having acquired an absolute title in two of the villages under the partition proceedings in 1880.

The finding of the Subordinate Judge is as follows: He holds that the right of the plaintiffs to redeem is not barred by the dismissal of their previous suit in 1892; secondly, that the decision of the Subordinate Judge in the previous suit as to the amount then due for redemption holds good and cannot be reopened:—thirdly, that the mortgagee-appellants are only entitled to get a proportion of the mortgage money as they have become absolute owners of two of the mortgaged villages. From all these three findings the appellants appeal.

The Subordinate Judge has also decided one point in favour of the mortgagees, namely, he held that although in the previous redemption suit no interest was allowed on the Rs. 1,600 secured by the deed of further charge, yet the mortgagees were entitled to get interest from the date of that suit in 1892. Against this decision the respondent-mortgagors have filed a cross-objection, maintaining that the effect of the decision in the former case was a bar to a claim for any interest whatever.

It will thus be seen that there are four findings of the Subordinate Judge the correctness of which is in question in this appeal. We will deal with them in the order in which they have been stated.

The question whether the fact of a redemption suit being brought and being dismissed for failure of the mortgagors to pay the sum decreed for redemption will operate under the rule of res judicata to prevent the bringing of a subsequent suit for redemption has been decided by a Full Bench of this Court,: see *Sita Ram* v. *Madho Lal* (1). This was again followed in a two Judge decision *Hari Ram* v. *Indraj* (2). There is also a decision of their Lordships of the Privy Council which appears to affirm the principle followed in these decisions: *Maina Bibi* v. *Chaudhry Vakil Ahmad* (3). In that case a mortgage was not in question but the heirs of a Muhammadan were suing his widow for recovery of property held by her as a lien against her dower. They brought one suit and got a decree, but failed to pay the money required under that decree. They subsequently brought another suit, and this was held to be permissible. It appears, therefore, to us that one cannot question the right of the plaintiffs to sue for redemption notwithstanding their failure to redeem under the decree of the previous suit.

As to the second point whether the Subordinate Judge was right in holding that he was bound by the previous suit in respect of the amount then found due, we may refer to a Bombay Full Bench decision: *Ramji* v. *Pandhannath* (4). It was there held by the Chief Justice

(1) [1901] 24 All. 44=(1901) A. W. N. 194 (F.B.).
(2) A. I. R. 1922 All. 377=44 All. 730.
(3) A. I. R. 1925 P. C. 63=47 All. 250=52 I. A. 145 (P.C.).
(4) [1919] 43 Bom. 334=49 I. C. 894=21 Bom. L. R. 56 (F.B.).

of the Bombay High Court and one other Judge (a third Judge dissenting) that in similar circumstances an earlier decree, although ending in dismissal of a suit by reason of non-payment of the sum decreed, would operate as res judicata in respect of all matters decided at that date. On the other hand, we have been referred to the Allahabad decision just mentioned : *Hari Ram* v. *Indraj* (2), as an authority for the contrary. It was there stated by Ryves, J., that the parties would be relegated to their position as it was at the commencement of the previous suit. It is sufficient to say that the present matter was not in issue before that Court, and the sole question then was the right to bring a second suit. Furthermore, this Allahabad decision uses the same language as was used by a Subordinate Judge and quoted with approval by their Lordships of the Privy Council in *Maina Bibi* v. *Chaudhri Vakil Ahmad* (3). This latter case clearly and emphatically decided that in similar circumstances matters decided in a previous suit could not be reopened. It decided particularly that where the rate of interest was decided in an earlier suit, dismissed for the same reason that the earlier suit was dismissed in this case, the subsequent suit could not call it in question. The authority, therefore, is clear for holding that any matter arising in the earlier suit which was decided cannot be reopened in the present suit.

As to the third question the appellants contend that the whole of the mortgage money should be thrown on to the three villages which the plaintiffs are now allowed to redeem, and that no redemption should be allowed, because their right to redeem two of them has disappeared. So far as we are able to understand the argument on which this contention is based, it appears to be this. By their laches in the partition proceedings referred to above the plaintiffs lost any right to redeem the two villages. Consequently they should get no benefit in the present suit from that laches. They should not be allowed to claim that the mortgage money payable for redemption of the three villages is less than that for the whole five. There can, however, be no question that by the partition proceedings the appellants have become absolute owners of two of the villages. Their rights as mortgagees in these two villages have merged in their rights as owners. Consequently the integrity of the mortgage has been broken, and that being so, the plaintiffs are entitled to claim redemption of the three villages for a proportionate amount of what would be requirsd to redeem the five. These conclusions result in the dismissal of the appeal.

There remains the respondents' cross-objection. In describing the facts of the previous litigation above we showed that in the former suit the Subordinate Judge refused to allow any interest on the principal mortgage money. The grounds for that decision were not obvious, but that decision in itself was impugned by the mortgagees in their cross-objection. stood. When that cross-objection was dismissed by reason of the withdrawal of the appeal, the decision of the Subordinate Judge on this point remained undisturbed. It therefore decided something which cannot be reopened. We hold then that the mortgages cannot be decreed any sum by way of interest and consequently the present cross-objection must be upheld.

The consequence is that this appeal fails and is dismissed with costs. The cross-objection is successful and is decreed with costs. The decree of the lower Court will be modified by excluding the sum awarded as interest, that is to say Rs. 1967-7-0. The mortgage debt will then be, up to the date of the lower Court's decree Rs. 5243-13-0 less than Rs. 1967-7-0. The rest of the decree will stand except that the costs decreed against defendants 1 and 2 in the lower Court will be proportionately reduced.

S.N./R.K. *Decree modified.*

A. I. R. 1929 Allahabad 411

ASHWORTH, J.

Faqir Pasi and *another*—Plaintiffs—Appellants.

v.

Behari Kundigar and *others*—Defendants—Respondents.

Second Appeal No. 231 of 1928, Decided on 21st February 1929, against decree of 2nd Addl. Sub-Judge, Gorakhpur, D/- 8th November 1927.

(a) Transfer of Property Act, S. 60—"Mortgage-money" means principal money and interest.

The expression "mortgage-money" in S. 60 is to be construed as the principal money and

interest of which payment is secured for the time being. [P 413 C 1]

(b) Transfer of Property Act, S. 60—High rate of interest stipulated in mortgage-deed is not clog.

In no circumstances can a high rate of interest in the mortgage be construed as a clog on the equity of redemption, provided that the parties entered into the contract with eyes open and on equal terms, and that the terms of the mortgage were clear and not equivocal : 3 *O. L. J.* 746, *Disc.* and *Dist.* ; *Kreglinger* v. *New Patagonia Meat and Cold Storage Co. Ltd.*, (1914) *A. C.* 25, *Rel. on.* [P 413 C 1]

Baleshwari Prasad for *Sankar Saran* —for Appellants.

M. Wali-ullah—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-appellants for redemption of a certain mortgage of a house. The mortgage set out that the mortgagee was to do all the repairs of the house in question and moreover to rebuild certain dilapidated portions. In addition to enjoyment of the house he was to get Rs. 24 per cent interest per year. The mortgage was also not redeemable for a period of 20 years.

The trial Court came to a finding that the present value of the house is about Rs. 1,000, and that according to the terms of the mortgage-deed the mortgage debt must have amounted at the date, when the mortgage became redeemable, to a sum of Rs. 2,120. It consequently held that the provision as to interest at this high rate amounted in effect to a denial of all rights to redeem, and allowed redemption upon repayment of the principal amount only, namely Rs. 200.

In appeal the Subordinate Judge held that the repairs and rebuilding of the house must have swallowed up all the pecuniary advantage to be enjoyed by the mortgagee from enjoyment of the house, that a high rate of interest could not be deemed a clog on the equity of redemption and that the mortgager must have agreed to this interest and was not proved to have been subjected to undue influence or pressure. He, therefore, allowed redemption only on payment of the entire interest at the full contractual rate.

In this second appeal the first plea taken is that the lower appellate Court wrongly construed the mortgage deed, but counsel for the appellants admits that this only means that the lower appellate Court should have found the exorbitant rate of interest to be a clog on the equity of redemption. We are, therefore, solely concerned in this appeal with the question whether an exorbitant rate of interest, so exorbitant as to make it impossible or at least improbable that the mortgagor would ever dream of redemption if required to pay the contractual interest, can be treated as a clog on the equity of redemption.

I am referred by the appellant's counsel in support of his contention that it can, to a decision of a two Judge Bench of the Judicial Commissioners Court of Oudh (now Chief Court), namely *Mohammad Ali* v. *Ramzan Ali* (1). The Judges composing this Bench were Pandit Kanhaiya Lal, for many years a Judge of this Court, and Mr. Kendall, who is at present a Judge. The relevant portion of that judgment is as follows :

"A covenant, which renders redemption prohibitive or penal, is very often added with the object of fettering the equity of redemption, and the question for consideration in such cases is whether the covenant is reasonable so as not to go beyond what is necessary for the protection of the covenantee, or impair his security. Where the parties occupy an unequal position, as they do in this case, it is not open to the mortgagee to stipulate for a condition that operates oppressively on the mortgagor and renders the property practically irredeemable."

It is sufficient for this case to remark, without otherwise expressing my concurrence with the principles laid down in that judgment, that in that judgment there was a finding that undue pressure was used to obtain the excessive and impossible interest. I do not construe that judgment to mean that high interest alone could be construed as a clog on the equity of redemption. If I had to construe it in this manner, I regret that I could not agree with it. As in this case the lower appellate Court has expressly stated that no undue influence was proved, that case cannot be deemed applicable to the facts in this case.

In that case reference was made to the very illuminating judgment of Viscount Haldane, L. C., in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co Ltd.* (2), where the whole history and principles of the law as regards a clog on the equity of redemption as administered by Chancery Courts was set forth.

(1) [1917] 3 O. L. J. 746=38 I. C. 454.
(2) [1914] A. C. 25=83 L. J. Ch. 79=30 T. L. R. 114=58 S. J. 97=109 L. T. 802.

In particular Viscount Haldane pointed out that the previous decisions of Courts are more binding under a system of jurisprudence such as the English system than under a system where the paramount autho ity is that of a Code. It appears to me, therefore, desirable to see how far the Transfer of Property Act justifies the application of the English doctrine of the clog on the equity of redemption.

There is nothing in the Transfer of Property Act to justify the application of this doctrine except the provisions of S. 60. That section gives a statutory right to the mortgagor to redeem on payment of the mortgage money, and qualifies this right only by a proviso that the right conferred by the section has not been extinguished by act of the parties or by order of a Court. Looking at S. 58 we find that the expression "mortgage money" in S. 60 is to be construed as "the principal money and interest of which payment is secured for the time being."

From this it is clear that the parties may agree to any rate or amount of interest that they choose, and that a mortgagor cannot redeem without payment of that interest, even if the interest is so excessive as to prevent all possibility of redemption. The terms of S. 60 afford no relief to the mortgagor. Nor will the principle embodied in the phrase "once a mortgage always a mortgage" operate in favour of the mortgagor; for a mortgage providing for redemption being deferred until a time when the mortgage money at the contractual rate of interest amounts to such a sum that no sane person would redeem, if he had to pay that sum, will in effect be an absolute transfer and not a mortgage. It is necessary to look at the substance and not the form and where the mortgage contains terms in effect preventing any possibility of redemption, the contract in effect is not a mortgage even though it is called one. So the principle will not apply. My conclusion then is that in no circumstances can a high rate of intetest in the mortgage be construed as a clog on the equity of redemption, provided that the parties entered into the contract with eyes open and on equal terms, and that the terms of the mortgage were clear and not equivocal. Accordingly I dismiss this appeal with costs.

S.N./R.K *Appeal dismissed.*

A. I. R 1929 Allahabad 413

SULAIMAN AND KENDALL, JJ.

Chauharja Singh and *others*—Defendants—Appellants.

v.

Bachcha Lal—Plaintif—Respondent.

Second Appeal No. 1425 of 1926, Decided on 15th February 1929, against decree of Dist. Judge, Allahabad, D/-29th May 1926.

Agra Pre-emption Act (11 of 1922), S. 4 (1)—Mere fact that person is recorded as cosharer and is in possession does not make him cosharer.

The mere fact that a person is recorded as cosharer and is in possession of the property does not make him a cosharer that is to say, one entitled as proprietor to the share within the meaning of sub-Cl. (1). The title in that clause means actual proprietary title and not merely possessory title. [P 413 C 2, P 414 C 1]

Kailas Nath Katju—for Appellants.

Peary Lal Banerji—for Respondent.

Judgment. — This is a defendants' appeal arising out of a suit for pre-emption of property transferred under a sale-deed dated 19th June 1923 Subsequently the vendee obtained a deed of gift from one Babu Lal of a share in this mahal. Two successive suits were instituted to pre-empt this transaction. The suit to pre-empt the gift on the ground that it was really a sale has failed on the finding that the transaction was a gift and not a sale; but the suit to pre-empt the sale transaction has been decreed by both the Courts. The plaintiff at the outset had alleged that the donor Babu Lal had no title to the property and had no right to make the gift. In the course of the trial when Babu Lal was examined it transpired that the property did not really belong to him but belonged to his wife who died ten years ago. Although Babu Lal's name had been entered in the revenue papers as a cosharer he has sons and grandsons who are heirs to his wife. One of the sons was examined as a witness and stated that he had no objection to the gift being made The learned Judge has held that Babu Lal had not acquired full proprietary title to the property and therefore the deed of gift executed by him was wholly ineffective to confer title on the vendee. He has further held that the mere fact that Babu Lal is recorded as a cosharer and is in possession of the property does not

make him a cosharer, that is to say one entitled as proprietor to the share within the meaning of S. 4, sub-Cl. (1). According to him the title there means actual proprietary title and not merely possessory title. We fully agree with this view.

The learned Judge has also repelled the defendants' contention that the plaintiff having himself instituted the suit to pre-empt the gift made by Babu Lal was estopped from contending that Babu Lal had no right to make the gift. There is no estoppel against the plaintiff particularly as it has been pointed out by the iearned Judge that there is nothing to indicate that the plaintiff was aware of this fact before Babu Lal was examined. There is no force in this appeal aud it is dismissed wlth costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 414

SEN, J.

Masitullah and *another*—Plaintiffs—Appellants.

v.

Umrao and *others*—Defendants—Respondents.

Second Appeal No. 1865 of 1927, Decided on 19th February 1929, against decree of Addl. Sub-Judge, Moradabad, D/- 8th August 1927.

(a) Partition Act (4 of 1893), S. 4—Conditions to be fulfilled for application of S. 4.

For the application of S. 4, four conditions ought to be fulfilled:

(1) The house should be owned by an undivided family.

(2) The share of a cosharer should have been transferred to a person who was a stranger to the family.

(3) The purchaser should have sued for partition ; and

(4) A member of the family being a shareholder claims or undertakes to buy the share of the stranger transferee: 12 *C. L. J.* 525; and 35 *All.* 364, *Ref.* [P 415 C 1]

(b) Partition Act (4 of 1893), S. 4—One member selling his interest and his portion separated—S. 4 will apply to the rest of house.

Section 4 will apply even to a house a portion of which is already separated owing to one member selling his interest in it. [P 415 C 1]

(c) Partition Act (4 of 1893), S. 4—Undivided family is used not in technical sense—it means same thing as "undivided family" in Transfer of Property Act, S. 44 (2)—Words.

The term "undivided family" in S. 4 has not been used in a technical sense and is applicable to Hindus and Muhammadans alike and must be held to have much the same meaning as the words "undivided family" in in Cl. (2), S. 44, T.P. Act. [P 415 C 2]

Akhtar Husain Khan—for Appellants.

Vishwa Mittra—for Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit for partition of a dwelling house which is situate in mohalla Jatan in the city of Bijnore. The house originally belonged to an undivided Hindu family and was owned by different members of the family in unequal shares and who occupied different portions of the house property. Mt. Kallo, plaintiff 2 purchased a one-sixth share of the house from Ghasi and instituted a suit for partition against the defendants. This was suit No. 1196 of 1922. The defendants did not claim the benefit of S. 4, Partition Act (Act 4 of 1893).

The plaintiffs 1 and 2 have purchased the shares of two other members of the family namely Tula and Umrao. The extent of their share in the entire house is two-fifth. The present suit was instituted for the partition of this share. The defendants claimed the benefit of S. 4, Partition Act. The learned Munsif in a well reasoned judgment came to the conclusion that the defendants were entitled to the benefit of S. 4, Partition Act. The plaintiffs appealed The lower appellate Court has affirmed the decision of the trial Court.

The sole question in this appeal is whether the defendants are entitled to the benefit of S. 4, Partition Act. A right to partition being one of the incidents of proprietary right held in coownership cannot ordinarily be resisted. Where the effect of the partition is calculated to destroy the intrinsic value of the entire property it should be more in keeping with equity, not to allow the partition but to grant a money compensation.

Section 4 (1), Partition Act, provides:

"Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family, and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as he thinks fit, and direct the sale of such share

to such shareholder, and may give all necessary and proper directions in that behalf."

Section 4 of this Act is an enabling section but it ought to be strictly construed as it raises a statutory bar to the exercise of the right of partition in derogation of the right under the ordinary law. The object of this section is to enable the members of an undivided family to buy out a stranger who has purchased the share of one or the other of the co-owners. For the application of S. 4, four conditlons ought to be fulfilled:

(1) The house should be owned by an undivided family.

(2) The share of a cosharer should have been transferred to a person who was a stranger to the family.

(3) The purchaser should have sued for partition and

(4) A member of the family being a shareholder claims or undertakes to buy the share of the stranger transferee.

Khirode Chander Ghosal v. *Saroda Prasad Mitra* (1), and *Gobardhan Das* v. *Hari Lal* (2).

The above conditions have been satisfied in this case and the Courts below have properly granted to the defendants respondents the benefit of S 4.

It has been urged that S. 4 does not apply because the share of a dwelling house belonging to an undivided family has not been transferred. It has been argued that the family became divided in 1922 when one of the members sold his interest in the house to plaintiff 2 and that by reason of the partition decree in Suit No. 1196 of 1922 the integrity of the dwelling house was broken up. The argument is plausible but has no substance. The effect of the partition of 1922 was to cut off a portion of the house but to leave the rest of the house as a separate and independent entity. The rest of the house was a compact whole held by a number of cosharers who were members of an undivided family having a community of interest. The portion left undivided must be regarded as a separate unit. That it is a dwelling house is a fact which admits of no doubt. The separated block ceases to have any concern with the outgoing member whose share had been sold but was held in ownership by the rest of the members of an undivided family. The term "undivided family" in S. 4 has not been used in a technical sense and is applicable to Hindus and Muhammadans alike and must be held to have much the same meaning as the words "undivided family" in Cl. (2), S. 44, T. P. Act.

Section 4 is fully applicable to the facts of the present oase. No estoppel can arise against the defendants for their not having claimed the benefit of S. 4 in the former suit (Suit No. 1196 of 1922) The sale to plaintiffs 1 and 2 has given rise to a fresh cause of action and there is nothing in law to preclude the defendants from exercising their statutory right under S. 4, Partition Act. The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1910] 12 C. L. J. 525=7 I. C. 436.
(2) [1913] 35 All. 364=19 I. C. 121=11 A.L.J. 379.

A. I. R. 1929 Allahabad 415

ASHWORTH, J.

Babu Ram —Plaintiff—Appellant.

v.

Lala Ram and *others*—Respondents.

Second Appeal No. 1345 of 1927, Decided on 27th February 1929.

(a) Arbitration—Award—Proof of award is sufficient evidence of fact and validity of award in the absence of agreement to refer to arbitration.

Where a party is put to the proof of the arbitration award on which he bases his claim, the award is sufficient evidence of the fact of the award and of validity of the award in the absence of the agreement to refer to arbitration, because the fact of the award raises the presumption that there was a reference and that the award was in accordance with the reference. [P 416 C 2]

(b) Evidence Act, S. 91—S. 91 does not apply to agreement to refer.

The agreement to refer to arbitration is not a contract, grant or other disposition of property and so S. 91 does not apply to it. [P 416 C 2]

N. V. Vaish—for Appellant.

G. Agarwala—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-appellant on a mortgage dated 7th November 1910 executed by one Ganga Ram to Mt. Lachho and Ram Narain. The successors-in-interest of the mortgagor are defendants 1 and 2. Defendants 13 and 18 are said to be transferees of the mortgagee Ram Narain. The plaintiff sues as the successor-in-interest of Mt. Lachho. The suit was resisted only by by defendants 13 and I4 as successors-in-interest of Ram Narain, the co-mortgagee of Mt. Lachho.

The plaintiff based his claim to represent Mt. Lachho on the following facts

He produced an award dated 1st August 1912 which appears to have awarded the interest of Mt. Lachho in this deed to one Anrudh Prasad. He says that when Anrudh Prasad died, his interest devolved on his widow Mt. Sheorani and his adopted son Ambika Prasad. They sold him that interest by a deed dated 22nd October 1925. As noted above, the only persons to resist this suit were the successors-in-interest of Mt. Lachho's co-mortgagee Ram Narain.

The trial Court dismissed the suit because the plaintiff did not manage to procure the attendance of the arbitrator who gave the award, namely Chaudhri Surajpal Singh, and held consequently that the award had not been proved It also held that Ambika Prasad was not the adopted son of Anrudh Prasad.

There was an appeal, and the lower appellate Court very properly on the facts sent the case back to give the plaintiff a further chance of procuring the attendance of the arbitrator Surajpal Singh The arbitrator gave his evidence in Court, and apparently with reluctance had to admit the fact of his being asked to make the award and of his having made it.

When the case came up after his evidence had been obtained, the Subordinate Judge in whose Court the appeal was pending had been replaced by another Subordinate Judge. The latter dismissed the appeal and the suit on the ground that

" mere proof of the award without proof of the terms of the agreement which was admittedly reduced to writing does not advance plaintiff's claim any further. "

He also held that the award itself showed that Ram Narain, the co-mortgagee, was the only heir of Mt. Lachho, the other nominee.

The present appeal is based on the contention that the award alone was sufficient evidence of its having been made and of its being in order, and that at any rate, in the circumstances, the lower appellate Court should have given the plaintiff an opportunity of proving the reference to the award.

The Subordinate Judge is clearly wrong in stating that an arbitration award is no evidence of the fact of the award and of the validity of the award in the absence of the agreement to refer to arbitration. By his remark that the agreement was admittedly reduced to writing I presume that the Subordinate Judge invokes S. 91, Evidence Act. Section 91 is not applicable. The agreement to refer to arbitration was not a contract, grant or other disposition of property. The principle that acts done by persons in a judicial or quasi judicial capacity are presumed to have been done correctly until the contrary is proved will apply. In this case we have the award proved, and it was for the party denying its validity to bring some evidence to cast suspicion upon it. In this case the respondents instead of themselves examining the award and the terms of reference to see if the award could be impugned on the ground that it was not in accordance with the reference, contented themselves with merely putting the plaintiff to proof of the award. He proved the award, and then the Subordinate Judge dismissed the suit, because he had not proved the reference. The plaintiff could rely on the fact of the award as raising the presumption that there was a reference, and that the award was in accordance with reference.

The appellant's counsel has not had a translation of the award made as required by law, and if it had been necessary to examine the award his appeal might have been dismissed on this ground, but I find that the judgment of the lower Court admits the award and admits, by its failure to criticize that award, that it purported to be in pursuance of an agreement te refer to arbitration, It is not, therefore, necessary to examine the award to see whether it recited the fact of the agreement to refer.

For the above reasons, I allow this appeal. At the same time I desire to punish the plaintiff in the matter of costs for the slovenly way in which the plaint was drafted and the suit conducted. In his plaint he failed even to mention the award. The consequence was that the defendant did not get an opportunity by his written statement to contest the fact or the validity of the award. Again it appears from the evidence of the trial Court that the plaintiff was negligent in summoning such evidence as was necessary to prove the award and its validity. In allowing this appeal, therefore, I decree the suit but only award half costs throughout to the plaintiff.

S.N./R.K. *Appeal allowed.*

* A. I. R. 1929 Allahabad 417

KENDALL, J.

Secy. of State—Petitioner.

v.

Har Charan Das and *another*—Opposite Parties.

Civil Revn. No. 285 of 1928, Decided on 16th March 1929, against order of Small Cause Court Judge, Bareilly, D/- 4th August 1928.

*** (a) Provident Funds Act (1925), S. 3 (1) — Compulsory deposit made in General Provident Fund is not attachable even after contributor's retirement—General Provident Fund Rules, R. 10—Civil P. C., S. 60 (k).**

Compulsory deposit made in the General Provident Fund is not liable to attachment even after the retirement of the contributor from service. R. 10, General Provident Fund Rules, is merely a rule of procedure directing the Accounts Officer how to proceed on receipt of a notice of attachment. It does not legalize a notice of attachment and consequently does not have the intention of making the deposit attachable after retirement : *A. I. R.* 1924 *Pat.* 524; *A. I. R.* 1924 *All.* 68, *Foll.*; 29 *Bom.* 259; 46 *Cal.* 962 and *A. I. R.* 1923 *Cal.* 585, *Rel. on.* [P 418 C 2, P 419 C 1]

(b) Government of India Act (1919), S. 96-B, sub-S. 4—Scope.

Sub-S. (4) is not sufficiently wide to cover rules regulating General Provident Fund (*Obiter*). [P 418 C 2]

Uma Shankar Bajpai—for Petitioner.

G. Agarwala, S. B. Johari and *G. S. Ghatak*—for Opposite Parties.

Judgment.—This is an application under S. 25, Small Cause Courts Act, for the revision of an order of the Judge of the Small Cause Court of Bareilly, directing the attachment of deposits amounting to Rs. 450 in the execution of a decree against one Gulzari Lal. The application, however, is made on behalf of the Secretary of State. Gulzari Lal was a clerk in the Collector's office in Pilibhit, and he was a subscriber to the General Provident Fund. He has now retired. A decree was obtained against him by one Har Charan Das in the Small Cause Court of Bareilly and it is in the execution of this decree that the present question has arisen. The Judge has complied with the decree-holder's application to attach money lying to the credit of Gulzari Lal in the General Provident Fund, and an objection was made by the Pay and Accounts Officer, U. P. that the deposit was not liable to attachment. That objection has, however, been overruled by the Court below.

It has been pointed out by the learned Government Advocate that under S. 2, Provident Funds Act, 1925, a compulsory deposit is not

"until the happening of some specified contingency, repayable on demand otherwise than for the purpose of the payment of premia &c."

and under S. 3 (1) of the same Act a compulsory deposit

"shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any civil, revenue or criminal Court in respect of any debt or liability incurred by the subscriber or depositor . . . . . ."

Under Cl.(k) of S. 60, Civil P.C., again "all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment"

are specifically exempted from attachment.

Five cases have been cited to support the contention that the compulsory deposit is not liable to attachment. In the cases of *Veerchand Nowla* v. *B. B. & C. I. Ry. Co.* (1), *C. D. M. Hindley* v. *Joynarain Marwari* (2), *Secy. of State* v. *Raj Kumar Mukherjee* (3), the attachment was disallowed. These three cases have been distinguished from the present one by the Judge of the Court below on the ground that the Provident Fund concerned was a Railway Provident Fund and was not the General Provident Fund. It is argued here on behalf of the decree-holder that there is a special rule of the General Provident Fund which renders a compulsory deposit in that Fund liable to attachment. But it may be said here that these three decisions are by no means without value in the present case, for they show that the sanctity attached by the Act to compulsory deposits as defined in the Act does not cease with the retirement of the contributor, or even at his death. The decisions relate to the period previous to 1925 which is the year of the current Act. But this is not a matter of any importance, as there has been no change in the Act of 1925 which affects any of the considerations in the present case.

Of the two other decisions that have been referred to in argument the lower Court has mentioned the case of *Devi Prasad* v. *Secy. of State* (4) but has re-

(1) [1905] 29 Bom. 259=6 Bom. L. R. 921.
(2) [1919] 46 Cal. 962=54 I. C. 439=24 C. W. N. 288.
(3) A. I. R. 1923 Cal. 585=50 Cal. 347.
(4) A. I. R. 1924 All. 68=45 All. 554.

fused to follow it on the ground that there is nothing in the published report to show whether the deposits concerned in that case were governed by the General Provident Fund Rules or by some other rules. I have sent for the paper book in the case and find that the contributor concerned was a clerk in the Accountant General's Office and that he had been a subscriber to the General Provident Fund. If this fact had been known to the Judge he would have been bound to follow that decision. The *Patna* case undoubtedly refers to a contributor to the General Provident Fund. It was suggested by Mr. Girdhari Lal Agarwala on behalf of the decree-holder that it may have been a case in which the contributor was still in service. From the fact, however, that the judgment mentions that the contributor was a nazir in the civil Court, and that R. 10 of the rules regulating the General Provident Fund was discussed and criticised, it is apparent that the contributor had retired, for R. 10 relates to "withdrawals on retirement."

This brings me to R. 10 on which the decree-holder's whole case is based. That rule is to the following effect:

"The amount which accumulates to the credit of a subscriber in permanent employ shall, when he quits the service, become his property and shall be handed over to him unless the Accounts Officer has received notice of an attachment, assignment or encumbrance affecting the disposal of the amount or any portion of it. Should such notice have been received the Accounts Officer shall hand over to the subscriber only that portion of the amount which is not affected by the attachment, assignment or encumbrance and shall obtain the orders of the Government of India in the Finance Department as administrators of the Fund regarding the disposal of the balance."

It is argued that this rule legalises the attachment of the amount which accumulates in the General Provident Fund in spite of the fact that under S. 3 of the Act compulsory deposits are protected, in spite of Cl. (k) of S. 60, Civil P. C., and in spite of the decisions of the Courts which have been already quoted to show that this protection extends to the period after the retirement of the contributor and even after his death. The effect of the rule is not altogether clear. The argument is that according to it the compulsory deposit becomes automatically the property of the contributor on his retirement and that it is payable on demand. The rule, however, provides that the Accounts Officer shall not hand it over if notice has been received of attachment, assignment or encumbrance until the orders of the administrators of the Fund have been received. Clearly then the deposit does not become absolutely the property of the contributor on his retirement, nor is there any express provision by which deposit is rendered liable to attachment. The utmost that can be said for the decree-holder is that the rule does contemplate that a notice of attachment may be received, and that it may be possible to infer from this that such a notice would be a legal notice. The lower Court has requested the Pay and Accounts Officer to

"comply with R. 10, General Provident Fund Rules and send the amount of deposits Rs. 450 here."

But the rule does not authorize the Accounts Officer to comply with a notice of attachment or to send the amount to the attaching Court, but merely to obtain the orders of the administrators of the Fund. The rule in short appears to be merely a rule of procedure directing the Accounts Officer how to proceed on receipt of a notice of attachment. It does not by its terms legalize a notice of attachment. Even if the express intention of the rule was to legalize an attachment it is certainly not clear to me that the framers of the rule had any authority to override the provisions of the Act. Presumably the rules are framed by the Government of India, but it does not appear to me that they have statutory authority. It has been argued that statutory authority to these rules has been given by sub-S. (4), S. 96-B, Government of India Act. That sub-section confirms:

"all rules or other provisions for operation at the time of the passing of the Government of India Act, 1919 whether made by the Secretary of State in Council or by any other authority relating to the civil service of the Crown in India."

But it is certainly open to question whether this expression is sufficiently wide to cover rules regulating the General Provident Fund. I am decidedly of opinion that it is not, but it is not necessary for me to decide the point here because as I have already said the rule itself does not appear to me expressly to authorize the attachment of these com-

pulsory deposits or to revoke any statutory provision relating to them.

I consider therefore I am justified in following the authority of the cases reported in *Devi Prasad* v. *Secy. of State* (4) and *Jagannath Thirani* v. *Tara Prasanna Ganguli* (5) and holding that the deposit in question is not liable to attachment. I therefore allow the application with costs, and set aside the order of the Court below directing the deposits to be attached.

S.N./R.K. *Order set aside.*

(5) A. I. R. 1924 Pat. 524=3 Pat. 74.

A. I. R. 1929 Allahabad 419 (1)

SULAIMAN AND KENDALL, JJ.

Mauji and *another*—Appellants.

v.

Bhagole and *another*—Respondents.

Second Appeal No. 670 of 1927, Decided on 6th March 1929, against decree of Dist. Judge, Jhansi, D/- 5th January 1927.

Agra Pre-emption Act, S. 12 (3) — Vendor Hindu widow — Pre-emptor claiming preference by relationship must not only show that he is related to vendor but also that they have common ancestor.

When property in the hands of a Hindu widow is sold by her and both the pre-emptors are cosharers, one cannot be preferred to the other because he is related to the husband of the widow, for the pre-emptor, claiming preference by relationship with the vendor, must not only show that he is related to the vendor but must also show that they are descended from a common ancestor : *A. I. R.* 1926 *All.* 216, *Ref.* ; *S. A. No.* 1632 *of* 1924, *Foll.*

[P 419 C 2]

M. H. Faruqi—for Appellants.

K. O. Carleton and *Krishna Murari Lal*—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit for pre-emption. The pedigree is set forth in the plaint. The plaintiffs are the grandsons of Phul Singh, another grandson of whom was Jugal Kishore who is dead. The vendor is Mt. Sardar his widow. Both parties are cosharers in the village, but the plaintiffs claim preference on account of their relationship with Mt. Sardar. The lower appellate Court has held that though the vendor Mt. Sardar was not related by blood to the plaintiffs-respondents, the latter have a preferential claim as against the defendants-appellants. The property held by the widow is a Hindu widow's estate, and the learned Judge has thought that the plaintiffs being related to her husband have preference. He has conceded that if the property transferred by her were her self-acquired property or her stridhan the plaintiffs would not have come within the meaning of S. 12, sub-Cl. (3). Now, in order to succeed the plaintiffs must not only show that they are related to the vendor but must also show that they are descended from a common ancestor. The learned Judge has overlooked this portion of sub-Cl. (3). Although the plaintiffs are in a way related to Mt. Sardar, namely by marriage, they have not a common ancestor with her. It therefore seems to us that the plaintiffs do not come within the meaning of S. 12, sub-Cl. (3), inasmuch as they have not an ancestor common with the vendor.

Our attention has been drawn to the case of *Jagrup Singh* v. *Indrasan Pande* (1) where the plaintiff though related to the husband of one of the vendors was given a decree. The judgment does not show that this point was specifically raised before the learned Judges, and it seems that the respondent did not argue that the plaintiffs did not come within S. 12, sub-Cl. (3), on that account. In an unreported case of *Manrup Singh* v. *Mahadeo Kuar* (2) by another Bench, of which one of us was a member, it was held that descent from a common ancestor of the vendor's husband was not the same thing as that from a common ancestor of the vendor, and that relationship by marriage with the vendor did not entitle the plaintiff to preference under sub-Cl. (3). We agree with the latter pronouncement. In our opinion the plaintiffs have no preference over the defendants. The appeal is accordingly allowed, the decrees of the Courts below are set aside, and the suit is dismissed with costs in all Courts including in this Court-fees on the higher scale.

S.N./R.K. *Appeal allowed.*

(1) A.I.R. 1926 All. 216=48 All. 347.

(2) S. A. No. 1632 of 1924, Decided on 5th March 1925.

A. I. R. 1929 Allahabad 419 (2)

ASHWORTH, J.

Jaideo Singh and *another*—Plaintiffs—Appellants.

v.

Munshi Dhoom Singh and *others*—Defendants—Respondents.

Second Appeal No. 140 of 1923, Decided on 20th February 1929.

(a) Hindu Law—Widow—Original owner ceasing to be in possession—Widow and reversioners not taking steps to recover possession—Reversioners will be barred by limitation—Adverse possession.

Where the original owner has ceased to be in possession and his widow and his reversioners successively take no steps to recover possession within the period of limitation, the reversioners will be barred by limitation.

[P 420 C 2]

(b) Civil P. C., S. 100—Finding as to execution is one of fact.

Lower appellate Court's finding that the documents were properly executed is a finding of fact.

[P 420 C 2]

S. B. Johari and *Badari Narain*—for Appellants.

N. P. Asthana—for Respondents.

Judgment.—These four appeals arise out of two suits brought by Jaideo Singh and Kunj Behari against Dhum Singh and others for partition of a certain house in Bareilly. It is common ground that the two plaintiffs are the grandson and son respectively of one Bahadur Singh, who was the uncle of one Dilsukh Rai. It is also common ground that the house in question was at one time the joint property of Champat Rai and Dilsukh Rai, although it was a question whether Dilsukh Rai represented himself alone or the whole branch of the family to which he belonged. The suit was resisted by members of Dilsukh Rai's branch and others, but one of them Nityanand, the son of Dilsukh Rai, admitted the claim for partition, provided that he was given his father's share in the house, which he said was one half. The trial Court decreed the suit.

On appeal the District Judge found that although the plaintiff's branch of the family or a single member of that branch had been joint with Champat Rai as owners of the house (see the pedigree in the trial Court's judgment), yet that more than 12 years before the date of suit Champat Rai had ceased to have possession, and consequently the plaintiffs claiming as heirs of Champat Rai were barred by limitation.

In this second appeal this finding of the lower appellate Court is impugned on the following grounds: Firstly, when Champat Rai died, his widow Mt. Jamna Kunwar came into possession, and the piaintiffs could not sue as reversioners of Champat Rai during her lifetime; nor could limitation run against them during that lifetime. As regards this plea, the lower appellate Court has found that limitation began to run in the lifetime of Champat Rai, and secondly it would not be interrupted by Champat Rai's death and the right of the widow to possession. This appears to me to be correct. Where the original owner has ceased to be in possession and his widow and his reversioners successively take no steps to recover possession, the reversioners will be barred by limitation. The widow would represent the estate for the purpose of taking action, and the reversioners cannot set up the fact of her being a widow as saving limitation.

The next plea is that the lower appellate Court should not have accepted certain documents as proving a partition between Champat Rai and Dilsukh Rai, because the Munsif regarded these documents as suspicious. The appellant is not entitled to question in appeal the fact of the lower appellate Court finding that the documents were properly executed. This is a finding of fact. No misdirection on the part of the lower appellate Court has been shown to me, nor does it appear from the judgment.

The appeal has chiefly been argued on a ground not taken in the memorandum of appeal. It is this. A remark of the District Judge is relied on, namely that "I also find that the partition relied on by the appellants did not in fact take place."

A careful reading of the judgment will show that the insertion of the words "not" was a mere clerical error. The appeal was allowed by the District Judge. If, therefore, the appellants' case rested on an alleged partition, it would be impossible that the appeal would have been allowed if the Judge had meant to find against that partition. Again, it is said that the Judge has in one part of his judgment propounded the question whether the partition was ever given effect to, and it is alleged that that question was never answered. This again is to misread the judgment. The Judge has clearly stated that in a previous suit brought by Kunj Bihari plaintiff as regards the estate left by Champat Rai he never claimed any interest in this house. Again we find:

"It is clear that even in Champat Rai's time he ceased to have any interest in the house and the heirs of Sheo Sahai remained in exclusive possession thereof."

These remarks clearly show that the Judge held the partition to have been

given effect to. The partition then showed that the suit for partition now was unsustainable. Further, the Judge seems to have considered whether the suit as a suit for possession could be maintained. He held in effect that he believed certain evidence whereby Champat Rai after the partition had removed the materials on his apportioned share of the land and had taken a sum of money from Dilsukh Rai in exchange for the site awarded to him. From that date the Judge held that Champat Rai ceased to be in possession, and consequently the suit was barred by limitation. Of course on this finding the Judge might further have held that Champat Rai from this date ceased to have any title to the property and perhaps his remark :

" it is clear from that day Champat Rai ceased to have any interest in the property "

was intended to mean this. Any way it is above all question that the District Judge did find facts showing that Champat Rai ceased to have possession from a date before his death, and on this finding he was entitled to hold the suit barred by limitation.

I, therefore, find there is no force in this appeal. It is based partly on a slip of the pen in the judgment and partly on the judgment not having been as clearly and definitely expressed as was desirable.

I now come to the two appeals of Nityanand. It would appear prima facie on the finding in the other two appeals of the District Judge that no decree could be given against Nityanand. The reason why the District Judge has given a decree against him is because he found that Nityanand admitted that the plaintiffs were entitled as heirs of Champat Rai to joint ownership of the house with himself, but he demanded that he should be given his half share. It is said by his counsel that his meaning in his written statement was that he was the sole heir of Dilsukh Rai, the joint owner with Champat Rai, and that he would be satisfied if he retained Dilsukh Rai's half-share without any one sharing in it. Now it is clear that where a defendant sets up a plea which will give him all the interest in property which he is actually enjoying, that plea cannot be construed as an admission that he is entitled to something less. It may be that the arguments or facts on which he based his claim are wrong, but if his claim is rejected, certain portions of the statement on which it is based cannot be accepted and the rest disregarded. The lower Court having found that the suit was barred by limitation could not use Nityanand's written statement to avoid that conclusion, or decree the suit against Nityanand to a greater extent than Nityanand was willing to confess judgment. In other words, it is not a confession of judgment for one defendant among many to say :

" I do not care what the plaintiff gets provided that he gets nothing from me. "

For the above reasons I dismiss the Appeals Nos. 139 and 140 with costs and allow the Appeals Nos. 2296 and 2297 with costs throughout.

S.N./R.K. *Order accordingly.*

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* A. I. R. 1929 Allahabad 421

BOYS AND ASHWORTH, JJ.

Kalika Prasad—Plaintiff—Appellant.

v.

Ajudhia Prasad—Defendant—Respondent.

Second Appeal No. 399 of 1926, Decided on 19th February 1929, against decree of Dist. Judge, Jhansi, D/- 4th December 1925.

(a) Mortgagor and mortgagee—(*Per Boys, J.*) Mortgage with condition as to foreclosure—Suit by mortgagee—Trial Court striking out condition as to foreclosure and holding that thereupon whole mortgage was destroyed—Appellate Court holding that in spite of striking out that condition mortgage subsisted and remanding suit—Effect of remand order is to reduce mortgage to simple mortgage (*Ashworth, J., contra*) **— Transfer of Property Act S. 58.**

Per Boys, J.—A mortgage was executed between parties which had a condition as to foreclosure if the mortgage money was not paid by the date agreed. In the mortgagee's suit to enforce the mortgage the trial Court held that the condition as to foreclosure must be struck out and that on its being struck out there would remain no mortgage at all. On appeal the appellate Court held that the effect of striking the condition was not to destroy the mortgage wholly but there still remained relation of mortgagor and mortgagee between parties.

Held : that the effect of the order of remand was to reduce the mortgage to a simple mortgage. (*Ashworth, J., contra*). [P 426 C 1, 2]

*** (b) Bundelkhand Alienation of Land Act (2 of 1903), Ss. 9 (1), 10 and 16—Application of Ss. 10 and 16 being restricted to those mortgages which are covered by Act, they cannot affect simple mortgage between mem-**

bers of same tribe which is excluded from S. 9 (1).

Simple mortgage executed between members of the same tribe does not come within the scope of S. 9 (1) and as Ss. 10 and 16 of the Act cover only those mortgages which come within the general scope of the Act, they cannot affect such a simple mortgage : *A. I. R.* 1926 *All.* 617 (*F.B.*), *not Appr. but Foll.* [P 424 C 1]

(c) Bundelkhand Alienation of Land Act (2 of 1903), S. 16—Scope.

Per Boys, J.—S. 16 is of retrospective effect. [P 425 C 1]

(d) Interpretation of Statutes—Section.

Per Boys, J.—Any section in any Act must be interpreted in the light of the rest of the Act. [P 425 C 1]

*** (e) Civil P. C., S. 151—To prevent obvious injustice High Court can refuse to be bound by remand order of Subordinate Court though neither party can question it—Civil P. C., S. 105 (2).**

The High Court can, under its inherent powers, to prevent an obvious injustice, refuse to be bound by a finding in a remand order of a Subordinate Court even though neither party can question it, not having appealed from the remand order. [P 428 C 2]

(f) Bundelkhand Alienation of Land Act (2 of 1903), S. 4—Scope.

Per Ashworth, J.—An order under S. 4 allowing Local Government to determine what persons are to be deemed to be agriculturists must be deemed to have retrospective effect. [P 427 C 2 P 428 C 1]

P. L. Banerji—for Appellant.

N. C. Vaish—for Respondent.

Boys, J.—This is a plaintiff's appeal arising out of a suit on a mortgage, the plaintiff mortgagee asking for his money or for foreclosure. The mortgage has, however, under circumstances which will have to be set forth, been held to be a simple mortgage and this fact will have an important bearing on the applicability of the Full Bench decision to which reference will have to be made later. The history of the proceedings, which is important for the purposes of the present appeal, is as follows :

In 1903—(Local) Act 2 of 1903, the Bundelkhand Land Alienation Act, was passed. By S. 1 (3) it was declared that the Act should come into force on a date to be declared by notification.

1st July 1903—By notification the Act came into force on this date.

27th July 1912—Date of the mortgage in suit. On this date Ajudhya Prasad, defendant-respondent, executed a mortgage in favour of Kalika Prasad, the plaintiff-appellant, for Rs 160. It provided for interest at Re. 1-4-0 per mensem payable yearly, and the principal sum was to be repaid with any accumulated interest on 15th June 1916, with a condition as to foreclosure if the money was not paid by that date.

11th October 1913—By S. 4 of the Act it was provided that by notification the Government might determine what bodies of persons are to be deemed agricultural tribes for the purposes of the Act ; and on this date both the mortgagor and the mortgagee were declared to be agriculturists within the meaning of the Act. Prior to that date they had not been "agriculturists."

16th Jauuary 1923—On this date the mortgagee filed a suit asking for the money then due, Rs. 699-7-0 or for foreclosure. The defendant relied upon S. 10, Bundelkhand Land Alienation Act. S. 10 provides that :

"in any mortgage of land made after the commencement of this Act, any condition which is intended to operate by way of conditional sale shall be null and void."

12th February 1923—The trial Court held that the condition as to foreclosure must be struck out, and that if that was struck out there remained no legal relation of mortgagor and mortgagee between the parties, and dismissed the suit, since, if the bond was treated as a simple money bond, the remedy was barred by limitation.

28th July 1923—The mortgagee having appealed, the District Judge held that the effect of striking out the condition was not to destroy wholly the relationship of mortgagor and mortgagee, but that there remained a mortgage. He held further that the Munsif had misunderstood the effect of S. 9 (the Munsif had thought it only applicable before any suit was instituted), and finally remanded the case to the learned Munsif :

"for rehearing and deciding the questions not yet decided. If he finds that anything is due he will determine what is due ..... and then send the case to the Collector."

12th September 1923—The trial Court found Rs. 160, principal and Rs. 539-7-0 interest due and :

"referred the matter to the Collector under S. 9 (3), Bundelkhand Land Alienation Act for the exercise of the powers under S. 9 (1) of the said Act."

14th November 1923—The Collector held S. 9 not applicable and refused to act under it on the ground that the mortgagor was not an agriculturist, and further held that even if both parties be regarded

as agriculturists he need not, in view of an order of the Board, take any action.

The Commissioner held that the question whether the parties were agriculturists was res judicata by the civil Court and cancelled the Collector's refusal to take action.

16th April 1925—On appeal the Board reversed the decision of the Commissioner and upheld that of the Collector that S. 9 (1) was not applicable the mortgagor not having been an agriculturist at the time when he made the mortgage and that there was no provision in the Act for the case where, though the mortgage was made after the commencement of the Act, the Act had not been applied to the mortgagor at the date of the mortgage, i. e. the mortgage was made between the commencement of the Act and the date of the notiflcation applying the Act to the mortgagor. The Board further directed that a copy of its order should be sent to the trial Court, the Munsif.

On 12th September 1925—The learned Munsif proceeded to pass a preliminary decree for sale of the property under O. 34, R. 4 the decree to be framed on the basis of the order of the Munsif's proceeding dated 12th September 1923, in which it had been found that Rs. 699-7-0 was due on the mortgage.

On 4th December 1925, the lower appellate Court held that :

"the matter is decided by S. 16, Bundelkhand Land Alienation Act, under which no land belonging to a member of an agricultural tribe can be sold in execution of any decree or order of a civil Court."

The appeal was thereupon allowed and the suit dismissed with all costs against the plaintiff.

The plaintiff appeals to this Court and raises two pleas. It is contended that even upon the view taken by the lower appellate Court the mortgagee was entitled at least to a decree for sale even though he might not be able to execute that decree. He meets the principle that the Court will not give what must inevitably be an infructuous decree by the suggestion that if he is given a decree it is possible that the judgment-debtor may be induced to pay up, even though the decree cannot be executed by sale. This is not I think a contention which we should allow ; but the real contest between the parties has been concerned with the two related questions :

(a) whether a mortgage executed in the circumstances of the present case comes within S. 9 of the Act, and (b) if it does not come within S. 9, then is the mortgagee entitled to stand outside the Act altogether or does S. 16 stand in his way? While these two questions are intimately related they must be dealt with separately.

I have set out at the commencement of this judgment with what might seem at first sight unnecessary detail, the chequered history of this case, but I have deemed it advisable to do so because this case does not stand alone, and is only illustrative of the trouble and expense that is caused to individuals and to the public by the present state of the statutory law and of judicial decisions, whether of the civil or revenue Courts, and of the orders of the Board of Revenue taken together.

I will consider first the question whether the present mortgage can be held to fall within the purview of S. 9. If it was open to me to hold that it does come within the purview of S. 9, I might feel compelled to so hold, notwithistanding the fact that the Board of Revenue has refused to allow action to be taken under S. 9.

There are two considerations which must be weighed in the circumstances of this case in determining the applicability of S. 9. The first of these, as we proceed through the section, is whether the present mortgage can be said to come within the phrase in S. 9 :

"a member of an agricultural tribe makes a mortgage of his land."

For the mortgagor it may be contended with some force that in this case no member of an agricultural tribe made the mortgage, that he, the mortgagor, was not a member of an agricultural tribe at the time he made the mortgage, and this view was taken by the Collector and the Board of Revenue. On the other hand it may be contended on behalf of the mortgagee that we should give effect to the intention of the Act and that we should consider the words "a member of an agricultural tribe makes a mortgage" as including the case where a non-member of an agricultural tribe makes a mortgage and subsequently before the mortgage comes into Court, is declared to be a member of an agricultural tribe within the Act. It is not, however, necessary in view of the next consideration to answer

this question as it appears to me that the second consideration is conclusive.

I proceed to state that second consideration. In *Ram Sahai* v. *Debi Din* (1) a Full Bench of this Court had to consider the applicability of S. 9 to a simple mortgage executed after the Act between members of the same tribe. Two learned Judges, Walsh, J., and Daniels, J., placed an interpretation on the next following words :—"in any manner or form not permitted by or under this Act" in accordance with which they held that a simple mortgage executed between members of the same tribe did not come within S. 9 (1) of the Act. I myself was the third Judge in that Full Bench and I dissented from the view expressed by my brothers and would have held that such a mortgage was not excluded from S. 9 by the phrase "in any manner or form not permitted by or under this Act," but there can of course be no question but that I am bound to accept absolutely the decision oi the majority. The mortgage with which we were there concerned was clearly not excluded from S. 9 (1) by the words " a member of an agriculturist tribe makes a mortgage" upon either the narrow or the wide interpretation. But as to the present case, even if the wider interpretation be put on those words and the mortgage passes that test, there remains the fact that the mortgage has been held to be a simple mortgage and being, ex hypothesi, made between members of an agricultural tribe, it is in these essentials exactly on the same footing as the mortgage with which we had to deal in the Full Bench and must be held to be not within S. 9. It therefore is immaterial to consider whether or not it is also excluded by the words "a member of an agricultural tribe makes a mortgage."

Before leaving this point I may note that counsel for the mortgagor respondent contended that by the order of remand of the District Judge to the trial Court, after he had held that striking out the condition from the mortgage did not destroy the mortgage altogether but reduced it to a simple mortgage, the question of the applicability of S. 9 to this particular mortgage at any rate was concluded there having been no appeal from that order of remand. The contention is apparently that the District Judge's direction, that the Munsif after determining the amount due should send the case to the Collector under S. 9, was a conclusive finding that S. 9 was applicable. The result of this would be that we could not discuss whether S. 9 was applicable, but would be bound to hold it applicable in the present case ; and as the Board of Revenue has refused to hold it applicable the mortgagor would be successful in depriving the mortgagee of all remedy. I am not prepared to hold, however, that there was any issue raised at all before the learned District Judge as to whether S. 9 was applicable or not. The Munsif had applied the Act in so far that he had applied S. 10. The only question dealt with by the Judge was whether the result arrived at by the Munsif after applying S. 10 was correct or not, and the learned District Judge held that it was not. Incidentally he directed the learned Munsif to proceed under S. 9, but it was not a necessary part of his order, and though the mortgagee in his grounds of appeal to the District Judge had referred to the applicability of S. 10, there is nothing whatever to show that anybody at all, either the parties or the Judge, considered or discussed the issue whether the Act was applicable at all. I thought it desirable to mention this as the point was argued. I do not think that we are debarred for this reason from considering the applicability of S. 9 but I have already held that whatever may be my own opinion I am debarred by the decision of the majority of the Full Bench from applying S. 9.

I turn then to the second question whether, assuming the mortgage to be outside S. 9 altogether S. 16 can properly be applied to deprive the mortgagee of his right to sell. The scope of S. 16 was discussed in the Full Bench case, *Ram Sahai* v. *Debi Din* (1) to which I have just referred. Walsh, J, referred to S. 16 in a few lines which will be found at the bottom of p. 11 and the top of p. 12 of the report and Daniels, J., p. 13. I myself dealt with S. 16 on the hypothesis that the opinion of the majority of the Full Bench must result in holding that the mortgage in question did not come within S. 9, though it might be a view with which I was not personally in agreement and I gave my reasons for holding that, on the hypothesis that the mortgage did not come within S. 9, S. 16 should not be interpreted to deprive the

(1) A.I.R. 1926 All. 617=49 All. 8 (F.B.).

mortgagee of his right to sell. The order of the Court, which will be found at p. 25, only concerned the scope of S. 9. The scope of S. 16 is still, therefore, a question open to us. I have heard no reason for holding the view which I expressed in the Full Bench case to be mistaken.

As to the classes of mortgage to which it is applicable S. 16 is clearly of retrospective effect, and if the present mortgage comes within the other provisions of the Act there can be no question but that S. 16 will apply at whatever date the mortgage was made before or after the commencement of the Act. But S. 16 must be interpreted, like any section in any Act, in the light of the rest of the Act. The question is, therefore, whether we ought to apply it to all mortgages or whether, upon a consideration of the scheme and intention of the Act as deduced from the Act itself, we are justified in limiting its application, whether retrospective or otherwise, to those mortgages only which are found to be within the general scope of that Act.

It is unnecessary for me to repeat the reasons which I have already recorded in my judgment in that Full Bench. As I appreciate the scheme of the Act and its intention as evidenced by the Act itself, we find first in the opening words of S. 6 what I may call the personal considerations with which the Act is concerned, and in the remainder of S. 6 and S. 9 we find the types of mortgage with which the Act is concerned, and then we have the provision in S. 16. It appears to me that the true interpretation of these sections is that the legislature set itself to consider:

> "Who are the types of persons and what are the types of mortgages which we desire to control, and what are the limitations that we will put on the rights of the mortgagee in those cases."

Having laid down the forms which those mortgages must take or the forms into which they must be transformed and having thus secured to the mortgagee the rights which he was to have, they proceeded to deprive the mortgagee by S. 16 of the right to bring to sale. I would state this in other words by a simple illustration. The legislature considered the transactions which it desired to control, let us say four types of mortgage, A, B, C and D and having determined what rights the mortgagee was to have in the cases of those mortgages, it proceeded to say:

> "Having given the mortgagee the remedies we think he should have, we will now (by S. 16) deprive him of his right to sell."

Whether the legislature, in omitting some mortgages from the provisions which it enacted giving in the case of certain mortgages other remedies in place of the right to sell, omitted them by design or accident, one thing at least absolutely certain is that it did not intend by S. 16 to deprive any mortgagee of his normal legal rights without giving him what it considered to be an equitable equivalent. It is impossible to conceive that S. 16 was intended to apply to cases where the legislature was not giving the mortgagee any other remedies. If, therefore, by intention or by accident a type of mortgage, E or F was omitted from the clauses giving the mortgagee other exceptional remedies I think we are wholly justified by the recognized canons of interpretation which I have discussed in my judgment in the Full Bench case in refusing to apply S. 16 and that we should be wrong in applying it. In his judgment in the Full Bench case Walsh, J., said:

> "it is a mortgage which is not within the mischief prohibited by S. 6. The policy of the Act is to keep out what may be called outsiders,"

if, as by the decision of the Full Bench I am compelled to hold, the mortgage does not come within the mischief with which the Act deals I feel not merely inclined but compelled by the relevant canons of interpretation to hold that S. 16 is not applicable.

In conclusion I may be permitted to emphasise that there is no conflict between the two views which I hold. The guiding principle underlying both is the same that S. 16 can only be applied where there is a mischief which comes within the Act. If the mortgage comes within Ss. 6 and 9 and is thereby declared to be within the mischief contemplated by the Act and S 16 is not applicable. If the mortgage does not come within Ss. 6 and 9, it has not been declared to be within the Act and the mischief contemplated by the Act and S.16 is not applicable. The first condition is untenable according to the majority decision of the Full Bench; the second alone remains. Having arrived then at the conclusions that, in obedience

to the decision of the majority of the Full Bench, I must hold that this mortgage, deprived as it at present stands of its foreclosure clause by the remand order of the District Judge purporting to be passed under S. 10 of the Act which order was allowed by the parties to become final, does not come within the Act and that S. 16 does not constitute any obstacle, it would remain to consider to what, if any, relief the decree-holder was entitled.

The remand order of the District Judge while it struck out the foreclosure clause, held that there was a subsisting mortgage and that could only mean a simple mortgage. On such a simple mortgage the Act not being applicable, the mortgagee would be entitled to a decree for sale, and, if the matter ended there, I would give him such a decree. I appreciate that as a result of such a sale the property might pass into the hands of an outsider, but the mortgage cannot be held to be outside the mischief of the Act so as to deprive the mortgagee of his remedy under S. 9 and to be inside the Act so as to deprive him of his normal remedy and if the mortgage must be held to be outside the Act in obedience to the majority in the Full Bench case it must be held outside the Act altogether.

But the matter does not end here. Exactly the same reasoning which applies to exclude S. 16 from operation to a mortgage not within the scope of the mischief aimed at by the Act applies to exclude the operation of S. 10.

The basis of the Full Bench majority decision was that "the policy of the Act is to keep out, what may be called outsiders." The giving effect to this mortgage by granting the mortgagee the foreclosure to which he was entitled under its terms would not have had the effect of admitting an outsider, the mortgage as it stood was outside the Act, and that being so, S. 10 was no more operative than S. 16 in the case of a simple mortgage.

It is true that it may be said that both parties rested under the remand order exercising the foreclosure clause, but that does not preclude us from exercising the powers reserved to us by S. 151 to do justice. I am aware that those powers should not be lightly exercised where a litigant had a remedy and did not avail himself of it, but the circumstances of this case and the manner in which the subject has been dealt with by the legislature and the Courts are such that it would be grossly unjust to penalise a litigant for his ignorance of what view the Courts might take and for not pursuing what might well have seemed to him and his advisers a fruitless course involving further and useless costs.

The result is that I would be prepared to give the mortgagee a decree for sale on the basis that his mortgage as it at present stands is a simple mortgage, or to restore the foreclosure clause and give him a decree for foreclosure.

In view of the fact that as I understand my learned brother is not prepared to take the view that the result of the District Judge's order of remand was as between the parties to establish a simple mortgage, and in view of the facts that the same reasoning applies to exclude the operation of both Ss. 16 and 10 and that a decree for foreclosure will exclude the possibility of admitting an outsider, I am prepared to restore the foreclosure clause and give the appellant a decree for foreclosure if the amount due upon the mortgage is not paid before a date to be fixed.

Ashworth, J.—This second appeal arises out of a suit brought by the plaintiff-appellant for foreclosure on a mortgage dated 27th June 1912. The mortgage was a mortgage by conditional sale. The plaintiff sued for foreclosure. Fourteen months after the mortgage was executed Government issued a notification under S. 4, Bundelkhand Land Alienation Act, U. P. 2 of 1903 making the tribe to which both parties to the mortgage belonged an agricultural tribe for the purposes of the Bundelkhand Land Alienation Act.

Section 10 of that Act is as follows :

"In any mortgage of land made after the commencement of this Act any condition which is intended to operate by way of conditional sale shall be null and void."

The Munsif dismissed the suit on the ground that under this section the condition of conditional sale being eliminated there remained no mortgage. On appeal to the District Judge it was held by him that although the plaintiff could not sue on the mortgage as it stood by reason of S. 10, nevertheless he might get the terms of the mortgage revised by the Collector under S. 9 (1), Alienation

Act and remanded the case to the Munsif in order that the latter might proceed under S. 9 (3), that is to say, might refer the case for action by the Collector under S. 9 (1). The provisions of S. 9 of the Act are as follows :

"(1) If after the commencement of this Act a member of an agricultural tribe makes a mortgage of his land in any manner or form not permitted by or under this Act, the Collector shall have authority to revise and alter the terms of the mortgage so as to bring it into accordance with such form of mortgage permitted by or under this Act as the mortgagee appears to him to be equitably entitled to claim.

(2) If a member of an agricultural tribe has before the commencement of this Act made a mortgage of his land in which there is a condition intended to operate by way of conditional sale the Collector shall have authority to put the mortgagee to his election whether he will agree to the said condition being struck out, or to accept, in lieu of the said mortgage, a mortgage in form (a) as provided by S. 6 which shall be made for such period not exceeding the period permitted by the said section, and for such sum of money as the Collector considers to be equitable.

(3) If a suit is instituted in any civil Court on a mortgage to which sub-S. (1) applies, or if a suit for the enforcement of a condition intended to operate by way of conditional sale in a mortgage made before the commencement of this Act, is instituted or is pending at the commencement of the Act, in any civil Court, against a member of an agricultural tribe or if any appeal in any such suit is instituted, or is pending at the commencement of this Act in any civil Court other than the High Court, the Court shall if it finds that the mortgage is enforceable or that the mortgagee is entitled to a decree absolute for foreclosure, refer the case to the Collector with a view to the exercise of the power conferred by sub-Ss. (1) and (2) respectively."

Accordingly the Munsif referred the case to the Collector, but the Collector refused to take any action under S. 9 on the ground that it did not apply, the mortgagor not being a member of an agricultural tribe at the date when the mortgage was made. This view was upheld by the Board of Revenue. The appellant then came back to the Munsif who proceeded to grant a decree for sale, I cannot discover what justification the Munsif held to exist for the passing of such an order.

(a) On appeal to the District Judge it was objected that the passing of such a decree for sale on a mortgage by conditional sale was contrary to S. 67 (a), T. P. Act.

(b) that S. 16 (1), Alienation Act, forbade the sale of any land belonging to a member of an agricultural tribe.

That section is as follows :

"No land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any civil or revenue Court, made after the commencement of the Act."

The District Judge did not consider the first plea, but according to the second plea held that S. 16 (1) prevented a decree for sale being operative 'and therefore no such decree should have been granted.

In this appeal the position taken up is that the District Judge by his order of remand which was not appealed against, conclusively established that the plaintiff must get a decree on the basis of his mortgage. As S. (16) (1) prevented him getting a foreclosure decree and as the refusal of the Collector to proceed under S. 9 prevented him getting his mortgage altered and revised he must be deemed to have a remedy by sale of the mortgaged property.

In reply it is urged :

(a) that the Collector was right in holding that S. 9 would not apply on the ground that that section would not apply to a mortgagor who was made a member of an agricultural tribe at a date subsequent to the mortgage, and that in any case the Collector's order, upheld as it was by the Board is final and cannot be interfered with by this Court ;

(b) that a decree for sale cannot be passed, because in the first place no such decree can be passed on a mortgage by conditional sale under S. 67 (a), T. P. Act, and secondly if it was passed, it would be inoperative by reason of S. 16 (1). Consequenely the plaintiff has no remedy. His claim for foreclosure is barred by S. 10, his claim for revision of the mortgage by the Collector is barred by the Collector's order and his claim for decree for sale is barred by S. 16 (1) of the Act, and S. 67 (a), T. P. Act.

I hold that the Collector's order was wrong even though upheld by the Board. The Act clearly was designed to have restrospective effect. Reference may be made in particular to S. 9 (2) which allows the Collector to interfere with mortgages executed before the Act came into force. This being so. we must deem that an order under S. 4 of the Ac allowing the Local Government to deter-

mine what persons are to be deemed to be agriculturists must also be deemed to have retrospective effect. Under S. 21, U. P. General Clauses Act 1 of 1904, the Local Government could notify additional tribes as agricultural tribes from time to time.

At the same time it is pleaded in this case that even if the Collector's refusal to apply S. 9 was incorrect if based on the ground that the Government notification did not have retrospective effect it was correct on another ground, namely that both the parties to this mortgage were members of the same agricultural tribe, and it has been ruled by a Full Bench in this Court, namely *Ram Sahai* v. *Debi Din* (1), that S. 9 would not apply to a case of a mortgage by one member of an agricultural trlbe in favour of another. I may remark that in any case this Court cannot disturb the Collector's finding as S. 22, Alienation Act, deprives this Court of jurisdiction in any matter which a Revenue Officer is empowered by this Act to dispose of. This must mean that if a Collector decides that he has no jurisdiction to act under S. 9 (1) and revise a mortgage, this Court cannot question his decision.

I also hold it beyond doubt that the plaintiff cannot get a decree for sale. S. 67 (a) clearly bars such a decree on a mortgage like this. Nor is there anything in the District Judge's remand order (assuming that we cannot go behind it as it was not appealed against) that can be interpreted to mean that the District Judge held the mortgage to be enforceable only as a simple mortgage decree. What the District Judge in effect said was that although the condition for foreclosure could not operate there was still left a mortgage that could be referred to the Collector. It is not, therefore, necessary to consider whether S. 16 (1) would prevent the plaintiff getting a decree for sale.

The only question then is whether the plaintiff can get a decree for foreclosure. Apart from the Full Bench decision in *Ram Sahai* v. *Debi Din* (1), I should hold that he could not, and that his only remedy was revision of the mortgage by the Collector. But that decision by which I am bound (though I agree with the dissentient judgment in that case of Boys, J., and hold it was wrongly decided) takes away that remedy. It held that S. 9 did not refer to a mortgage executed by one agriculturist in favour of another. As it is clear that the legislature could not have intended to deprive a mortgage between two agriculturists of all effect, the logical consequence is that not only S. 9 but no section of the Act applies to such a mortgage. Therefore we must hold S. 10 does not apply.

It is true that the District Judge's remand order held it to apply. That order was not appealed from and under S. 105 (2) the appellant cannot now question its correctness. But I hold that this Court can under its inherent powers, to prevent an obvious injustice, refuse to be bound by a finding in a remand order of a subordinate Court, even though neither party can question it. It would lead to an impossible situation if by S. 105 (2), Civil P. C., a High Court were in an appeal from a decree to be debarred from taking on a law point a different view from that taken by the District Judge in an interlocutory order. S. 151 is wide enough to prevent such an impasse. I would decree the suit with costs throughout and give the plaintiff a decree for foreclosure in the ordinary form, six months being allowed for paying the mortgage money.

S.N./R.K. *Suit decreed.*

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* A. I. R. 1929 Allahabad 428

ASHWORTH, J.

Cheri—Plaintiff—Appellant.

v.

Ram Sewak and *others*—Defendants—Respondents.

Second Appeal No. 1545 of 1927, Decided on 12th March 1929, against decree of Second Sub-Judge, Cawnpore, D/- 12th April 1927.

(a) Specific Relief Act, S. 9—Scope.

A person with established possession can bring a suit on the basis only of prior possession against a person interfering with that possession. [P 429 C 1]

*** (b) Landlord and Tenant—Abadi—Planting of trees by residents in vacant land near their houses is not by itself evidence of their exclusive possession of that land.**

Planting by residents in the abadi of trees on vacant land near their houses cannot by itself be any evidence of the establishment of exclusive possession of the vacant land as against other residents. [P429 C 1]

M. H. Faruqi—for Appellant.

Sailanath Mukerji—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-

appellant for possession of certain land of which his possession has been disturbed by the defendant-respondents and for removal of an earthen boundary (khain) erected by the defendants. Both the lower Courts have dismissed the suit. The Munsif found that the plaintiff had not been in established possession of any but a very small portion of the land claimed, and that the defendants had been in possession of the rest. He found that the real owners were the zamindars, who were no parties to the suit. He found that the disputed khain was an old one and marked the boundary between the land as occupied by the parties. He consequently dismissed the suit. In the appeal the Subordinate Judge treated the case as a case based on title.

In this second appeal the appellant's counsel has rightly pleaded that the Subordinate Judge misunderstood the case and that his judgment is in the circumstances worth nothing. No doubt a person with established possession can bring a suit on the basis only of prior possession against a person interfering with that possession. We have, therefore, to fall back on the findings of the Munsif in order to decide this appeal. The Munsif's findings appear to be based on a proper consideration of the evidence and to be definite. No reason has been shown to me for disagreeing with his decision that the plaintiff's established possession only extended up to the khain or boundary, and it does not even appear to be alleged that the defendants have disturbed the plaintiff's possession up to that point. As to beyond that point the only evidence on which the appellant can rely is that the zamindar said he had planted some trees. This evidence has been disbelieved by the Munsif who held that all the trees were planted by the defendants. Even if it were true that the trees, or any of them, were planted by the plaintiff, it would not prove that the whole area claimed had passed into the exclusive possession of the plaintiff, and nothing short of this would support a plea on the ground of prior possession. Planting by residents in the abadi of trees on vacant land near their houses cannot, in my opinion, be alone any evidence of the establishment of exclusive possession of the vacant land. Where the land belongs to the zamindar, he may well have no objection to the planting of a tree. It will afford shade not only to the person who plants it but to others. Whether the person who plants the tree has a right to the tree is a question of village custom, or, failing, that of the attitude of the zamindar. But as against other residents in the abadi it cannot be deemed to establish exclusive possession.

Although, therefore, the lower appellate Court took a wrong view of the case and misdirected itself, its conclusion which was the conclusion of the trial Court, that the plaintiff had not made out his case appears to me to have been justified. Accordingly I dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 429

BOYS, J.

Sita Ram and *others*—Plaintiffs—Appellants.

v.

Thakur Prasad—Defendant—Respondent.

Second Appeal No. 1453 of 1927, Decided on 1st March 1929, against decree of Small Cause Court Judge, exercising powers of a Sub-Judge, Allahabad, D/- 13th May 1927.

Civil P. C., S. 100—Suit for damages for malicious prosecution—Whether there was reasonable and probable cause is question of fact—If lower Courts after judicially considering evidence find against plaintiff, High Court cannot disturb finding nor can it certify case for Letters Patent Appeal—Letters Patent (Allahabad) Cl. 10.

In a suit for damages for malicious prosecution the question whether the defendant had reasonable and probable cause for instituting criminal proceedings against the plaintiff is a pure question of fact. And where the lower Courts, after judicially considering the evidence, find that the absence of such cause was not proved by the plaintiff the High Court cannot disturb the finding nor is it a fit case to be certified for an appeal under the Letters Patent : *A. I. R.* 1926 *P. C.* 46, *Ref.*; *A. I. R.* 1928 *All.* 337; (1889) *A. W. N.* 189 ; 11 *A. L. J.* 125, *Dist.* [P 430 C 1, 2]

Haidar Mehdi and *S. Zafar Mehdi*—for Appellants.

I. B. Banerji and *R. S. Pandit*—for Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit for malicious prosecution. Mr. Mehdi has said everything that could possibly be said on behalf of the appellants, but when I find that the Privy Council have laid down in four very clear propositions what a plaintiff must prove before he can be success-

ful in a suit for damages for malicious prosecution, I decline to accept the position that I have power to whittle away the force of those propositions by holding that I am entitled to add to them other considerations—those conditions being quoted to me as having been approved by this or the other Judge in some particular set of circumstances. Here the first two propositions laid down by their Lordships of the Privy Council at p. 457 of *Balbhaddar Singh* v. *Budri Sah* (1) are admitted to exist. The third thing which the plaintiff has to prove is:

"That the prosecution was instituted against him without any reasonable and probable cause."

The circumstances of every case and the conditions of the judgment by which the plaintiff was acquitted must vary infinitely in every case. The burden was on the plaintiffs to prove that the prosecution was without any reasonable and probable cause. Both Courts have found that the plaintiffs have failed to establish the absence of such cause. That is in my view a finding of fact and I could not possibly disturb it without a detailed examination and weighing of all the evidence from the time the report was made to the time the original case was decided, and presumably also all the other evidence that was led in this case.

Mr. Mehdi contends that it is a mixed question of law and fact. That is a contention which in one sense may be raised in almost every case. I am unable to hold that there is any question of law or a hint of any question of law arising in the decision of the simple issue:

"Had the defendants reasonable cause or not for bringing the case."

I am unable to allow that there is anything but the question of fact. The only other question that arises is:

"Did the lower Courts exercise their discretion judicially."

It is suggested to me that if the lower Court had held that the addition of two and two make five, though it is on the face of it a question of fact this Court would not refuse to interfere, I entirely agree, though I have met with the contrary experience when I was at the Bar. But the proper answer there is that for a Court to hold that two and two make five means that it has not exercised a judicial discretion. I have read the judgment and I am unable to hold that the Court did not pay a judicial attention to the evidence.

I am referred to the cases *Shubrati* v. *Shamsuddin* (2), *Hira Lal* v. *Bandhu Bhagat* (3) and *Radha Lal* v. *Munnoo* (4), in support of a request that I should certify this judgment as a fit case for appeal under the Letters Patent. In *Shubrati* v. *Shamsuddin* (2) it was held that the Court cannot find its judgment solely on the result of the criminal case in the trial Court and on appeal but must go into the evidence. In the present case both Courts have gone into the evidence. In *Hira Lal* v. *Bandhu Bhagat* (3) and *Radha Lal* v. *Munnoo* (4) it was held that where the charge must have been false to the knowledge of the defendant there could be no question of reasonable and probable cause. In the present case the complaint has not been found to be false to the knowledge of the defendant. All the three cases are irrelevant. The plaintiff tried to prove that no quarrel at all took place, that the complaint was false. They have been disbelieved, or in other words they failed to prove the facts from which the plaintiff was asking the Court to find absence of reasonable and probable cause. The appeal is dismissed with costs, and for the reasons I have given I decline to certify it as a fit case for appeal under the Letters Patent.

S.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1926 P. C. 46=29 O. C. 163=1 Luck. 215 (P. C.).

(2) A. I. R. 1928 All. 337=50 All. 713.
(3) [1889] A. W. N. 189.
(4) [1913] 11 A. L. J. 125=18 I. C. 280.

* A. I. R. 1929 Allahabad 430

ASHWORTH, J.

Suraj Narain—Plaintiff—Appellant.

v.

Kalyan Das — Defendant — Respondent.

Second Appeal No. 1476 of 1927, Decided on 1st March 1929, from a decree of Addl. Sub-Judge, Agra, D/- 10th May 1927.

(a) Easements Act, S. 35 (a)—"When" must be construed to mean "when and where."

The word "when" in S. 35 (a) must be construed to mean "when and where" because it would be useless to prescribe that an injunction could be granted when damages can be claimed under S. 33, if damages under S. 33 could not be claimed. [P 431 C 2]

(b) Easements Act, S. 35—Injunction is not independent form of relief—Specific Relief Act, S. 54.

An injunction is only an alternative within the discretion of the Court and is not an independent form of relief. [P 431 C 2, P 432 C 1]

*** (c) Easements Act, S. 35 (a)—Injunction for disturbance of easement of light can be granted only where damage is proved — Easements Act, S. 28 (c).**

An injunction to restrain the disturbance of an easement of light can only be granted where substantial damage is proved to have been caused : 29 *All.* 571, *not Foll* ; *A. I. R.* 1924 *All.* 394 ; 33 *Mad.* 327, *Foll. Colls* v. *Home and Colonial Stores Ltd.* (1904) *A.C.* 179 and *Kine* v. *Jolly*, (1905) 1 *Ch.* 480, *Ref.* [P 431 C 2]

N. P. Asthana and *Shabd Saran*—for Appellant.

K. D. Malayiya for *M. L. Chaturvedi* —for Respondent.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-appellant for a mandatory injunction. We are only concerned with three out of six skylights, namely those marked A, B and C in the map filed by the plaintiff. These skylights give light and air to certain small rooms. The respondent has built a house which interferes with the light and air hitherto received from these skylights.

The defence in respect of the three skylights was that the defendant's house left three other skylights which afforded sufficient light and air to the rooms apart from skylights A, B and C. The trial Court decreed the suit on the ground that the plaintiff was entitled to that quantity of light and air that had been accustomed to enter these skylights, A, B and C during the previous 20 years. In appeal the lower appellate Court dismissed the suit as regards these skylights on the ground that the disturbance did not cause substantial damage to the plaintiff.

This was clearly a finding of fact. The appellants counsel has, however, taken up the position that, although damages in respect of disturbance of an easement can only be granted where substantial damage is proved, nevertheless an injunction may be granted irrespective of substantial damage. He based his contention on the language of S. 28 (c), Easements Act, which declares that the extent of a prescriptive right to the passage of light or air to an opening is that quantity of light or air which has been accustomed to enter that opening during the prescriptive period irrespectively of the purposes for which it has been used. He supports his contention by reference to the case of *Kunni Lal* v. *Kundan Bibi* (1). That decision was the decision of a single Judge. In it Aikman, J. refused to follow the English decisions of *Colls* v. *Home and Colonial Stores, Ltd.*, (2) and *Kine* v. *Jolly* (3) on the ground that S. 28 (c), Easements Act, provided a different test as regards what could be claimed by reason of a prescriptive easement to that applied by the English decisions referred to. The appellant's counsel is no doubt supported by that decisions but I am unable to follow it.

In the case of *Durga Prasad* v. *Lachhmi Narain* (4), Kanhaiya Lal, J., did not follow it. He held that the effect of Ss. 33 and 35, Easements Act, only allowed a suit where disturbance has actually caused substantial damage as defined in the former sections. He did not attempt to distinguish *Kunni Lal* v. *Kunda Bibi* (1) except by saying that the circumstances of the latter case might have justified an order for the removal of the obstruction.

The reason why I am unable to follow *Kunni Lal* v. *Kundan Bibi* (1) is that in that judgment Aikman, J., entirely ignored S. 35 (a), Easements Act. S. 35 enacts when an injunction may be granted. Clause (a) refers to a mandatory injunction and Cl. (b) to a perpetual injunction. The section is unfortunately worded. In Cl. (a) a mandatory injunction is allowed when compensation for disturbance might be recovered under S. 33. The word "when" must be construed to mean "when and where," because it would be useless to prescribe that an injunction could be granted when damages can be claimed under S. 33, if damages under S. 33 could not be claimed. The effect of the clause is, therefore, only to allow an injunction where substantial damages is proved. This conclusion also follows from S. 54, Specific Relief Act, which only allows an injunction when pecuniary compensation would not afford adequate relief. It follows that an injunction is only an alternative within the

(1) [1907] 29 All. 571=4 A. L. J. 477=(1907) A. W. N. 175.
(2) [1904] A. C. 179=73 L. J. Ch. 484=20 T. L. R. 475=53 W. R. 30=90 L. T. 687.
(3) [1905] 1 Ch. 480=74 L. J. Ch. 174=21 T. L. R. 128=53 W. R. 462=92 L. T. 209.
(4) A. I. R. 1924 All. 394.

discretion of the Court and is not an independent form of relief.

The view which is here taken by me was adopted by Bench of the Madras High Court in *Esa Abbat Sait* v. *Jacob Haroon Sait* (5). It was there pointed out that although the Indian legislature in S. 28 (c) had adopted a view as to the extent of a prescribed right to the passage of light and air to an opening which was not in accordance with the view taken by the House of Lords in *Colls* v. *Home and Colonial Stores Ltd.* (2), yet the Act had cut down the effect of the wider definition of the prescriptive right by only allowing any remedy where the disturbance caused substantial injury. In other words, it held that the Easements Act had given a right without a co-extensive remedy. This appears to be in conflict with the general principle *ubi jus ibi remedium.* It is obviously desirable that no right should exceed the limits of the remedy to enforce it. This criticism, however, of the Easements Act cannot affect the interpretation to be put on that Act. It is for the legislature to avoid disagreement between the extent of a right and the extent of the remedy, but it is for the Courts to confine themselves to the remedy allowed by the statute.

For the above reasons, I find that the lower appellate Court was correct in rejecting the suit for an injunction on the ground that the disturbance caused no substantial damage. No argument has been addressed to me (and I do not think that the facts would permit any argument) that the lower appellate Court misdirected itself in determining that there had been no substantial damage. The consequence is that this appeal fails and is dismissed with costs.

D.N./R.K. *Appeal dismissed.*

(5) [1910] 33 Mad. 327=20 M. L. J. 291=4 I. C. 425=(1910) M. W. N. 246.

A. I. R. 1929 Allahabad 432

BANERJI AND KING, JJ.

Raghubar Dayal—Plaintiff — Appellant.

v.

Puran Singh—Defendant — Respondent.

Second Appeal No. 413 of 1926, Decided on 1st February 1929, against decree of Addl. Sub-Judge, Etawah, D/- 28th November 1925.

Civil P. C., O. 17, R. 3—Adjournment refused— Plaintiff not examining even witnesses in attendance— Suit dismissed —Dismissal order was on merits and so appealable.

Plaintiff's pleader applied for adjournment but adjournment was refused, thereupon the plaintiff's pleader did not examine even the witness in attendance without any valid reason and the trial Court dismissed the suit.

Held : that the order dismissing the suit was an order on merits and so was appealable : 34 *All.* 123, *Rel. on.* [P 432 C 2]

Baleshwari Prasad—for Appellant.

G. Agarwala—for Respondent.

Facts.—The facts of the case so far as necessary to understand this judgment are that when the case came up for hearing the plaintiff's pleader applied for adjournment of the case but the application for adjournment was rejected for certain reasons. Thereupon even the witnesses in attendance were not examined by the plaintiff's pleader without any valid reason and under the circumstances the case was decided against the plaintiff by the trial Court. In the first appeal the lower appellate Court held that no appeal lay against the order. Hence this appeal to the High Court.

Judgment.— This is plaintiff's appeal. The only point for consideration in this appeal is whether the order passed by the learned Munsif on 26th February 1925, dismissing the suit was an order of dismissal for default. The order on the face of it shows that it was not a dismissal for default. The learned Judge of the lower appellate Court states in the judgment as follows :

"No doubt the Court below was a little wrong in writing the judgment on merits."

This also seems to indicate to us that the lower appellate Court did not treat the order as an order dismissing the plaintiff's suit for default. The dismissal was on the merits, and therefore an appeal lay against the decree of the Munsif. We are of opinion that the Court below was not right in holding that no appeal lay. The same view was taken on a similar order in the case of *Gaura Bibi* v. *Ghasita* (1)

We allow the appeal, set aside the decree of the lower appellate Court, and remand the case under O. 41, R. 23, to that Court. Costs here and hitherto will abide the result.

S.N./R.K. *Case remanded.*

(1) [1912] 34 All. 123=12 I. C. 603=8 A. L. J. 1265.

* A. I. R. 1929 Allahabad 433

BANERJI AND KING, JJ.

Balmakund—Defendant—Appellant.

v.

Nanak Chand and *others*—Plaintiffs—Respondents.

First Appeal No. 499 of 1927, Decided on 27th February 1929, against decree of of Dist. Judge, Moradabad, D/- 22nd August 1927.

(a) Civil P. C., S. 92—Constant visitors of trust temple, who are also close relatives of founder can sue for trustee's removal.

Persons who are constant visitors of the trust temple and are also closely related to the founder of the trust are sufficiently interested in the trust property to maintain a suit against the trustee praying for his removal.

[P 434 C 1]

(b) Civil P. C., S. 92—Mere indebtedness of trustee does not justify inference that he wasted money on immoral purposes.

In the absence of evidence to show that a person actually spent money on prostitutes or drink or drugs, his mere indebtedness is insufficient to justify an inference that he wasted money on such immoral purposes so as to render him unfit to be trustee of a temple.

[P 434 C 2]

*** (c) Civil P. C., S. 92—Trustee's being guilty of neglect of his duty in not keeping proper accounts is not adequate cause for his removal from office.**

Where hereditary a trustee is not positively dishonest and does not lack is the capacity for discharging his duties, the mere fact that he is guilty of petty neglect of duty and of not keeping proper accounts and mixing up trust account with his private accounts, is no adequate cause for removing him from his office. [P 436 C 2]

K. N. Katju, S. C. Goyle, L. M. Roy and *K. D. Malaviya*—for Appellant.

P. L. Banerji, S. K. Dar and *Shambhu Nath Seth*—for Respondents.

Judgment.—This appeal arises out of a suit under S. 92, Civil P. C., praying for the removal of the defendant Balmakund, from his office as trustee of a public religious and charitable trust, and for certain subsidiary reliefs.

The author of the trust was one Mt. Parbati the widow of P. Nand Kishore Deputy Collector. She built a thakurdwara, a shivalaya and a tank for perpetuating the name of her deceased husband and for the public good. By a deed of waqf dated 17th September 1903 Mt. Parbati, with the consent of the next reversioner, P. Gopeshwar Datt, her deceased husband's brother, dedicated about 1/3rd of her zamindari property bringing in an income of about Rs. 3,000 a year for the support of the temple and for feeding faqirs and other poor persons and for celebrating fairs to be held on the Janam Ashthami and Shiv Ratri and for water booths and similar public purposes of a religious or charitable nature. The property was dedicated to Shri Krishnaji. P. Balmakund, the defendant who is Mt. Parbati's brother's son, was appointed manager and trustee of the waqf property. The deed of waqf further provided that the office of trustee should devolve upon P. Balmakund's descendants if qualified to act as trustees. By a will of the same date Mt. Parbati divided the remaining 2/3rds of her property between Balmakund and Gopeshwar Datt, her husband's brother, in equal shares.

Balmakund has managed the trust from its foundation in 1903 up to the present day. Mt. Parbati died in 1911.

The present suit was instituted in December 1926 by P. Nanak Chand and seven other persons upon the allegation that P. Balmukand has been mismanaging the trust ever since Mt. Parbati's death in 1911. He had failed to complete the buildings left unfinished by the deceased founder and had not properly carried out the daily worship and the repairs of the temples and had not been feeding the faqirs and other poor persons or spending the prescribed amount of money over the annual fairs and had embezzled large sums out of the income of the trust. Further, he had given about 400 bighas of the trust property to his own son-in-law, P. Ant Ram, at a nominal rent. It was further alleged that he was deeply in debt and was also morally unfit to hold the post of trustee as he had been accused in a case of murder and was a drunkard and smoked charas and was of bad character.

The defendant in his written statement traversed the allegations of mismanagement and bad character. He challenged the right of the plaintiffs to institute the suit under S. 92. He further alleged that he had been faithfully carrying out his duties as trustee, had maintained the temples and trust property in good condition and had even carried out some improvements and had not embezzled a single rupee of the income of the trust but, on the contrary, had spent large sums of his private money for the purposes of the trust.

The learned District Judge found that the plaintiffs had a sufficient interest in

the trust to entitle them to bring the suit. He found that the allegations of drunkenness and immorality were not proved. He found that the defendant had not been keeping proper accounts of the trust and had failed to account for certain items of income and held that the defendant was liable to removal from his office as trustee on the following grounds:

(1) That his accounts were unsatisfactory.

(2) That he had given lands to his son-in-law, Ant Ram, on an inadequate rent; and

(3) That he is heavily indebted and that this indebtedness raised an inference that he must be of immoral character and extravagant habits.

In the result the Court below passed a decree for

(1) Removing the defendant from his post as trustee;

(2) Ordering the defendant to deposit the sum of Rs. 5,322 in Court within three months; and

(3) Directing the parties to attend the Court on a specified date for drawing up a scheme of management for the temple.

The defendant appeals against the decree of the Court below.

It has been argued that the learned District Judge was wrong in finding that the plaintiffs had a locus standi for instituting the suit. As regards plaintiffs 1 to 7 we have no hesitation in accepting the finding of the Court below. Plaintiff 1, Nanak Chand, has been a constant visitor to the temple and his father was employed as a servant therein for about six years. Also he is a grand-nephew of Mt. Parbati, the founder of the trust. Plaintiffs 2, 3 and 4 also constantly visit the temple. Plaintiffs 6 and 7 are the widow and daughter respectively of Gopeshwar Datt and thus closely related to Mt. Parbati's husband. We have no doubt that plaintiffs 1 to 7 have an interest in the trust snfficient to entitle them to maintain a suit under S. 92, Civil P. C. The question whether the last plaintiff, B. Gauri Nath Kakaji, has such an interest is more open to argument. He is the Secretary of the U. P. Dharam Rakshani Sabha at Lucknow but does not appear to have any special interest in the trust which forms the subject-matter of this suit. We think it unnecessary to decide whether plaintiff 8 is entitled to maintain a suit since the determination of this question is unnecessary for the purpose of deciding this appeal.

We agree also with the Court below that the charges of immorality and drunkenness and drug-taking have not been proved against the defendant. The learned District Judge has not been very consistent in his findings on these points. He admits that the plaintiffs' evidence to the effect that the defendant consorts with prostitutes and drinks liquor and takes drugs is most unsatisfactory. He also distinctly states that he does not believe that the defendant ever indulged in drug-taking to any serious extent, as the defendant does not appear to be in any way affected by drug-taking but, on the contrary, seems to be very intelligent. For the same reasons apparently the charge of drunkenness cannot be held to have been proved against the defendant. It is, however, admitted that the defendant is indebted to the extent of about Rs 80,000, although he has private property to the value of about two lakhs of rupees, and the learned District Judge has taken the fact of indebtedness as raising an inference that the defendant must have been wasting his money on prostitutes, drinks and drugs. We are unable to endorse the reasoning of the learned District Judge on this point The defendant has explained the principal causes of his indebtedness. After Mt. Parbati died Gopeshwar Datt sold some of the waqf property and some of the property which had been left to the defendant. The defendant had to spend Rs. 11,000 in recovering this property partly on his own account and partly on account of the trust. The allegation that the defendant did spend about Rs. 11,000 for these purposes has not been rebutted and must be accepted.

In the second place the defendant was admittedly involved in a charge of murder in the year 1918. He states that he spent over Rs. 20,000 in securing his acquittal. As the defendant engaged expensive counsel we see no reason to doubt that he did spend these sums in defending himself. Moreover, the mere fact that a man is heavily indebted is quite insufficient in our opinion to raise any inference that he has been wasting his money on prostitutes or drink or drugs. As the learned District Judge frankly admitted that the evidence to the effect that the defendant did spend his

money for such purposes was most unsatisfactory we think it quite unjustifiable to infer that he must have spent his money on such purposes merely from the fact that he is heavily indebted.

We note that the defendant has been able to produce a number of most respectable and independent witnesses to testify to his good character and good management of the trust property. Among these witnesses are two Tahsildars, two Sub-Inspectors of Police, one Mukhtiar, one Assistant Surgeon and several other respectable residents of the neighbourhood. The Court below has frankly admitted that the plaintiffs' evidence is weak and is outweighed by the evidence produced by the defendant and that the suit has been brought out of enmity and not with any idea of public spirit. We fully agree to the opinion expressed by the Court below. The first plaintiff, P. Nanak Chand, is the son of P. Ram Nath who was employed as a bhandari at the temple for about six years. He was dismissed by the defendant in 1924 and we have no doubt that the present suit is the outcome of his dismissal. The plaintiffs allege that the defendant has been mismanaging the property ever since 1911 and this fact must have been well-known to Ram Nath at least who was himself one of the servants of the temple, and to Gopeshwar Datt, who was entitled to share in the management of the trust in accordance with an agreement entered into with the defendant in 1913, but no one thought of instituting a suit for the removal of the trustee until after Ram Nath's dismissal in 1924. We think that Gopeshwar Datt, who never succeeded in enforcing his right to share in the management would certainly have brought a suit to remove the defendant if the latter had really been of immoral character and had really been flagrantly mismanaging the trust. In our opinion the charges of immorality, drunkenness and drug-taking are disproved and were only made spitefully in order to make the case against the defendant as black as possible.

The principal question which has been argued in appeal is whether the defendant has been proved to have acted dishonestly in discharging his duties as a trustee, and has embezzled the income of the trust, or whether he is only proved to have maintained the accounts of the trust in an unsatisfactory manner.

It must be admitted at once that the accounts are indeed unsatisfactory. No separate account of the trust income and expenditure was regularly maintained. The defendant kept a daily account book or roznamcha which was written up by his son-in-law Ant Ram from the year 1914, but this roznamcha contains items of income and expenditure both of the defendant's private property and of the trust property indiscriminately. This mixing up of private accounts with trust accounts is certainly most objectionable. It is impossible even for Ant Ram who kept the accounts to say with certainty whether certain items relate to the trust property or to Balmukand's private property. (The judgment here discusses evidence and concludes). Upon these findings it is clear that there has been no substantial embezzlement. The defendant has no doubt been guilty of mixing up his private accounts with the trust accounts and has not credited to the trust certain miscellaneous items which he should have done. But the sum total of such items is very petty in comparison with the total income and expenditure and we do not consider that the defendant is proved to have acted dishonestly or to have intentionally embezzled any of the income of the trust.

It has been argued that the defendant is guilty of a breach of trust because he spent more under certain heads than was prescribed in the deed of trust. There are only two items which form the subject of this criticizm. In the trust deed Rs. 100 per annum are laid down as the expenditure on the piyaos while the defendant shows that it has been about Rs. 400 per annum. Similarly Rs. 500 are laid down in the trust deed as the amount to be spent on the two annual melas while according to the defendant he is spending about Rs. 1,900 per annum. We think there is no force in the contention. In the first place, the deed of trust does not mention Rs. 500 as a maximum to be spent on the two fairs. That figure must be taken as only the approximate expenditure which the founder of the trust desired to be spent for that purpose. If the income of the trust increases, we see no reason why the expenditure upon the fairs should not also be increased. The cost of food and

of labour has risen greatly since 1903 and we cannot hold that the trustee is guilty of a breach of trust for spending more than he was directed to spend under the deed of trust.

As a matter of fact the income of the trust property has about doubled since its foundation in 1903. The net income was then about Rs. 3,000 and it is now about Rs. 6,000. This fact is of itself an indication that the property has not been mismanaged by the trustee and that he has not been converting the property to his own use.

Another answer to the contention is that in the deed of trust the trustee is given discretion to spend the balance, over and above the specified sums mentioned, on any dharamshala " or on any other work of public good." Evidently the founder of the trust considered the fairs to be for the public good since she herself directed money to be spent upon fairs We find moreover that the legislature is of the same opinion. Under S. 8 (1), Cl. (1), U. P. Municipalities Act 1916, Municipal Boards are expressly authorized to spend their public funds upon " holding fairs and exhibitions." Under S. 91 (k), U. P. District Boards Act 1922, District Boards are expressly directed to spend money on similar purposes.

The excess expenditure upon piyaos or water booths is obviously within the competence of the trustee as being expenditure upon " works of public good."

We consider that the defendant has laid himself open to justifiable criticism in giving land at a favourable rent to his son-in-law, Ant Ram. It is true that Ant Ram does service for the trust in that he keeps the accounts. Such services should properly be remunerated by a salary and not by the grant of tenancy holding at nominal rent. A statutory tenant cannot be ejected except for special reasons during his lifetime, so he would be entitled to retain the holding at a nominal rent even if he ceased to do any work on behalf of the trust. Ant Ram was given about 80 bighas of land in the time of Mt. Parbati at a nominal rent and in this land he has now acquired occupancy rights. The plaintiffs have not raised any objection to the management of Balmukand during the lifetime of Mt. Parbati, so we must leave this amount of land out of account. After Parbati's death, however, the defendant gave Ant Ram from time to time more land at a very low rate of rent so that his total holding amounted to 343 bighas. Ant Ram surrendered 133 bighas in January 1927, i. e., after the institution of this suit and now has about 210 bighas in his possession including the 80 bighas of occupancy holding.

We consider the defendant's action in this matter objectionable, but it was at least done quite openly and we do not consider that it indicates any dishonesty on the defendant's part. The question now remains what reliefs should be granted to the plaintiffs.

It is clear that the Court has jurisdiction to remove the trustee. The main principle on which such jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate. A hereditary trustee should not, in our opinion, be removed merely for inaccuracy in accounts or petty neglect of duty. We consider that we should be guided in the exercise of our discretion by the following general principles set forth in Storey's Equity and Jurisprudence which have been quoted with approval by their Lordships of the Privy Council in the case of *Letterstedt* v. *Broers* (1) at p. 365 as follows :

"But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust ; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

In the present case we hold that the defendant has not been positively dishonest. He certainly does not lack capacity for discharging his duties. In fact, he has shown himself an efficient manager by doubling the income of the trust and by collecting so large a percentage of the rental demand. A number of respectable and independent persons deposed that his management of the temple and of the trust generally is perfectly satisfactory. He has no doubt been guilty of neglect of duty in not keeping proper accounts, but we do not consider this to be an adequate cause for removing him from his office.

(1) [1885] 19 A. C. 371=53 L. J. P. C. 44=51 L. T. 169.

We accordingly allow the appeal in part and vary the decree of the Court below as follows: We set aside the order removing the defendant from his office as trustee, and for drawing up a scheme of management for the temple, but we uphold the order that the defendant shall deposit the sum of Rs. 5,322 in Court. We also direct Balmukand to keep the trust accounts wholly apart from his private accounts. The trust accounts must give true and full particulars of all income and expenditure received or incurred on account of the trust property and entries must be made punctually and regularly. We further direct the defendant to take the necessary steps without delay for getting the rent of Ant Ram's holdings as statutory tenant in the trust property enhanced up to the fair and equitable rent payable by a statutory tenant for land of similar quality. Dr. Katju has stated before us that Ant Ram is willing to agree to such enhancement of rent. When the rent has been thus enhanced, the defendant may pay Ant Ram a reasonable salary for services rendered to the trust. The parties will bear their own costs in this appeal.

S.N./R.K. *Decree varied.*

A. I. R. 1929 Allahabad 437

ASHWORTH, J.

Ramdeo Ram—Plaintiff—Appellant.

v.

Frank Combs and *others*—Defendants—Respondents

Second Appeal No. 1541 of 1927, Decided on 15th February 1929, against decree of Sub-Judge, Gorakhpur, D/- 5th March 1927.

(a) Civil P. C., O. 21, R. 16—Notice to judgment-debtor is absolutely necessary—Decree for sale of mortgage property obtained against mortgagor and subsequent mortgagee—Decree assigned—Assignee applying for execution but not giving notice of his applicaton to subsequent mortgagee—Subsequent mortgagee being a judgment-debtor, execution proceedings will be void for want of notice to him.

Rule 16 absolutely requires that any judgment-debtor must have notice and enacts that the execution proceedings subsequently taken in the absence of such notice are absolutely void. [P 438 C 2]

The first mortgagee sued the mortgagor and the second mortgagee and got a decree for sale. The decree was then transferred by him and the assignee applied for execution but did not give notice to the second mortgagee of his application for execution. In execution of the decree the property was sold and was purchased by the assignee decree-holder himself.

Held: that the second mortgagee was a judgment-debtor within the meaning of R. 16 and so failure to serve notice on him would make the whole execution proceedings void: 36 *Bom.* 58 and *A. I. R.* 1921 *Lah.* 143, *Foll.* [P 438 C 2]

(b) Equity—Court of equity cannot contravene direct provisions of Code to attain equitable result nor can it excuse breach of mandatory rule because such breach has resulted in justice.

It is not within the function of a Court of equity to contravene a direct provision of a Code in order to attain an equitable result, nor can it excuse a breach of a mandatory rule on the ground that it has resulted in justice. [P 439 C 1]

Harnandan Prasad—for Appellant.

K. Verma—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-appellant for a declaration that he is the owner of certain property, or in the alternative for possession of property. The plaintiff's case was as follows: One Zalim Singh took a first mortgage on the property. The property was again mortgaged by the mortgagor to Mr. Frank Combs, defendant-respondent. Zalim Singh sued on his mortgage, making Mr. Combs a party and got a decree for whole of the property. It appears that that decree was not framed in the proper form. The proper form is given as No. 7 of Appendix D of the schedule to the Civil Procedure Code and provides for the proceeds of the sale of the property being paid first to the first mortgagee and any balance to the second mortgagee. The decree as framed used the words of O. 34, R. 4, directing the proceeds to be applied in payment of what was due to the first mortgagee and the balance to be paid to the defendant or other persons entitled to receive the same. I am of the opinion however, that the decree may be interpreted in the same way as it would have been if it had been in form 7.

It is not clear from the record whether Zalim Singh applied for execution. All that is certain is that the plaintiff-appellant made an application either to be substituted in pending execution proceedings taken out already by Zalim Singh (this is stated in the plaint) or himself, after transfer of the decree to him by

Zalim Singh, moved the Court for execution. It does not appear to me to make any material difference which was the case, and for the purpose of this judgment I will assume that the latter was the case. When the plaintiff applied for execution he ought under O. 21, R. 16, to have had notice of his application served on the judgment-debtors. He had it served on the mortgagor but did not have it served on the respondent, second mortgagee. The property was sold and purchased by the plaintiff first mortgagee. It does not appear whether there was any balance to pay to the second mortgagee after the first mortgagee was paid: possibly not. The plaintiff has met with opposition from the respondent in getting his name substituted in the village papers. The revenue officer directed that the plaintiff having sold up the interest of the mortgagor and having purchased that interest should be entered as mortgagor and the respondent as second mortgagee should be entered as mortgagee. Hence this suit.

The trial Court found as a matter of fact that the plaintiff had not given notice to the respondent when applying for execution or when applying for his name to be entered in a pending execution file in the place of the decree-holder (whichever was the fact). It went on, however, to say that failure to give notice by the plaintiff could not possibly prejudice the respondent except so far as it might prevent the respondent from obtaining any balance of sale proceeds available for him as second mortgagee after the sum due on the plaintiff's first mortgage was paid. Accordingly it accepted an offer of counsel for the plaintiff of the full sum due under the second mortgage and decreed possession to the plaintiff on condition that this sum was paid to the respondent. In first appeal the Subordinate Judge has held that under O, 21, R. 16, the sale of the property was ineffectual for want of notice to the respondent. He has also held that the Munsif could not allow the plaintiff to get possession by redemption of the respondent. The plaintiff appeals. In this Court his counsel's argument is that the respondent, even if he had got notice, could not possibly have resisted the application for sale of the property, and that the only possible way in which he can have been prejudiced by want of that notice was by losing an opportunity possibly to lay claim to any balance payable to him as second mortgagee. O. 21, R. 16, however, does not appear capable of being construed, in my opinion, otherwise than as absolutely requiring that any judgment-debtor must have notice and has enacted that the execution proceedings subsequently taken in the absence of such notice are absolutely void. This was held in *Kassum Goolam Hussein* v. *Dayabhai Amarsi* (1). That decision has been followed in *Notam Dass* v. *Lachhman Singh* (2), where other decisions on the same lines have been quoted. Whatever injustice the mandatory nature of O. 21, R 16, may work, it does not appear to me to be possible to evade its clear provisions.

The question then arises, however, whether the respondent in this second appeal should be regarded as a judgment-debtor within the meaning of O. 21, R. 16. It has been argued by the appellant's counsel that no execution of the decree was sought against the respondent but only against the mortgagor, and that being so, it is the mortgagor alone who should have been regarded as the judgment-debtor. It is to be observed, however, that the second mortgagee was a party to the suit on the mortgage, and that the decree had this effect as against him that the property would be sold, and that he would no longer have any right to execute his second mortgage against it. It cannot, therefore be said that he was not a person directly affected by the decree. The mere fact that under the mortgage decree, as properly framed, he should have been given a right to a balance of the sale proceeds, cannot alter the fact that the decree was against him to the extent stated. He might well have preferred retention, as usufructuary mortgagee, of possession of the property to any problematic chance of getting any surplus. As to the argument that if the decree of the trial Court is restored the respondent will have got all that he could possibly be entitled to, this may be true; but where the law is clear as to the method in which a person's right may be secured to him, it can be no answer that these rights are secured to him in a different way to that enjoined by the

(1) [1912] 36 Bom. 58=12 I. C. 547=13 Bom. L. R. 973.
(2) A. I. R. 1921 Lah. 143=2 Lah. 230.

law. Moreover in considering the legality of the execution we have to see what was the position of the parties at the time of execution and not their position subsequently. Where a decree is obtained against a mortgagor and second mortgagee and that decree is transferred, it is conceivable that the second mortgagee if given notice of execution by the transferee of the decree, might be in a position to plead some arrangement with the decree-holder before assignment of the decree, which would prevent execution taking place. Any way, the law is designed to give a judgment-debtor an opportunity to object to execution and the evasion of any procedure that is required by law cannot subsequently be defended on the ground that it has occasioned no harm. All this argument really comes to the single plea that the respondent has not been prejudiced by the trial Court's order.

Then it is argued that this Court is a Court of equity. But it is not within the function, even of a Court of equity to contravene a direct provision of the Code in order to attain an equitable result, nor can it execuse a breach of a mandatory rule on the ground that it has resulted in justice. The last argument by appellant's counsel is that the sale of the property should be upheld against the mortgagor even if held invalid against the respondent, second mortgagee. It is impossible for a sale to be both valid and invalid, and in any case as this appeal is between the second mortgagee and the first mortgagee the sale must be held invalid for the purposes of this appeal. I must admit that in this case I should have been very glad to see my way to grant the appeal and restore the decree of the trial Court, but it appears to me that to do so would be contrary to law, and as such more undesirable than having to acquiesce in the plaintiff losing the property owing to an omission which may as a matter of fact not have prejudiced the respondent. At the same time I think that the appellant should have leave to appeal. The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 439

ASHWORTH, J.

Chhotey Lal—Appellant.

v.

Manzur Ahmad and *another* — Plaintiff and Defendant—Respondents.

Second Appeal No. 1623 of 1927, Decided on 16th March 1929, against decree of Addl. Sub-Judge, Banda, D/- 5th July 1927.

(a) Landlord and Tenant—Abadi — Abandonment of site or house is sufficient for its reverting to zamindar and it is unnecessary to prove that tenant has given up all connexion with village.

Under the custom regulating the right of tenants in their houses in the abadi, abandonment of the site or the house is sufficient to cause the site to revert to the zamindar. It is not necessary to prove that the tenant has given up all connexion with the village. [P 440 C 1]

(b) Civil P. C., O. 1, R. 8—One cosharer can bring representative suit on behalf of another.

Order 1, R. 8, provides for the institution by one cosharer of a representative suit on behalf of all. [P 440 C 1]

(c) Civil P. C., O. 1, R. 9—Nonjoinder of parties does not defeat suit.

No suit shall be defeated by reason of nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. [P 440 C 1]

(d) Landlord and Tenant—Custom whereby agricultural tenants occupy abadi sites is so well known that it will be presumed to exist in absence of proof to contrary.

The custom whereby agricultural tenants occupy sites of the abadi on certain conditions is so prevalent and so well known that it will be presumed to exist in the absence of evidence to the contrary. [P 440 C 2]

K. N. Laghate—for Appellant.

S. Majid Ali—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-respondent as zamindar against the defendant-appellant as a tenant for possession of a certain site in the town of Moudeha on the ground that the appellant who had originally been allowed occupation of the site for his house as an agriculturist had abandoned the house and the site.

Both the lower Courts have decreed the suit. In this appeal four pleas are raised. The first plea is that inasmuch as the appellant still has a holding in the village he could not be held to abandon the house site. The lower Courts have found that he has gone to live in another vil-

lage, that he has not kept up the house which is in ruins and that he has sold the site under the ruins to another person. On these facts they have found abandonment. It is clear that, under the custom regulating the right of tenants in their houses in the abadi, abandonment of the site or the house is sufficient to cause the site to revert to the zamindar. It is not necessary to prove that the tenant has given up all connexion with the village. The principle is that the site which is given for residence can be resumed by the zamindar when no longer used for the purpose for which it was granted.

The second plea is that the plaintiff being only a cosharer to a small extent in the village could not sue the appellant alone. It is true that O. 1, R. 8, Civil P. C., provides for the institution by one cosharer of a representative suit on behalf of all but under O. 1, R. 9, no suit shall be defeated by reason of non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. In the present case the plaintiff is entitled to all the enjoyment in the abandoned site that is open to the proprietary body. Retention of the site by the defendant would defeat the right of the plaintiff. It appears to me that the Courts were justified in giving a decree to the plaintiff alone. It is to be remarked that the other cosharers could not have, in opposition to the plaintiff, permitted the defendant assignee to take possession of the site. A third plea is that, inasmuch as the plaintiff called Maudeha a qasba or town, the suit would not lie. The use of the word "qasba" is not inconsistent with the village or town being of the character of an agricultural village. Nor was there any plea in defence to this effect. The plaintiff clearly alleged that the defendant had received a grant of this site from him as zamindar and in the capacity of an agricultural tenant. There was no contention of the defendant that he received the site otherwise than as an agriculturist. Indeed this was the basis of the defence plea that by maintaining his holding he maintained occupation of the site of the house. Lastly it is urged that no issue having been framed as regards the custom the lower Courts could not invoke it. It has been repeatedly held by the High Court that the custom whereby agricultural tenants occupy sites of the abadi on certain conditions is so prevalent and so well-known that it will be presumed to exist in the absence of evidence to the contrary. So there is no force in this plea. The appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 440

SULAIMAN AND KENDALL, JJ.

Malik Singh and *others*—Plaintiffs—Appellants.

v.

Shiam Lal and *others*—Defendants—Respondents.

First Appeal No. 101 of 1926, Decided on 18th January 1929, against decree of Sub-Judge, Aligarh, D/- 19th January 1926.

*** Pre-emption—Purchaser during pendency of pre-emption suit, if a preferential claimant to pre-emptor, can retain property purchased by him because pre-emptor need not bring suit but may acquire property from vendee at private sale—Transfer of Property Act, S. 52.**

The pre-emptor need not necessarily bring a suit for pre-emption, but may acquire the property direct from the vendee by a private sale.

The plaintiff in a pre-emption suit got his plaint amended and impleaded the subsequent purchaser of the suit property who had purchased it from the vendee after the institution of the plaintiff's suit but before the expiry of the period of limitation for pre-emption. The trial Court found that the purchaser had a preferential right of pre-emption.

Held : that although the doctrine of lis pendens governs vendees in pre-emption suit, still the purchaser here having the preferential right of pre-emption is entitled to retain the property purchased by him : *A. I. R.* 1926 *All.* 179 ; 27 *All.* 544 and *A. I. R.* 1926 *All.* 180, *Rel. on.* [P 441 C 1 ; P 442 C 1]

Panna Lal—for Appellants.

K. N. Katju—for Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit for pre-emption. On 8th July 1924, and 1st September 1924, Shiam Lal purchased shares in a village under two sale-deeds from two different cosharers for Rs. 15,000 and Rs. 18,000 respectively. On 7th July 1925, a suit for pre-emption was brought by the present plaintiffs to pre-empt both these sales. On the same day about two hours after the filing of the plaint a sale-

deed by Shiam Lal in favour of the contesting defendant Umrao Singh was presented for registration under which the two shares were transferred in lieu .of Rs. 33,000. The whole amount was not paid in cash and Umrao Singh executed a mortgage deed for Rs. 44,200 hypothecating the property transferred to him as well as some other property belonging to him. On 8th October 1925, the present plaintiffs impleaded Umrao Singh in their suit and got the plaint amended by adding his name therein and also a new para. 7-A, in which it was alleged that the sale-deed in his favour was fictitious and nominal and was ineffective because it was taken during the pendency of the suit. The position that the sale-deed in favour of Umrao Singh was fictitious was abandoned at the trial. The plaintiffs took their stand on the provisions of S. 52, T. P. Act, and contended that the transfer in favour of Umrao Singh was in no way binding upon them.

The learned Subordinate Judge has upheld Umrao Singh's defence that inasmuch as he was a cosharer as well as a relation of the vendor and had a preferential right of pre-emption he was entitled to resist the plaintiffs' claim on the strength of the sale-deed taken by him. That the doctrine of lis pendens governs vendees in pre-emption suits is now well settled. We may refer to the case of *Bhikhi Mal* v. *Debi Sahai* (1). The point which arises in this appeal is however slightly different. If Umrao Singh were taking his stand only on the sale-deed in his favour he would be prevented by that doctrine from depriving the plaintiffs of their right of pre-emption. On the other hand if they are claiming the right to take the property from the original vendee by virtue of their own preferential right of pre-emption, they are not basing their claim on the sale-deed but on their paramount title. A pre-emptor may either go to Court and sue for pre-emption, or may induce the vendee to re-transfer the property to him thereby avoiding such suit. A private transfer of this kind can be an acknowledgment of such right of pre-emption and an acceptance of his claim, and may be made to him in recognition of his right. That a pre-emptor can acquire property by private deed from the vendee, has been recognized by this Court in several cases to which we shall refer presently. The learned advocate for the appellants contends that in view of the provisions of S. 52, the defendant Shiam Lal was prevented from dealing with the property during the pendency of the suit, and that therefore the only course open to Umrao Singh if he wanted to claim the property by pre-emption was to institute a suit. It is, however, clear that Umrao Singh obtained his deed before the expiry of the period of limitation for pre-emption, and paid the exact amount of price which had been paid by the vendee to the vendor. A somewhat similar case arose in *Manpal* v. *Sahib Ram* (2). Although the Full Bench did not consider it necessary to express any opinion on the effect of S. 52, T. P. Act, they did hold that if the plaintiff got his plaint amended and did implead the subsequent purchaser who had a preferential right of pre-emption, it was no longer open to him to object to the finding as to his preferential right upon the issue raised at this invitation and to say that the Court should disregard it. On facts the present case is similar to the case before the Full Bench and is governed by the principle laid down by it.

Furthermore, we are of opinion that even having regard to the provisions of S. 52 the plaintiffs must not succeed. Umrao Singh acquired this property before his right to pre-empt it was lost to him. In the case of *Bachan Singh* v. *Bijai Singh* (3) two suits for pre-emption had been filed by rival pre-emptors having equal claims, and on the date of the filing of the second suit the vendees sold the property in suit to another person having an equal right of pre-emption with the two sets of plaintiffs. This was a private transfer made at the time when the limitation for pre-emption had not expired. This last mentioned transferee was on equal footing with the cosharers who were claiming pre-emption. The Bench held that these three sets were entitled to divide the property proportionately among them, treating the purchaser under a private deed on the same footing as those who had brought the suit. By not allowing the cosharer to retain the whole property which he had purchased under a private deed, the

(1) A. I. R. 1926 All. 179=47 All. 923.

(2) [1905] 27 All. 544=2 A. L. J. 428=(1905) A. W. N. 94 (F. B.).

(3) A. I. R. 1926 All. 180=48 All. 221.

learned Judges recognized the applicability of the principle of lis pendens. On the other hand, by allowing him to retain one-third of the property they accepted the principle that a pre-emptor need not necessarily bring a suit for pre-emption, but may acquire the property direct from the vendee. We think that the principle underlying that decision applies to the present case, and Umrao Singh is entitled to fall back upon his right of pre-emption independently of his rights as a vendee of the deed of sale dated 7th July 1925. It is not disputed before us that Umrao Singh, being both a cosharer and a relation of the vendor, has a preferential right as against the present plaintiffs. In these circumstances he is entitled to retain the whole of the property: *Jagrup Singh* v. *Indrasan Pande* (4). The plaintiffs' suit must accordingly fail and the appeal is accordingly dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(4) A. I. R. 1926 All. 216=48 All. 347.

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* A. I. R. 1929 Allahabad 442

ASHWORTH, J.

Jadunandan Singh—Appellant.

v.

Bechan Koeri and *others*—Respondents.

Second Appeal No. 1550 of 1927, Decided on 16th March 1929, against decree of Sub-Judge, Ghazipur, D/- 20th May 1927.

(a) U. P. Land Revenue Act, S. 41—S. 41 includes boundary disputes between zamindar and tenant.

Section 41 is not confined to boundary disputes between proprietors or between tenants, and so must be deemed to include also boundary disputes between a zamindar and his tenant. [P 442 C 2]

(b) Agra Tenancy Act, Ss. 95 and 167—Civil Court is barred to entertain suit by tenant based on wrong decision of Collector regarding boundary of his holding.

Section 95 read with S. 167 clearly bars the entertainment of a suit by the civil Court instituted by the tenant against his proprietor on the ground that the Collector fixed a wrong boundary and consequently caused loss to the tenant. [P 443 C 2]

*** (c) Practice—New Plea—Jurisdiction—Tenant suing proprietor in civil Court for determining boundary of his holding—Objection as to jurisdiction not raised in both Courts—High Court can allow it to be raised for first time—Jurisdiction—Objection to.**

A tenant sued his proprietor for a declaration of the area and boundary of his holding in a civil Court. The proprietor did not raise the objection that such a suit cannot be entertained in a civil Court either in the trial Court or in the lower appellate Court.

Held: that the High Court could allow the objection to be raised in second appeal for the first time as its decision does not require facts or evidence. [P 443 C 1]

Haribans Sahai—for Appellant.

S. N. Verma—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-respondents against the defendant-appellant. The plaintiffs are admittedly tenants of a holding and the defendant, the zamindar. The defendant wanted to get the boundary of the holding defined, and applied apparently under S. 41, Land Revenue Act. The Collector (or officer acting as Collector) heard the parties and fixed the boundary, and had stones put up to mark it. The present case is brought by the plaintiffs on the ground that measurements were wrongly made by the revenue officials, and consequently the Collector fixed the wrong boundary and caused the loss of three biswas to the plaintiffs. This suit was brought in the Munsif's Court. Strange to say the defendant zamindar did not raise plea of want of jurisdiction of the Munsif's Court in either the trial Court or the lower appellate Court. Both those Courts had some new measurements taken and decreed the suit. In this second appeal the only point with which I need deal is that this case was not cognizable by a civil Court. To my mind it is quite clear that it was not. The revenue Courts are given by S. 41, Land Revenue Act, power to settle boundary disputes. That section is not confined to boundary disputes between proprietors or between tenants, and so must be deemed to include also boundary disputes between a zamindar and his tenant. An appeal is allowed from a decision under S. 41, and that appeal is to be to the Commissioner: see S. 210, Land Revenue Act. At the same time I do not find anything in S. 44 or S. 210, Land Revenue Act, which would bar this suit, although it is obviously undesirable that where the Land Revenue Act provides for an appeal against the order of the Collector, the Collector's decision should be challenged by a suit in the civil Court. But I do find in S. 95 read with

S. 167, Tenancy Act a clear bar to the entertainment of such a suit as this by the civil Court. S. 95 (c) provides for a suit by a landlord against a tenant asking for a declaration as to situation, area and boundaries. The contention of the respondent in this case that his suit was one for possession and not one involving a declaration as to area and boundaries is clearly untenable. He bases his claim to possession on the ground that the boundary set up by the Collector was wrong. It may be that if the plaintiff had sued in the revenue Court for a declaration as to his boundary, the revenue Court would have been bound, by reason of S. 44, Revenue Act, by the decision already given by the Collector in the settlement of boundary dispute under S. 41, Land Revenue Act, but the fact that the plaintiff might not have been able to obtain relief by a suit in the rent Court will not operate to give him a right to sue in the civil Court, where such right is clearly barred.

It is, however, urged that in this second appeal I should not allow the appellant to plead want of jurisdiction of the trial Court, because the plea of want of jurisdiction has not been raised in the lower Courts. It is urged that in second appeal a Court should never take up a plea of law when the legal question has not been agitated in either of the lower Courts. This, in my opinion, is not a correct statement of the matter. What has been held by the Privy Council is that in second appeal a Court should not take up a question of law (which will include questions of jurisdiction or limitation) where by reason of the failure of the party raising the plea to raise it at an earlier stage of the suit the record fails to contain facts or evidence which it would have contained if the plea had been raised earlier and which the Court hearing the appeal requires for the purpose of coming to a decision on the plea. It is even suggested by certain decisions of their Lordships of the Privy Council that the plea will not be entertained where it requires a prolonged scrutiny of facts or evidence which should have taken place in the lower Courts. None of these objections can be urged in the present case. The simple question whether a tenant can sue his landlord in a civil Court for a declaration of the area and boundary of his holding requires no facts or evidence. It is plain that he cannot do so, from the language of Ss. 167 and 95, Tenancy Act. It is obviously undesirable that the civil Courts should assume a jurisdiction which they do not possess and determine a boundary question arising between a landlord and his tenant. It is difficult to understand how this escaped the notice of the lower Courts. For the above reasons, I allow this appeal, and set aside the judgments and decrees of the lower Courts. But in view of the plea of jurisdiction not having been taken, I direct that the parties bear their own costs.

S.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 443

BANERJI AND KING, JJ.

L. Ram Prasad—Plaintiff—Appellant.

v.

Mt. Mukandi and *another* — Defendants—Respondents.

Second Appeal No. 778 of 1926, Decided on 4th March 1929, against decree of Dist. Judge, Bulandshahr, D/- 10th February 1926.

(a) Partition Act—Act must be strictly construed.

The Partition Act must be construed strictly as the provisions of the Act exclude the right of the majority share-holder to acquire the property the subject of partition at the option of the minority shareholder. [P 444 C 1, 2]

(b) Partition Act, S. 2—Request that sale should be held and that highest bidder among cosharers may be given property is not request under S. 2.

Where the request made by the cosharer is that a sale may be held and that whoever among the cosharers offers the highest bid may be given the property, the request does not amount to a request under S. 2, and so the provisions of the Partition Act do not apply. [P 444 C 1, 2]

P. L. Banerji—for Appellant.

N. P. Asthana and *P. M. L. Verma*—for Respondents.

Judgment. — This is a plaintiff's appeal in a suit for partition. The subject of partition was a house of which the plaintiff is a transferee of a two-thirds share and the defendants of a one-third. It has been found concurrently by both the Courts that the house is small and is incapable of partition.

The Courts below held that the provisions of S. 3, Partition Act of 1893, applied and that the defendants were entitled to get the whole house at the valua-

tion arrived at by the Court, the Court of first instance having valued the whole house at Rs. 2,100 and the lower appellate Court at Rs. 1,500. It appears that the plaintiff, who is the appellant before us, offered in the Court of first instance and in the lower appellate Court to buy over the share of the defendants on payment of Rs. 1,700. Mr. P. L. Banerji appearing on behalf of the appellant repeats that offer in Court, but the defendants have not accepted that offer. We have therefore to decide in this case whether the Partition Act applied and whether the statement of the plaintiff in para. 5 of the plaint amounts to a request to the Court that the property be sold under S. 2, Partition Act.

Section 2, Partition Act (4 of 1893) provides :

"Whenever in a suit for partition it appears to the Court that by reason of the nature of the property a division of the property cannot reasonably or conveniently be made and that a sale of that property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested, to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds."

We have omitted the unnecessary words in this section which do not apply to the case. We are of opinion that in order to see whether any request by a party amounts to a request for sale under S. 2 we must consider the exact request made by the party. In the present case the request made by the plaintiff, who is a two-thirds sharer, is that a sale may be held and that whoever among the cosharers offers the highest bid may be given the property. It clearly does not contemplate a sale at which any outsider could bid and the plaintiff should have no option at any time whatsoever and under any circumstance whatsoever to retain possession of or buy in the whole property. If such a request is treated as a request under S. 2 it is apparent from S. 3, Partition Act, that if the shareholder of a smaller interest chooses he can ask for leave to buy the property at a valuation by the Court, and if he does not do so, then the property is to be sold under the provisions of S 6, Partition Act, when the plaintiff can bid for the property to ensure that a proper price is obtained for the property at the sale. In our opinion the Partition Act must be construed strictly as the provisions of the Act, especially S. 3, exclude the right of the majority shareholder to acquire the property the subject of partition at the option of the minority shareholder. On a reference to para. 5 of the plaint it is clear that there was no unconditional request by the plaintiff to sell the property, and we cannot accept the contention of the other side that when a conditional offer is made by the holder of the majority shares of the property, the plaintiff's request to buy at any valuation can be ignored at the mere will of the minority shareholder. Under these circumstances we are of opinion that the provisions of the Partition Act did not apply to the facts of this case and that this appeal must be allowed. We therefore set aside the decree of the Court below and remand the case to the Court of first instance in order that the Court may proceed to hold the sale of the property among the cosharers, namely the plaintiff and the defendants, and direct that the property should be given to that party who offers to pay the highest price above the valuation made by the Court. The appellant is entitled to the costs of this Court and that of the lower appellate Court. The costs of the Court of first instance will abide the result.

S.N./R.K. *Case remanded.*

A. I. R. 1929 Allahabad 444

BOYS AND YOUNG, JJ.

Mithan Lal--Applicant.

v.

Maya Devi and *others*--Opposite Parties.

First Appeal No. 9 of 1928, Decided on 7th March 1929, against order of Asst. Addl. Dist. Judge, Aligarh, D/- 17th October 1927.

(a) Civil P. C., O. 22, R. 10—Case of assignee of preliminary decree comes within R. 10 and not Rr. 3, 4 and 8—It is not governed by Limitation Act Arts. 171 and 176.

Cases of assignment i. e. cases which are not concerned with the effect of the death of a party on the rights of the legal representatives of that party or on rights of assignees or receivers in insolvency proceedings, come within the purview of R. 10. [P 446 C 1]

The rules governing abatement occur only in those rules, which deal with the rights of the legal representatives and have no application to the case of the assignee who is not affected by those rules. [P 446 C 1]

An application made by an assignee of the preliminary decree for the preparation of the final decree is not governed by Arts. 171 and 176. [P 446 C 2]

Where an application for the preparation of the final decree was made on the basis of an assignment by gift of the preliminary decree and the only excuse for suggesting that it could possibly be regarded as an application for substitution of the applicant's name as the legal representative of the deceased was that the word "waris" was used in direct conjunction with the word "malik," but which was in form and in effect nothing but an application for the preparation of the final decree.

Held: that the rules governing abatement did not apply to a person who did not claim to come in as legal representative but claimed only as an assignee. [P 446 C 2]

M. A Aziz—for Applicant.

Judgment.—This is a judgment-debtor's appeal from an order of remand. Mt. Nando Kuer, the widow of Durga Prasad, brought a suit against Mante Lal, Gaya Prasad, Jamuna Prasad and Lachhmi Narain for her maintenance due to her under an agreement made with them and charged on certain property and obtained a preliminary decree from the Munsif of Jalesar. The appeal against this preliminary decree was confirmed on 21st October 1923.

There next followed some efforts on behalf of Mt. Nando Kuer to execute the decree but on 20th January 1926, it was held as we are informed, that there could be no execution till a final decree had been prepared under O. 34, R. 5. On the same date, 20th January 1926, Mt Nandu Kuar made a gift of her rights secured by this preliminary decree to her daughters, one of whom was Mt. Maya Devi, the present respondent. On 29th January 1926, Mt. Nando Kuer died. No steps were thereupon taken by anybody to bring her legal representatives on the record. The litigation continued up to the High Court where on 5th May 1926 Mante Lal, who was there the appellant asked to be allowed to withdraw his appeal. Again nothing happened till 20th December 1926, when Mt. Maya Devi, on the strength of the gift to her and her sister of 20th January 1926, made an application to the execution Court. This application was described to us at the hearing as one containing two prayers. Firstly, for substitution of Mt. Maya Devi's name as legal representative of the deceased plaintiff decree-holder, Mt. Nando Kuer and secondly, for the preparation of a final decree. On examination, however, that application shows that it contained no prayer for substitution of her name as the legal representative of Mt. Nando Kuer. The application, as it stands, is simply one made by Mt. Maya Devi for the preparation of a final decree and was made on the basis of the assignment by gift to her of the preliminary decree, and the only excuse for suggesting that it could possibly be regarded as an application for substitution also is that it does contain the one word "waris" in direct conjunction with the word "malik." It was, however, in form and in effect really nothing but an application for the preparation of a final decree. On 19th February 1927, Mante Lal objected that the application was barred by limitation, relying upon Arts 176 and 171, Lim. Act and the Full Bench decision in the case of *Churya* v. *Beneshwar* (1). It was contended that the suit had abated and that no application having been made within sixty days to set aside the abatement, the whole application was barred by Arts. 176 and 171, Lim. Act as interpreted by the Full Bench case. Mante Lal further challenged the validity of the gift of 20th January 1926, and finally challenged the statement that Mt. Maya Devi was heir or one of the heirs af of Mt. Nando Kuer. Mante Lal's objection on the ground of limitation were accepted by the trial Court and the application of Mt Maya Devi rejected. In appeal the District Judge overruled the objections of Mante Lal, holding that Mt. Maya Devi was not making any application in regard to the substitution of legal representatives at all, but was simply applying in her capacity as assignee and she, therefore, had three years within which to make the application. Being of this opinion, the District Judge remanded the case for disposal on the merits. The objector, or rather Mithan Lal, his son, Mante Lal having died, has come in appeal to this Court.

The learned District Judge has held that in this case no question of abatement arises at all as Mt. Maya devi did not make her application of 20th December 1926, as legal representative of Mt. Nando Kuer but as her assignee from Mt. Nando Kuer in her lifetime Hold-

(1) A. I. R. 1926 All. 217=48 All. 334 (F. B.).

ing this view the learned District Judge has brushed aside all the pleas of abatement, etc., saying :

" The pleas of limitation, of abatement and of release (sic-setting aside) of abatement are quite technical. "

By " technical " there is no doubt that he meant to say " irrelevant. " In this view we think that there is no doubt whatever that he was right. A consideration of the scheme of O 22 in our view leaves no doubt on this point. It is headed " Death, marriage and insolvency of the parties. " R. 1 specifically declares that the death of a plaintiff shall not cause the suit to abate if the right to sue survives. In this case there can be no doubt that Mt. Maya Devi had a right to sue surviving in her unless that right was barred by limitation. It is apparent, therefore, that the death of Mt. Nando Kuer was not in itself sufficient to cause the suit to abate. How then could it abate? Rr. 2 to 6 proceed to deal with the consequences of the death of one or other of the parties. R. 2 is clearly inapplicable. We were much pressed with R. 3. It is clear that the rule concerns what is to happen in regard to the legal representative of the deceased plaintiff, and by sub-R. 2 it is clear that if no application is made by the legal representative within the time allowed by law the suit shall abate. But it is important to note that the words have been added " so far as the deceased plaintiff is concerned. " Rr. 4 and 5 similarly concern the effect of the death on the rights of legal representatives. R. 6 is irrelevant to the matter before us. Rr. 7 and 8 deal with marriage and insolvency the second and third of the main heads referred to in the title of the order. R. 9 clearly deals with the effect of abatement or orders of dismissal passed against legal representatives of parties or against assignees or receivers in insolvency proceedings. We then come to R. 10 which is the rule really applicable to the present case. It refers to " other cases " of assignment, etc. Here clearly we have " another case, " that is to say, one in which we are not concerned with the effect of the death of a party on the rights of the legal representatives of that party or on the rights of assignees or receivers in insolvency proceedings. There is no justification for applying rules governing abatement to a person who does not claim to come in as a legal representative. Mt. Maya Devi was entitled to say :

" Whether I am or am not the legal representative of Mt. Nando Kuer (a question which has not been decided at all) I am the assignee of Mt Nando Kuer by a gift executed by her in her lifetime and as such assignee I am entitled by the leave of the Court to coutinue the suit. "

As we have already held that the rules governing abatement occur only in those rules which deal with the rights of the legal representatives, and Mt Maya Devi claiming as an assignee was entitled to say that she is not affected by those rules, and R. 1 says that the mere death of the plaintiff does not by itself cause abatement there is, in our view, no ground for holding that her application was governed by Arts. 176 or 171, Lim. Act and she had three years within which to make her application. The order of the lower appellate Court was, therefore, in our view, correct, and we dismiss the appeal with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 446

DALAL, J.

Nand Kishore Rai—Defendant—Appellant.

v.

B. Ganesh Prasad Rai and *others*—Plaintiffs—Respondents.

Second Appeal No. 1495 of 1927, Decided on 12th March 1929, against decree of Sub-Judge, Ghazipur, D/- 27th July 1926.

(a) Legal Practitioner—Admission—Admission of party's pleader whether of law or fact binds that party and cannot be re-opened in appeal—Evidence Act, S. 18.

Where the pleader of a party makes an admission, whether the admission is of law or an admission of fact, that party is bound thereby and it would be doing great injustice to a Subordinate Court of law to reopen a matter in appeal, which has been decided by that Court on the admission of a pleader of a party. [P 447 C 1]

(b) Allahabad High Court General Rules (Civil) for Subordinate Courts, Ch. 3, R. 37—Amin alone can be deputed to prepare map and if Court deputes person other than amin on party's prayer, it must give reasons in detail.

An amin is the only person who may be deputed by a civil Court to prepare a map, and whenever any prayer is made by a party other-

wise, the Court has to apply its mind to the question whether it is necessary to employ another person as commissioner or not, and if it decides that another person should be engaged as commissioner it is bound to give reasons in detail for its order : *A. I. R.* 1922 *Mad.* 219, *Rel. on.* [P 447 C 2]

K. Verma—for Appellant.

G. S. Pathak for *U. S. Bajpai*—for Respondents.

Judgment.—I had to request Mr. Varma not to press his argument which was in conflict with an admission made in the lower appellate Court by his client's pleader. What is stated in the judgment of the lower appellate Court dated 27th July 1926 is this :

"The respondents' pleader has admitted that if the eaves be fouud to project over the rasta land then there can be no question that the projecting portion is liable to removal."

Mr. Varma argues that this was an admission of law. Whether an admission of law or an admission of fact, when the representative of a party makes a statement that party is bound thereby, and it would be doing great injustice to a Subordinate Court of law to reopen a matter here which has been decided by that Court on the admission of a pleader of a party. The amin's map is accepted as correct. In accordance with that map water from certain eaves of the new building of the defendant appellant falls on common rasta (path way) of the parties. Those eaves must be removed as admitted by the defendant's own pleader in the lower appellate Court. There is, therefore, nothing in the argument that even if the water drops on this common land the defendant is entitled to drop water on that land.

The lower appellate Court was quite wrong in issuing a commission to some person other than the amin. Ch. 3, R. 37, General Rules (Civil) applicable to Subordinate Courts is never attended to by the Subordinate Courts. That is a very salutary rule:

"that commissions other than commissions for the examination of witnesses or commissions to examine accounts should not be issued to persons other than civil Court amins except when it is impracticable, in consequence of temporary pressure of business or for some other good and sufficient reason, to have them executed by civil Court amins, and in every case in which a person other than a civil Court amin is employed, the reason shall be made clearly to appear on the proceedings."

In the lower appellate Court the defendant put in a petition for the appointment of another commissioner, and that Court light-heartedly without considering this rule, and possibly without knowledge of this rule, passed an order appointing a legal practitioner as a commissioner. This was done in defiance of a rule of this Court which is binding on every Court subordinate .to this Court. Many Hon'ble Judges of this Court have complained to me as administrative Judge of the cases in which commissioner after commissioner is appointed to prepare maps creating a mass of confusion in this Court. It is not the fault of this Court that such confusion results. It is the ignorance of Subordinate Courts of rules framed by this Court which is to blame. An amin is the only person who may be deputed by a civil Court to prepare a map, and whenever any prayer is made by a party otherwise, the Court has to apply its mind to the question whether it is necessary to employ another person as commissioner or not, and if it decides that another person should be engaged as commissioner it is bound to give reasons in detail for its order. If any thought is paid to the matter as required by the rule there will be a proper check to the appointment of a large number of commissioners to which, as I have said, exception has been taken by several Hon'ble Judges in complaints addressed to me.

In the course of the day in another case my attention was drawn to a Bench ruling of the Madras High Court in *Thottamma* v. *C. S. Subramaniyyan* (1). There the Madras High Court just like the Hon'ble Judges here has deprecated the practice in Malabar of appointing successive commissioners whenever objections are filed to their reports. The observations of their Lordships may be copied here for the information of Subordinate Courts:

"Now comes the question relating to the appointment of three successive commissioners by the first Court. As the procedure followed by the lower Court appeared to us to find no support in law, and as we were informed that the practice followed in this case is typical of what happens in valuing improvements in almost every Malabar suit, we think it desirable to express our emphatic disapproval of the course followed. What happened was apparently this : at first a commissioner was appointed to make the valuation. His conclusions were objected to by both the parties. Thereupon, defendant 1 asked for the appointment of a second commissioner. The plaintiff

(1) A. I. R. 1922 Mad. 219=45 Mad. 79.

consented to this course. Once again objections were raised to the report. A third commissioner was appointed with the consent of the parties. He sent in his report and valuation. Again objections were raised. The Munsif then said that he preferred the valuation of the first commissioner as he was a respectable vakil, and the Subordinate Judge has agreed with him."

"This procedure seems to us to be wholly wrong. Ordinarily when the report of a commissioner is objected to, the Court should hear the objections in open Court and decide with the aid of such evidence as it may take whether the valuation should be varied, and if so in what direction. This is the obvious duty of the Court. There may be cases in which the commissioner had so totally misconceived his duties as to render his report and valuation useless as a basis for a decision. In such cases no doubt, a new commissioner may be appointed. This would mean that the old report and valuation were superseded. But to regard the reports and valuations of the three commissioners as available data from which the option of the District Munsif to choose any one of them is to be exercised is opposed to every principle governing Courts in such matters. It means that the Court abdicates its function of deciding the matter on hearing the objection and reserves to itself the privilege of selecting one of the reports as its decision."

"It certainly encourages a haphazard and careless selection of commissioners. It subjects parties to unnecessary and avoidable expense, and encumbers the records with useless papers .... We want it to be distinctly understood that the filing of objections to a report is no ground for appointing another commissioner and that in all cases where a second commissioner is appointed to do the same work, the reasons for adopting such a course must be recorded in writing to enable the appellate Court to see whether the judicial discretion has been properly exercised."

This appeal is dismissed with costs. A copy of this judgment shall be sent to the offending judicial officer in the present case Mr. Krishna Das wherever he may be posted at present.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 448

SULAIMAN AND KENDALL, JJ.

Nasrat Ali—Appellant.

v.

Rudra Nath and *others*—Respondents.

Second Appeal No. 257 of 1927, Decided on 6th March 1929, against decree of First Addl. Sub-Judge, Cawnpore, D/- 21st June 1926.

U. P. Land Revenue Act, S. 106—Scope—Agra Pre-emption Act, S. 9.

A division of a village into six complete pattis and one joint patti is not a perfect partition, and there being only one mahal an exproprietary tenant in any patti can resist a emption against him. [P 448 C 2]

M. H. Faruqi—for Appellant.

K. C. Mital and *H. C. Muherji*—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for pre-emption. One of the pleas raised in defence was that the defendant was an exproprietary tenant in the mahal in which the property sold was situate and the suit for pre-emption against him did not lie. The suit has been decreed by both the Courts. The learned Judge has remarked that the plaintiff's witness Tajammul Husain has stated that the village

"is divided by perfect partition into six pattis,"

and then gone on to say that

"the share sold is in patti Ghissa, and the exproprietary holding of the defendant vendee is in patti Ali Bakhsh."

He has thus thought that when a village is divided into several pattis by perfect partition each patti is practically a separate mahal and the defendant is a stranger to the mahal. The whole finding is based on an entire misconception of what a perfect partition is as well as of the evidence of Tajammul Husain. Tajammul Husain only said that the village is divided into six complete pattis and one joint patti. The learned Judge mistranslated the words and put in "perfect pattis" instead of "complete pattis" in his notes. He has then misinterpreted it by thinking that the witness stated that the village itself has been divided by perfect partition into six pattis. The witness said nothing of that kind. What he stated was that the village has been partitioned into six complete pattis and one joint patti. Such a division is not a perfect partition under S. 106, Land Revenue Act. There is thus only one mahal and in that mahal the defendant is an exproprietary tenant. He is entitled to resist the suit for pre-emption under S. 9, Agra Pre-emption Act. The appeal is accordingly allowed, and the decrees of the Courts below are set aside and the suit dismissed with costs in all Courts including in this Court fees on the higher scale.

S.N./R.K. *Decree set aside*

A. I. R. 1929 Allahabad 449

SULAIMAN, AG. C. J., AND KENDALL, J.

Baikunth Nath and *others*—Plaintiffs —Appellants.

v.

Jai Kishun—Defendant—Respondent.

First Appeal No. 524 of 1924, Decided on 19th July 1928, against decree of Sub-Judge, Benares, D/- 4th September 1924.

(a) Civil P. C., O. 26, R. 4—Examination of witnesses on commission though is within Court's discretion, issuing summonses to witnesses is matter of course—Civil P. C., O. 16, R. 1.

The examination of a witness on commission as provided under O. 26, R. 4, is a matter in the discretion of the Court, whereas in the case of issuing summonses to a witness under O. 16, R. 1 they are to be issued as a matter of course though the Court may not permit an adjournment of the case if the application is made too late. [P 451 C 1]

(b) Hindu law—Widow's purchasing property does not raise presumption that money has come from savings of husband's property.

Where a Hindu widow in possession of her deceased husband's property as a Hindu widow, purchases certain property there is no presumption that the money has come from the savings of her husband's estate : 2 *C. W. N.* 197 and 26 *Cal.* 871, *Foll.* [P 452 C 2]

K. N. Katju and *A. P. Pandey*—for Appellants.

P. L. Banerji, *Gadadhar Prasad* and *Zamir Alam*—for Respondent.

Order.—This is a plaintiffs' appeal arising out of a suit for recovery of possession of certain immovable properties against the defendant Jai Kishun who is in possession. These properties were left by one Mt. Mungi Bahu, the widow of Gangadhar. The plaintiffs claim to be the bandhus of Gangadhar deceased and allege that there are no sapindas or samanodaks or sakullyas of the deceased alive and that they are his nearest heirs. The contesting defendant is the son of Mt. Mungi Bahu's own brother and would not be an heir to the estate if it was a Hindu widow's estate in the hands of Mt. Mungi Bahu.

The defendant denied the pedigree set up by the plaintiffs and further denied that there was no nearer heir alive in the family of Gangadhar. He also asserted that Gangadhar had made an oral will in favour of his wife Mt. Mungi Bahu who in her turn had bequeathed this property to the defendant of which he had become an absolute owner. The learned Subordinate Judge came to the conclusion that the plaintiffs had succeeded in establishing that they were the nearest bandhus of Gangadhar deceased, but he held that it was clear on the evidence that there were some samanodaks of Gangadhar alive and accordingly the plaintiffs were not the heirs to the estate. In view of his finding he did not consider it necessary to go into the other issues which were raised in the case. The plaintiffs come up in appeal and challenge the finding of the Court below that there are in existence nearer heirs to exclude them.

Taking up the point raised in the appeal itself first, we may mention that although the defendant in his written statement had not admitted the plaintiff's allegation that there were no sapindas, samanodakas or sakullyas of Gangadhar alive, he did not specifically mention the name of any person whom he alleged to be a nearer heir, nor did he give any particulars. Even on the date when the issues were framed the defendant was not in a position to give the name of any supposed nearer heir. In February 1924 an application was made on behalf of the defendant to summon two witnesses Mt. Shama Bai and Chhote Lal of Ahmedabad on commission. But and even then it was not mentioned that Chhote Lal was a nearer heir. When one of the plaintiffs Prem Nath was in the witness-box a question was put to him whether he knew Chhote Lal of Ahmedabad to which he replied that he did not know him. Even at that stage it was not definitely suggested on behalf of the defendant that Chhote Lal was a collateral who might inherit. After the plaintiffs' evidence was closed the defendant examined himself as his own witness, and he then stated that after the settlement of the issues he learnt from Mt. Shama Bai that Chhote Lal of Ahmedabad belonged to the family of Gangadhar. The statement of Jai Kishun was not based on any personal knowledge of his own but on what he had heard from Mt. Shama Bai. Mt. Shama Bai was examined on commission but the learned Subordinate Judge did not allow the defendant's application for the examination of Chhote Lal. We shall come to this point later on. Mt. Shama Bai no doubt gave a pedigree different from that set up by the plaintiffs and if her statements were believed the plaintiffs would

not even be the bandhus of Gangadhar. As regards Chhote Lal her statement was that Bapuji was related to Gangadhar as a distant brother of the same gotra. The evidence of the defendant himself was that Bapuji was the name of the father of Chhote Lal. Mt. Shama Bai did not state that Bapuji's son was related to Gangadhar within 14 degrees. She did not remember the name of Bapuji's father as she had not seen him. In cross-examination she admitted that she was not on friendly terms with the plaintiffs but was on bad terms with them and that there had been ill-feeling between herself and their father and uncle for a long time, in fact from the time of Data Ram, her grandfather-in-law. One of the plaintiff's witnesses Parshotam Jani in cross-examination stated that his great-grandfather was the brother of Ram Nath, the ancestor of Gangadhar. On this evidence the learned Subordinate Judge recorded a finding that the existence of samanodaks such as Parshotam Jani and Chhote Lal was proved, which disentitled the plaintiffs from instituting this suit.

The learned Judge did not apparently realize that Parshotam Jani's relationship with Ram Nath would not make him a samanodak of Gangadhar who was related to Ram Nath through a female and that Parshotam Jani would merely be a bandhu remoter than the plaintiffs according to the latter's allegation. His finding that the existence of Parshotam Jani is a bar to plaintiff's case cannot be supported at all. Parshotam Jani himself appeared as a witness for the plaintiffs and did not put forward any claim based on his supposed title.

As regards Chhote Lal, the evidence as it stands on the record is legally insufficient to prove that he was a samanodak of the deceased Gangadhar. All that we know is that Chhote Lal is the son of Bapuji. The defendant does not go further than that. We do not know the name of Bapuji's father and grandfather and we have not got a complete pedigree connecting Bapuji with Gangadhar. The solitary statement of Mt. Shama Bai who is admittedly not on good terms with the plaintiffs is that Bapuji was related to Gangadhar as a distant brother of the same gotra. That by itself is not sufficient to prove that Chhote Lal and Gangadhar were related to each other within 14 degrees. The finding of the Subordinate Judge that this fact is established cannot therefore be accepted.

No doubt the burden lay on the plaintiffs in the first instance not only to establish their pedigree but to prove that to the best of their knowledge and belief no nearer heir existed. The plaintiffs have led prima facie evidence in support of their case which shifted the burden on the defendant. Their witness Govind Ram stated that excepting the plaintiffs there were no sapindas, samanodaks or sakullyas of Gangadhar's family living. Similarly another witness Gauri Shanker states that in the family of Ballavji, Gurji and Gangadhar there is no nearer relation than the plaintiffs. The plaintiffs cannot be expected to prove the negative by direct evidence. We are therefore of opinion that the evidence of these two witnesses of the plaintiffs were sufficient to discharge the burden which lay on them initially and to shift the burden on the defendant. If the defendant wanted to establish that there was a nearer heir it was his duty to name him and to prove that he was in fact nearly related.

Before the evidence commenced the defendant applied to the Court that Chhote Lal be examined on commission after the plaintiff's evidence had been closed. He did not suggest in the application in express language that if the Court was not prepared to examine Chhote Lal after the plaintiff's evidence was closed he might be examined at an earlier stage, nor did he disclose in his application that Chhote Lal was the person who was a nearer heir than the plaintiffs. The Court merely passed the order that the application should be put up for orders after the plaintiffs' evidence had been closed. The plaintiffs' evidence was concluded on 18th August 1924 and thereafter the defendant's evidence began. On 20th August the defendant's pleader made a statement that he had concluded his oral evidence except the evidence of the two witnesses Mt. Shama Bai and Chhote Lal whom he asked to be examined on commission. Mt. Shama Bai was at that time living in the Benares City and was a pardanashin lady who could not be compelled to appear in Court. Chhote Lal on the other hand was residing at Ahmedabad in Gujrat outside the limits of the jurisdiction of the Subordinate Judge. On 20th August

the learned Judge granted the plaintiffs' prayer that Mt. Shama Bai be examined on commission, but he refused the application so far as Chhote Lal was concerned. Unfortunately the learned Judge has given no reasons showing why he did not permit the examination of Chhote Lal on commission. It is not necessary to speculate what might have been in his mind, but it is possible that he thought that the examination of Chhote Lal would involve considerable delay. As Shama Bai had not been then examined, he could not have felt satisfied that Chhote Lal's relationship had been established and that there was no necessity to examine him.

The learned advocate for the respondent has urged before us that Chhote Lal should now be ordered to be examined on commission. After considering the matter carefully we have come to the conclusion that now it is too late to order the examination of Chhote Lal. The defendant did not word his application properly, and did not ask the Court to decide whether Chhote Lal's examination would be ordered after the plaintiffs' evidence had been closed. He took the risk of having his application refused after the plaintiffs' evidence was concluded. Further more the examination of a witness on commission as provided under O. 26, R. 4, stands on a slightly different footing from the issuing of summons to a witness under O. 16, R. 1. In the former case the matter is in the discretion of the Court, whereas in the latter case summonses are to be issued as a matter of course, though the Court may not permit an adjournment of the case if the application is made too late. The defendant therefore had not an absolute right to get the witness Chhote Lal who was residing in Gujrat examined on commission. The learned Judge has refused his application. At the time when the learned Judge had passed his order in February 1924 that the application should be put up for disposal later on, he undoubtedly was not aware that the evidence of Chhote Lal would be particularly important or that he would be put forward as the nearer heir to the estate. Even up to 20th August 1924 Mt. Shama Bai, whose evidence alone could be legal evidence, had not been examined and the defendant's statement was based on a mere hearsay.

Having regard to all these circumstances we do not think that we should at this stage order this fresh evidence to be brought on the record. The result therefore is that there is no legally sufficient evidence on the record to establish that there is any sapinda, samanodak or sakullya within 14 degrees of Gangadhar who would be a nearer heir to the estate than the plaintiffs in case the latter have proved their pedigree.

The learned advocate for the defendant has sought to support the decree of the Court below by challenging the finding that the plaintiffs' pedigree has been established. (Here the judgment discusses evidence and concluded). The result therefore is that we must accept the finding that the plaintiffs' pedigree has been established by the evidence.

Chhote Lal whose rights are set up by the defendant is not a party to the suit and had not even been examined as a witness. There is nothing to prevent him if he is a nearer heir from instituting a suit against the successful party to the suit specially as several years still remain before limitation will expire. But unless the defendant succeeds in establishing that by two successive oral wills he had acquired the property as an absolute owner, he would be a stranger to the family and a trespasser. As between him and the plaintiffs it has now been found that the plaintiffs are the nearest bandhus and the defendant is not an heir at all. The plaintiffs would therefore be entitled to a decree unless the bequests are proved

The learned Subordinate Judge disposed of only the first issue out of five which had had been framed and left the others undecided. As the first issue was the main issue in the case and not a preliminary one we think it is necessary that we should call for findings on the remaining issues under O. 41, R. 25, before finally disposing of this appeal.

We accordingly direct the Court below to record findings on issues 2 to 5 mentioned in the judgment of the Court below and return those findings within two months from this date. No fresh evidence will be allowed. The order as to costs will be passed after the findings have been returned.

Judgment.—The findings have been returned and they are in favour of the

respondent. Objections have been filed to these findings.

The evidence adduced by the defendant to prove that Gangadhar had made any oral will in favour of Mt. Mungi Bahu is unreliable. The will is said to have been made 40 years ago. The evidence in support of it consists of the statement of three witnesses. During all these 40 years there is not the slightest documentary evidence to indicate that any such will was in existence. The learned Subordinate Judge has pointed out some discrepancies in the statements of these three witnesses. He had the opportunity of hearing them and marking their demeanour. He was not impressed by their evidence and has rejected it. We have examined that evidence and we are unable to take a contrary view. It must therefore be held that the oral will got up by the defendant is not established.

It follows that Mt. Mungi Bahu had no authority to make any will in favour of the defendant. As a matter of fact the evidence to prove such an oral will by the lady in favour of the defendant is also unsatisfactory, and the learned Subordinate Judge has rejected it We accept his finding on this point also.

The next question that remains is whether the house in mohalla Bhairon Baoli, which has purchased by Mungi Bahu, can be claimed by the defendant. The house was purchased under a sale-deed dated 4th July 1903 for a sum of Rs. 600. This sum consisted of Rs. 500 advanced by her previously and a sum of Rs. 100 paid at the time There is absolutely no evidence on either side to show where she had got the money which she advanced as a loan in the first instance, and where she got Rs. 100 from. The learned Subordinate Judge remarks that in the year 1885 she had sold a house of her husband for Rs. 2,000. The house in dispute was purchased 18 years after 1885, nevertheless the learned Subordinate Judge has said:

"It is difficult to trace the source of the money out of which the house in dispute was purchased, but one thing is clear and that is this that she had Rs. 2,000 in hand out of her husband's estate, and she could therefore very well manage to save Rs. 600 out of that to purchase the house in dispute even after a lapse of 18 years"

We find it very difficult to assume that Rs. 600 remained in the hands of the lady after the lapse of 18 years, and that it is with that amount that she must have purchased this house. This circumstance must accordingly be ignored. There is therefore no evidence either way The learned Subordinate Judge has held that it was for the defendant to prove that the money did not come out of the income of the husband's estate No authority has been cited before us in support of the contention that there is any presumption that the money in the hands of the lady is presumed to come out of the savings of her husband's estate. Cases have been cited which show that where it is known that property was purchased out of the savings, it would be treated as accretion to the estate, if it had not been disposed of before the widow died. Those cases are distinguishable. The only case which is at all applicable is the case of *Dakhina Kali Debi* v. *Jagadishwar Bhuttacharjee* (1), and that is in favour of the defendant, and shows that there is no such presumption in law. The case of *Diwan Ran Bijai Bahadur Singh* v. *Indarpal Singh* (2), also suggests that there is not any general presumption that the widow can own no property herself. We accordingly think that in the absence of any evidence to show the contrary, it must be held that the plaintiffs have failed to establish that the said house was acquired out of the savings of the widow's estate. Their claim as regards this house should accordingly be dismissed.

The last question was whether the defendant had any moveables in his possession which were part of the widow's estate. The evidence to prove the existence of such moveables is worthless and has been rejected by the Court below. We accept that findings and hold that there is no such proof. The appeal is allowed in part, and the decree of the Court below is set aside, and a preliminary decree in favour of the plaintiffs is passed as follows: The claim for the properties in Schs. 1 and 3 be decreed and that in Schs. 2 and 4 dismissed. The plaintiffs are further entitled to mesne-profits from May 1921 to December 1923 as well as pendente lite and future mesne profits till delivery of possession. The Court below will as-

(1) [1898] 2 C. W. N. 197.
(2) [1899] 26 Cal. 871=26 I. A. 226=4 C. W. N. 1=7 Sar. 578 (P.C.).

certain the amount of the mesne-profits to which the plaintiffs are entitled and pass a final decree. Parties will pay and receive costs in proportion to success and failure in both the Courts.

S.N./R.K. . *Appeal allowed in part.*

A. I. R. 1929 Allahabad 453

SULAIMAN AND SEN, JJ.

Basira Bibi—Plaintiff—Appellant.

v.

Sheikh Ata Ullah—Defendant—Respondent.

Second Appeal No. 127 of 1927, Decided on 27th February 1929, against the decree of Dist. Judge, Azamgarh, D/- 7th December 1926.

Pre-emption—Pre-emptor expressing clear intention not to pre-empt and waiving objection in unequivocal language to the property being sold—Pre-emptor is estopped personally from pre-empting—Evidence Act, S. 115.

The refusal to purchase the property at a particular price cannot be deemed to be also a refusal to purchase it at a lower price. Where, however, a pre-emptor has previously expressed his clear intention not to pre-empt the property on any account and has waived his objection in unequivocal language to the property being sold to the vendee, he is estopped personally from pre-empting afterwards, even though the exact share or price at which it was going to be sold was not mentioned to him : 6 *All.* 463 ; 27 *All.* 670 ; 5 *A. L. J.* 331; *A. I. R.* 1926 *All.* 467, *Ref.* [P 453 C 2]

Zafar Mehdi, *Mukhtar Ahmed* and *Hyder Mehdi*—for Appellant.

A. Sanyal and *Mohammad Husain*—for Respondent.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for pre-emption. The only ground on which the suit has been dismissed is that the plaintiff refused to make the purchase before the sale-deed. The evidence led by the defendant indicated the refusals on two occasions. A month prior to the sale deed it was stated that the vendee had declined to make the purchase unless the vendor's sister, the present plaintiff, agreed that she would not pre-empt the property. The parties went to the village where the plaintiff is stated to have said that she would not pre-empt the property and that it might be sold to the vendee. The evidence does not go on to show fully that at that time the exact extent of the vendor's share or the exact price at which the transaction was settled had been disclosed to the lady. The other occasion was when the sale-deed was registered. She was brought in person to the registration office. She attested the sale-deed and put her thumb mark on it. It is, however, a fact that in the sale deed the price mentioned was Rs. 1,500 whereas at the trial the vendee had to admit that the true consideration was only Rs. 1,250.

The first Court found that there was no refusal on her part. The learned District Judge has found that there was an absolute refusal on her part which estopped her. If the refusal had rested merely on her attestation of the sale deed I would have had considerable difficulty in accepting the finding that it amounted to an estoppel. The price put down in the sale-deed was an inflated price. The refusal to purchase the property at that price cannot be deemed to be also a refusal to purchase it at a lower price. But the learned District Judge has believed the oral evidence as regards the instances which happened in the village prior to the execution of the sale-deed.

No doubt in some earlier cases, *Subhagi* v. *Mohammad Ishaq* (1), *Kanhi Lal* v. *Kalka Prasad* (2) and *Munawar Husain* v. *Khadim Ali* (3) it was laid down that before there could be a final refusal there must be a definite contract entered into with the purchaser as regards the specific share of the property and its definite sale price. It seems to me, however, that there may be a personal estoppel against the pre-emptor which under S. 115, Evidence Act, would preclude her from pre-empting. It must be conceded that Ss. 14 and 15, Agra Pre-emption Act, do not lay down in an exhaustive manner the principles of estoppel applicable to a pre-emption suit: *Ranjit Singh* v. *Bhagwati Singh* (4). If a pre-emptor has previously expressed her clear intention not to pre-empt the property on any account and has waived her objection in unequivocal language to the property being sold to the vendee I would hold that she would be estopped personally from pre-empting afterwards, even though the exact share or price at which it was going to be sold was not mentioned to her. It was her duty before she spoke

(1) [1884] 6 All. 463=(1884) A.W.N. 174.
(2) [1905] 27 All. 670=2 A. L. J. 390=(1905) A. W. N. 149.
(3) [1908] 5 A. L. J. 331=(1908) A. W. N. 93.
(4) A. I. R. 1926 All. 467=48 All. 491.

in an unconditional manner to find out the price of the transaction in case she was making any mental reservation in her favour. One is entitled to say that the vendee's position has been compromised and that he has been led to purchase the property on account of the conduct of the plaintiff, and her admission precludes her from suing. I would therefore accept the finding of the learned District Judge and dismiss the appeal.

Sen, J.—This appeal is concluded by the findings of fact arrived at by the Court below The following extracts from the judgment may be usefully quoted :

"Three witnesses produced on behalf of the defendant vendee swear that a month before the execution of the sale deed the vendee accompanied by the father and the brother of the plaintiff went to mauza Kherewan where the piaintiff in the presence of her father-in-law Abdul Karim refused to make the purchase and told her brother that he might sell it to Abdul Qadir vendee. I see no reason to distrust the evidence of these witnesses on the point ..... She (the plaintiff) does not say that she was not willing to make the purchase at Rs. 1,500 but she would have made the bargain if it had been stated to her that the real price paid was Rs. 1,250 only. The whole evidence on the record shows that the refusal of the plaintiff was absolute, she having no mind to purchase the property, whatever may have been the price at which it was being sold. I am therefore of opinion that the sale-deed in dispute was executed after the refusal of the plaintiff and with her consent and therefore the plaintiff was estopped from maintaining the suit."

Had the plaintiff refused to purchase the property for Rs. 1,500 but the property was really sold for Rs. 1,250 there was no legal bar to her maintaining a suit for pre-emption. But when she absolutely and unconditionally refused to make the purchase, no matter what the value of the property was, she was precluded from instituting the suit for pre-emption. The rule of estoppel as formulated in S. 15, Pre-emption Act is not exhaustive, The law on that subject appears to have been stated too broadly in some of the previously decided cases like *Munawar Husain* v. *Khadim Ali* (3). The facts of that case, however, are distinguishable from those of the present case The finding of the Court below being that the plaintiff pre-emptor had refused to purchase the property absolutely and unconditionally the decree of the lower appellate Court cannot be disturbed. I would therefore dismiss the appeal with costs.

By the Court.—The appeal is dismissed with costs including in this Court fees on the higher scale.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 454

MEARS, C. J.

Collector of Meerut—Applicant.

v.

Sagar Mal—Opposite Party.

Civil Revn. No. 345 of 1928, Decided on 15th February 1929, against order of Small Cause Court Judge, Meerut, D/- 15th December 1927.

Guardian and Ward — Alienation—Guardian has no power to make gifts on minor's behalf which would appreciably reduce value of minor's estate.

Where a guardian purported to release a debtor of the estate from his indebtedness by giving him a receipt, the effect of which was to wipe out his indebtedness under the bond for Rs. 800 executed by him in favour of the minor and the consideration was expressed to be a gift at the time of the marriage of the minor and also as a recognition of his services as a mukaddam.

Held ; that though the guardian had authority to make such gifts as would be customary on the occasion of his ward's marriage, he had certainly no authority to make a gift of this extent as the effect of that gift was to reduce the value of the minor's estate by that amount. The authority of the guardian extended only to making disbursements which were legally compellable on behalf of the minor and customary gifts of a moderate value and that there was no legal compulsion to make this unusual gift and that the generosity could be challenged. [P 455 C 1]

U. S. Bajpai—for Applicant.

Panna Lal—for Respondent.

Judgment.—On 16th December 1922 Sagar Mal executed a bond for Rs. 800 in favour of Kunwar Mahandrajit Singh, who was then under age. The mother of Mahandrajit Singh was his legal guardian and was acting on his behalf. At some time in June 1923 Kunwar Mahandrajit Singh was married, and on the occasion of his marriage the mother of Kunwar Mahandrajit Singh purported to discharge the indebtedness of Sagar Mal to her son by giving him a receipt which in terms wiped out the indebtedness created under the bond. The consideration was expressed to be a gift at the time of the marriage and also as a recognition of his services as mukaddam.

Later in 1925 the estate of Kunwar Mahandrajit Singh came into the hands of the Court of wards and they consi-

dered the legal position arising from the act of the Rani Saheba, and they were of opinion that she being the legal guardian had imposed upon her as of necessity a right to defray all legal obligations but could not dissipate the estate by acts of generosity. They took the view that a guardian was bound to protect the estate, and if they could point to any instance where the Rani Saheba had in a manner that was not customary made gifts by which the estate was diminished, the legality of these gifts could be questioned. They, therefore, sued Sagar Mal, and Mr. Bhagwan Dass came to the conclusion that the Rani Saheba had authority to remit the money, and that she was within her rights in making the remission. I disagree. I have no doubt that the Rani Saheba had authority to make such gifts as would be customary on the occasion of her son's marriage, but certainly not a gift of this extent. The effect of that gift was to reduce the value of the estate of Kunwar Mahandrajit Singh by Rs. 800, and if the Rani Saheba had power to make that one gift in law, she had power to make other similar gifts and in that way to reduce the value of the inheritance.

I think she had no authority to do anything of the kind, and that her authority as guardian extended only to making disbursements which she was legally compellable to do on Kunwar Mahandrajit Singh's behalf and customary gifts of a moderate amount or value. There was no legal compulsion on her to make this unusual gift, and it was an act of generosity capable of being challenged by the Court of wards.

I, therefore, set aside the decision of Mr. Bhagwan Dass and decree the plaintiff's claim. In the circumstances each party must bear their own costs.

K.N./R.K. *Revision allowed.*

A. I. R. 1929 Allahabad 455

MEARS, C. J., AND YOUNG, J.

Rikhab Kumar and *another* — Plaintiffs—Applicants.

v.

Trivedi and *Co.*—Defendant—Opposite Party.

First Appeal No. 143 of 1928, Decided on 7th March 1929, against order of Sub-Judge, Cawnpore, D/- 9th July 1928.

(a) Arbitration Act, S. 19—Failure in the endeavour to solve differences by arbitration does not affect the validity of the arbitration clause.

The fact that the parties endeavoured to solve their differences by recourse to arbitration and failed does not in the slightest degree affect the validity of the arbitration clause and it is no answer to say that the parties went through, what all of them actually believed at the time was an arbitration in due form, if, when examined by the Court, the arbitration was found to have been of no legal effect. [P 456 C 2]

(b) U. P. Arbitration Act—Applicability.

U. P. Arbitration Act does not apply in cases where the contract provides for arbitration in Calcutta. [P 456 C 2]

U. S. Bajpai—for Applicants.

S. N. Seth—for Opposite Party.

Judgment—The plaintiffs and the defendants entered into a contract for the purchase of certain plate cuttings, the plaintiffs being the buyers, and the defendants being the vendors. The plaintiffs on 31st December 1925 entered into the ordinary form of contract which provided for arbitration in the event of any dispute or difference. A dispute arose and the parties each appointed an arbitrator, and after the refusal of the Bengal Chamber of Commerce to act as umpire, they appointed a Mr. Cameron. For reasons which we need not enter into, the High Court of Calcutta set Mr. Cameron's award aside, and thereupon, on 21st June 1927, the defendants nominated Mr. Lee as their arbitrator, he having been the same gentleman who had sat as arbitrator on their behalf before. The plaintiffs objected to this, probably on the ground that Mr. Lee had already expressed his opinion favourably to the defendants. The plaintiffs made various applications to get the appointment of Mr. Lee, who by lapse of time was said by the defendants to have become sole arbitrator, set aside, and failed. Thereupon, on 10th February 1928, the plaintiffs instituted a suit in Rs. 5,000 as damages, the damages being as the plaintiffs contended, the monetary compensation to which they were entitled by a breach of contract arising under this very engagement of 31st December 1925. Thereupon the defendants applied under S. 19 Arbitration. Act to stay the suit, and Mr. Raja Ram, a Judge of great experience in commerical matters, made the order staying the suit. From that order the plaintiffs have appealed here

We are of opinion that the learned Subordinate Judge came to a right conclusion, and that the matter is, when one examines the terms of the contract, beyond argument.

The first point to be noticed is that the price of the goods was to be paid in Calcutta, and when one turns to the arbitration clause, which is No. 4 of the printed form, it is seen at once that the buyers bound themselves to an arbitration, which, by the terms of Cl. 4, indicated exactly how and where that arbitration was to proceed. Cl. 4 runs as follows :

"If any question, dispute or difference whatsoever shall, touching this contract arise between sellers and buyers then, and in any such case, sellers will be entitled at their option to require buyers to submit the matter in difference, either to the arbitration of two European merchants in the trade in Calcutta (one to be appointed by sellers and one by buyers), or in the event of their differing of an umpire appointed by such arbitrators before entering on the reference or to the arbitration of the Bengal Chamber of Commerce. The award of such arbitrators, umpire or Chamber shall be final and binding on both the parties, either of whom will be at liberty to apply that the same may be filed as a rule of Court."

Now that was part of the agreement on the part of the plaintiffs who wanted to get certain goods from the defendants, and who could only get these goods from the defendants if they entered into that form of contract on which the defendants insisted. The plaintiffs are bound by the promise that they made, and the promise put in words, other than those in Cl. 4, was that if at any time there should be a dispute between the buyers and sellers, the sellers could, if they wished, force the buyers into an arbitration. That arbitration was to be held in Calcutta and two European merchants were to be the arbitrators, one appointed by each party. In the event of the arbitrators disagreeing, the award was to be made by an umpire, and such award was to be final and binding. There were provisions dealing with the failure of the buyers to appoint an arbitrator or to take part in an arbitration, and in that event the sellers were entitled to proceed ex parte, and the award so obtained was to have the same legal effect as if the matter had been fought out after contest with arbitrators on each side and an umpire. That was the bargain, and it necessarily follows that if the plaintiffs desire to break away from it and institute a suit, the Court must, under S. 19 Arbitration Act, stay such a suit.

Two points have been taken on behalf of the appellants, and one is that there was no proper submission as required by the U. P. Arbitration Act. The answer is that one must look to the contract. The contract provided for an arbitration in Calcutta in the event of any dispute arising. In our opinion the U. P. Arbitration Act has no application whatever to this matter.

The second point that was put forward was that inasmuch as there had been one arbitration and that had been abortive, the agreement contained in Cl. 4 contract had exhausted itself. There has never been an arbitration, there has been an attempted arbitration, which, when examined by the Court, was found not in law to have been an arbitration at all, that was set aside and swept away. The fact that the parties did endeavour to solve their differences by recourse to arbitration and failed, does not in our opinion in the slightest degree affect the validity of Cl. 4, and it is no answer to say that the parties went through, what all of them actually believed at the time was, an arbitration in due form, if, when examined by the Court, the arbitration was found to have been of no legal effect.

The consequence is that this appeal must be dismissed and the suit must be stayed in accordance with the order of Mr. Raja Ram.

The respondents are entitled to costs and fees on the higher scale.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 456

ASHWORTH, J.

Sadho Kandu—Defendant—Appellant.

v.

Mt. Jhinka Kuer and *another*—Plaintiff — and Defendants—Respondents.

Second Appeal No. 250 of 1929 Decided on 15th March 1929, from a decree of Dist. Judge, Azamgarh, D/- 1st November 1928.

(a) Evidence Act, S. 114—In absence of evidence non-compoundable complaint is to be presumed to be withdrawn and not compounded.

Where there is no evidence that a non-compoundable offence was compounded, it is

to be presumed that the criminal Court acted according to law, and the presumption is that the criminal case was withdrawn and not compounded. [P 457 C 2]

(b) Criminal Trial—No reason to show why non-compoundable complaint was withdrawn—Withdrawal is not unlawful for it may be due to the complaint being unlikely to succeed—Contract Act, S. 23.

It is not necessarily unlawful to agree to withdraw a criminal complaint of a non-compoundable offence because it may have been withdrawn because the complainant had very little chance to succeed in establishing his case. [P 457 C 2]

Where a complaint, made under Ss. 379, and 323, I. P. C. was withdrawn but no cause was shown as to why the complaint, so far as it was under S. 379, was withdrawn, the withdrawal cannot be said to be unlawful because it may have been withdrawn because the complaint under S. 379 was, in the circumstances, not likely to succeed. [457 C 2]

(c) Civil P. C., S. 100—Point of law.

In second appeal a Court will not take up a point of law for the satisfactory determination of which there is no material in the pleadings and judgments of the lower Courts. [P 457 C 2]

Mukhtar Ahmad—for Appellant.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-respondent against the defendant-appellant for arrears of maintenance fixed by a panchayat at Rs. 8 a month. It appears that the plaintiff, who is sister-in-law of the defendant, claimed from him Rs. 10 a month as maintenance, and that there was a quarrel over the matter. The plaintiff then made a criminal complaint under Ss. 379 and 323, I. P. C. This induced the appellant to agree to the matter being decided by a panchayat. The award recites that the criminal case had been compromised. The defendant set up in defence the plea that his assent to the reference to the panchayat in pursuance of which the award was made was obtained because the plaintiff agreed to compromise the criminal complaint, and that this was an unlawful consideration. The trial Court rejected the plea on the ground that it is not unlawful to contract with a person for the compounding of a compoundable offence. The lower appellate Court does not consider the plea now taken that this was not a compoundable offence. The plea does not appear to me to have been taken in the grounds of appeal to the lower appellate Court. It is true that the second ground of appeal in that Court was that the compromise was entered into on account of undue pressure and fear of conviction.

In the present appeal the point taken is that it is unlawful to compound a non-compoundable offence. There is no evidence that the offence was compounded. It is to be presumed that the criminal Court acted according to law, and the presumption is that the criminal case was withdrawn and not compounded. The question then is whether it is unlawful to agree to withdraw a criminal complaint of an offence which is not compoundable under the Criminal Procedure Code. A party may withdraw a complaint on more than one ground. It may withdraw it on the ground that it has been given some consideration to withdraw it or has been given some compensation for the injury caused by the offence. In either of these cases it would appear that the withdrawal is contrary to law where the offence is a non-compoundable one. But it may withdraw on another ground, namely that the party has little chance of establishing the alleged offence or cannot prove it, or indeed on the ground that the complainant repents having brought a false or exaggerated complaint. In this case it cannot possibly be said that the withdrawal is unlawful. In the present case no attempt has been made to show the reason of the plaintiff for withdrawing the complaint so far as it was a complaint under S. 379. I am asked to presume that the reason was a promise by the appellant to have the matter of maintenance settled by a panchayat. This presumption it is of course open to a Court to make, but in the circumstances of this case, I should not be prepared to make it, because I think that it is quite likely that the complaint under S. 379 was one not likely in the circumstances to succeed. It was for the appellant in the lower courts to make out quite clearly that the complaint of an offence under S. 379 was withdrawn for the improper reason and not for the proper reason. Further the point was not raised before the lower appellate Court except so far as it would come under the vague plea that there was undue influence. In second appeal a Court will not take up a point of law for the satisfactory determination of which there is no material in the pleadings and judgments of the lower Courts.

No doubt there is authority that it is contrary to public policy to compound a non-compoundable criminal case, but before this principle of law can be invoked it is necessary to prove that the case was compounded, that is to say settled by a quid pro quo and not that it was withdrawn merely as unsustainable. Where a complaint alleging circumstances constituting a compoundable and also other circumstances constituting a non-compoundable offence is preferred, it has to be seen what are the essential circumstances. Accordingly I hold that the appellant has failed to show that the lower appellate Court was wrong in finding the panchayat award to be free from taint on the ground that the appellant's assent to the arbitration was induced by a consideration opposed to public policy. The appeal fails and is dismissed.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 458

ASHWORTH, J.

(*Lala*) *Gopi Chand*— Plaintiff— Appellant.

v.

Jodhraj Deojit and *others* — Defendants—Respondents.

Second Appeal No. 183 of 1929, Decided on 12th March 1929, against decree of Dist. Judge, Agra, D/- 31st October 1928.

(a) Transfer of Property Act, S. 53—S. 53 applies even where debtor has other property to meet the decree.

The mere fact that the judgment-debtor has other property to meet the decree does not prevent the application of S. 53. [P 458 C 2]

(b) Civil P. C., S. 100—Whether the existence of other property to meet the decree is sufficient evidence of the genuineness of a transfer is a question of fact.

When a person gets a decree, he is entitled to execute that decree against any property of the judgment-debtor and if the judgment-debtor alienates some of his property, he restricts the facility of the decree-holder to execute that decree. It is a question of fact whether his other property is of such an amount and so easily available for satisfaction of the decree as to render the disposal by the judgment-debtor of the particular property immaterial. [P 458 C 2]

H. P. Agarwal—for Appellant.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-appellant for a declaration that certain property which the defendant-respondents have attached, and applied for sale of, in execution of a decree is not liable to attachment and sale. The appellant based his suit on a sale-deed by the judgment-debtor dated 15th October 1927. This sale-deed is admittedly subsequent to the respondent's decree.

The trial Court in a rambling judgment held that the transfer was not voidable under S. 53, T. P. Act, because there was no sufficient evidence to prove that the judgment-debtor intended by this transfer to defeat or delay the plaintiff decree-holder. The judgment-debtor had other property to meet the decree and the transfer to the plaintiff was made for adequate consideration. This Court did not consider the question of the appellant being a bona fide transferee in good faith.

In first appeal the District Judge held that as the sale by the judgment-debtor was subsequent to his receiving an injunction from the Court not to sell this property the transfer must have been made with intent to defraud the decree-holder. He also found that the consideration was not proved at all.

It is clear on these findings that the appellant cannot plead to be bona fide transferee in good faith. The only question that remains is whether the fact of the judgment-debtor having other property would prevent the application of S. 53.

It is sufficient to say that the facts found proved by the lower appellate Court were sufficient to justify a strong suspicion of collusion between the plaintiff and the judgment-debtor. The question whether the object of this collusion was to defraud, defeat or delay the decree-holder was a question of fact. It appears to me that when a person gets a decree, he is entitled to execute that decree against any property of the judgment-debtor, and if the judgment-debtor alienates some of his property, he restricts the facility of the decree-holder to execute his decree. It is a question of fact whether his other property is of such an amount and so easily available for satisfaction of the decree as to render the disposal by the judgment-debtor of the particular property immaterial. The finding of the lower appellate Court in this case is clearly that this was not so. It relied on the fact that the decree-holder anti-

cipated trouble in executing his decree if any of the judgment-debtor's property were sold and got an injunction in consequence. As the sale to the plaintiff was for no consideration, it is clear that the plaintiff was aware of the injunction. In these circumstances, the findings of fact of the lower Court justified the further finding of fact that the transfer was for the purpose of defeating or delaying the respondent. In second appeal it is not open to the appellant to question this finding of fact. The appeal, therefore, fails and is dismissed.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 459

SULAIMAN AND SEN, JJ.

Mohammad Raza Ali Khan — Defendant—Appellant.

v.

Mohammud Israr Hasan Khan — Plaintiff—Respondent.

Second Appeal No. 493 of 1927, Decided on 28th February 1929, against decree of Addl Sub-Judge, Shahjahanpur, D/- 23rd December 1926.

(a) Mahomedan law—Pre-emption—Intention to purchase must be gathered from the words used and the surrounding circumstances at the time of demand.

Although the word used by the pre-emptor was "purchase" there is nc hard and fast formula which has to be adhered to in performing the first demand. It is the intention which must be gathered from the words used and the surrounding circumstances. [P459 C 2]

(b) Mahomedan law—Pre-emption—Second demand has to be performed within reasonable time and without unreasonable delay from the first in presence of witnesses either before the vendor or the vendee or on the premises.

Where land adjoining pre-emptor's land at Shahjahanpur was sold on 13th November 1923 while he was at Bhopal, on receiving the news of the sale at Bhopal through his son in March 1924. immediately made the first demand and took no steps to make the second demand until 10th April and failed to explain the delay.

Held : that the second demand was not performed in due compliance with the requisition of the Mahomedan law as the second demand was not made as soon after the first as was practicable and as during the interval of six months intervening between the sale-deed and the second demand the vendee might very well have spent money on the improvement of the property. The second demand is to be treated as a public affirmation of the making of the first demand and an intimation to the vendee that the property would be pre-empted. A delay of this kind may prejudice the vendee and it may induce him to act on the supposition that the right of pre-emption was waived : 6 *W. R.* 173; 6 *B. L. R.* 165; 12 *C. L. R.* 312; 16 *W. R.* 13, *Ref.* 39 *Cal.* 915, (*P. C.*,) *Foll.* [P 460 C 2; P 461 C 1]

M. A. Aziz—for Appellant.

Hazari Lal Kapoor—for Respondent.

Sulaiman, J.— This is a defendant's appeal arising out of a suit for pre-emption under the Mahomedan law. The sale took place on 13th November 1923, at Shahjahanpur. The plaintiff who owns the adjoining land was at that time employed in the Bhopal State. His son was living at Shahjahanpur and apparently did not convey any information to his father till March following when he went to Bhopal personally. The plaintiff made the first demand at Bhopal as soon as he received the information from his son. He also deputed his son to go to Shahjahanpur to make the second demand. The second demand was made by the son at Shahjahanpur later. The defendant contested the claim on the ground that no demand had in fact or in law been made as were required by the Mahomedan law. The Courts below have decreed the suit holding that the demands were duly made.

So far as the finding of the lower appellate Court is a finding of fact it must be accepted. We must therefore assume that the plaintiff when he heard of the sale from his son at Bhopal some time in March 1924 stated that his land adjoined the land sold and the vendee Raza Ali Khan had no right to purchase it and that the plaintiff's son should "purchase" it on behalf of the plaintiff. After that he instructed his son to go to Shahjahanpur and state that the first demand had been made at Bhopal and that he should personally make the second demand from the vendee. Although the word used by the pre-emptor was "purchase" I think that there is no hard and fast formula which has to be adhered to in performing the first demand. It is the intention which must be gathered from the words used and the surrounding circumstances. On the facts stated there can be no doubt that the plaintiff intended to make the first demand and did make it and authorized his son to go to Shahjahanpur and make the second demand.

The findings that the second demand was duly made by the son at Shahjahanpur in the presence of witnesses at which

there was a reference to the first demand and the witnesses were invoked are findings of fact and must also be accepted. There is no suggestion that there was any delay in making the first demand. But the learned advocate for the appellant has contended before us that there was unreasonable delay which has not been explained away in the making of the second demand. We must for the purposes of considering this point accept in toto the oral evidence produced by the plaintiff which has been accepted by the lower appellate Court. When the plaintiff was questioned he was unable to state the date on which he made the first demand. His son also has not given the exact date but has stated that he went to Bhopal in March and it was on the first day of his arrival that he mentioned the matter to his father. We may therefore take it that sometime in March the exact date not being known, the first demand was made. The son has further stated that he came to Shahjahanpur and after two or three days of his arrival he went to the house of the vendee to make the second demand and that this demand was made after 10th April. He is not in a position to give the exact date on which he made the second demand. Thus, even accepting the evidence of the plaintiff and his son there is a possibility of an interval of nearely two months between the first and the second demand and there was at least an interval of ten days between them. No explanation was attempted to be offered for this delay. Nor is it clear why the son after having arrived at Shahjahanpur took two or three days to walk over to the house of the vendee in order to make the second demand.

The question that arises before us is whether in the circumstances of the present case it can be said that the delay was reasonable. This would have been substantially a question of fact if the learned District Judge has applied his mind to this matter. He has, however, not considered the point at all, and we have therefore to decide for ourselves whether there was a delay which would invalidate the right of pre-emption.

That the second demand should also be made as soon as practicable is quite clear from the authorities which have been cited before us. Indeed, a passage in Baillie's Digest of the Mahomedan law Chap. 3, p. 488 suggests that the demand should ordinarily be made within 24 hours. It has, however, been held by the Courts that the rule of making the demand within one day is not any hard and fast rule and the interval of time which might be allowed to elapse depends on the special circumstances of each case. I may mention here the case of *Mahomed Waris* v. *Hazee Emamoodeen* (1). But there has never been any doubt that even a second demand should be made without any unreasonable delay and as soon as practicable. In this connexion I may refer to the case of *Golakram Deb* v. *Brindaban Deb* (2) and *Nuruddin Mahomed* v. *Asgar Ali* (3), as also the Full Bench case of *Mt. Jumeelun* v. *Luteef Hossein* (4). Their Lordships of the Privy Council in affirming the judgment of the Calcutta High Court in *Jadu Lal Sahu* v. *Janaki Koer* (5), (at p. 923) remarked:

> "the second formality consists in the repetition of the demand with as little delay as possible under the circumstances, in the presence of witnesses either before the vendor or the vendee or on the premises."

All the leading commentators including Messrs. Amir Ali, Wilson and Tyabji lay down the rule that the second demand should be made as soon as possible or as soon as practicable. This being the accepted view of the law it seems to me that it was incumbent on the plaintiff to account for the delay which took place between the performances of the two demands. It is not sufficient for the plaintiff merely to state that he performed the demands without explaining why the second demand was not made soon after the first. No doubt the plaintiff was at the time at Bhopal but his son also happened to be there, and yet no prompt steps were taken to send him back to Shahjahanpur. Nor did the son act promptly in going to the vendee to make the demand after he had arrived at Shahajahanpur. During the interval of six months, which intervened between the sale deed and the second demand, the vendee might very well have spent money on the improvement of the property. The second demand is to be treated as a public affirmation of the making of the first

(1) 6 W. R. 173.
(2) 14 W. R. 265=6 B. L. R. 165.
(3) 12 C. L. R. 312.
(4) 16 W. R. 13=8 B. L. R. 160 (F.B.).
(5) [1912] 39 Cal. 915=15 I. C. 659=39 I. A. 101 (P. C.).

demand and an intimation to the vendee that the property would be pre-empted. A delay of this kind may prejudice the vendee and it may induce him to act on the supposition that the right of pre-emption was waived. I would therefore allow the appeal and setting aside the decrees of the Courts below dismiss the plaintiff's suit with costs in all Courts.

Sen, J.—This is a defendant vendee's appeal arising out of a suit for pre-emption under the Mahomedan law founded upon vicinage. Mt. Sadran and Mt. Qamran sold a piece of land to Mohammad Raza Ali Khan, the appellant, on 13th November 1923 for Rs. 500. The land is situate in Shahjahanpur. The plaintiff, who owns property adjoining this land was at the time when the sale took place employed in the Bhopal State.

Evidence was led to prove that the preliminary formalities of "*talab-i-mawasibat*" and "*talab-i-ishtishhad*" had been duly complied with. It has been found by the Courts below that the plaintiff received news of the sale for the first time at Bhopal through his son Khadim Husain, who went to see his father. The plaintiff immediately on receiving this news performed an immediate demand in these words:

"*yih arazi hamare arazi se mili hui hai Munshi Mohammad Raza Ali Khan ko koi haq kharidari karne ka nahin tum is arazi ko hamare liye kharid lo.*"

The plaintiff charged his son with performing the second demand at Shahjahanpur, and it is alleged that the second demand was duly performed at Shahjahanpur by Khadim Husain in the presence of witnesses. The Courts below have accepted the evidence produced by the plaintiff in proof of the two demands and have given the plaintiff a decree.

It is contended that the "*talab-i-mawasibat*" was not performed in accordance with the prescriptions of the Mahomedan law. Under the Mahomedan law no set of formula is necessary for the performance of the immediate demand. The words, employed by the plaintiff, amount to an expression of his intention to pre-empt and must be taken to have been in substantial compliance with requisitions of the Mahomedan law.

The exact date when the first demand was performed, cannot be known from the record; only this much is known that the news of the sale was brought to the pre-emptor by his son some time in the month of March 1924. The plaintiff appointed his son as agent with a view to perform the second demand at Shahjahanpur. This demand could be made either in the presence of the vendor or the vendee or on the premises sought to be pre-empted. It was necessary therefore for Khadim Husain to undertake a journey from Bhopal to Shahjahanpur in order to be able to perform the second demand on behalf of his father. The evidence discloses that Khadim Husain did not leave Bhopal within a reasonable time of the first demand having been made. Indeed, he admits that the second demand was not performed till sometime after 10th April 1924, and that he did not perform the second demand till after two or three days of his arrival in Shahjahanpur.

It is argued that there was an unreasonable delay in the performance of the second demand and that this is a circumstance which is fatal to the plaintiff's suit. The legal aspect of the case presents no difficulty. The second demand had to be performed according to the canons of Mahomedan law within a reasonable time of the first demand and without any unreasonable delay. The final word on that subject has been said by the Privy Council in re *Jadu Lal Sahu* v. *Janki Koer* (5):

"The second formality consists in the repetition of the "demand" with as little delay as possible under the circumstances, in the presence of the witnesses either before the vendor or the vendee or on the premises."

There can be no doubt that the second demand was not made without unreasonable delay and the delay has not been explained or accounted for by the plaintiff. Under these circumstances. I must in agreement with my learned colleague, hold that the second demand was not performed in due compliance with the requisition of the law. The result is that the appeal ought to succeed and the plaintiff's suit be dismissed.

By the Court. — The appeal is allowed, the decrees of the Courts below are set aside and the plaintiff's suit dismissed with costs in all Courts including in this Court fees on the higher scale.

K.N./R.K. *Appeal allowed.*

* A. I. R. 1929 Allahabad 462

SULAIMAN AND SEN, JJ.

Sahu Lal Chand—Defendant—Appellant.

v.

L. Ram Chandra and *others*—Plaintiffs—Respondents.

Second Appeal No. 672 of 1927, Decided on 15th March 1929, against the decree of the Sub-Judge, Mainpuri, D/- 24th January 1927.

*** Agra Pre-emption Act, S. 11—Sale-deed executed in pursuance of decree by Court is sale within meaning of S. 11 and as exception in S. 6 does not apply to such sale-deed, right of pre-emption can accrue in respect of it—Agra Pre-emption Act, S. 6.**

The transfer of proprietary interest for consideration which is effected by means of a sale-deed executed by the Court in pursuance of a decree for a specific performance is a sale within the meaning of S. 11 and as the sale is not in execution of a decree but only in pursuance of a decree, it does not come within exception contained in S. 6, a right of pre-emption can accrue in respect of it.

[P 462 C 2]

Peary Lal Banerjee—for Appellant

U. S. Bajpai and *N. P. Asthana*—for Respondents.

Judgment.—This is an appeal by Lal Chand arising out of a suit for pre-emption under very peculiar circumstances. On 18th August 1922, a sale deed was executed by Himmat in favour of Raushan Lal for Rs. 1,400. Suit No. 159 of 1923, was instituted for pre-emption of the property sold by Ram Chandar and Tej Ram. This suit was dismissed and an appeal by the pre-emptors was preferred to the Court of the District Judge. While this matter was pending there was another suit (suit No. 183 of 1923) instituted by Lal Chand for specific performance of a previous contract alleged to have been entered into by Himmat in his favour. Lal Chand impleaded the vendor Himmat, the vendee Raushan Lal as well as the two pre-emptors Ram Chand and Tej Ram. This suit for specific performance was decreed. An appeal was preferred by Raushan Lal in the suit but this was dismissed by the District Judge and so also was an appeal preferred by Ram Chand and Tej Ram in the pre-emption suit. The position thus was that the suit for pre-emption by Ram Chand and Tej Ram stood dismissed and the suit for specific performance by Lal Chand stood decreed.

The vendee Raushan Lal declined to obey the decree of the specific performance and the Court ordered that a sale-deed be executed in favour of Lal Chand. This actually took place on 25th November 1925. On this, two new suits for pre-emption, one by Raushan Lal and the other by Ram Chand and Tej Ram were instituted against Lal Chand in which Himmat was also impleaded. Both these suits have been decreed by the Courts below and Lal Chand has appealed. The two points urged on behalf of Lal Chand are (1) that no suit for pre-emption lay in respect of the sale-deed executed by the Court on 25th November 1925, and (2) that the plaintiffs are debarred from now claiming pre-emption when they did not set up this right in the specific performance suit. The first question to consider is whether the transfer of proprietary interest for consideration which is effected by means of a sale-deed exacuted is pursuance of a decree for a specific performance is a sale within the meaning of S. 11, Agra Pre-emption Act so that a right of pre-emption can accrue in respect of it. Under S. 4 (10) a sale means a sale as defined in the Transfer of Property Act. We think that the transfer of proprietary interest for cash consideration though it was under orders of the Court for enforcement of a previous voluntary contract for sale is a sale within the meaning of S. 11. It would therefore follow that a right of pre-emption would accrue on such sales. This result is in conformity with the general policy of the Act that property cannot be privately transferred so as to defeat the rights of pre-emption. If a sale outright cannot be effected the result ought to be the same, if a private contract for sale is entered into and then a decree for specific performance allowed to be passed.

The next question to consider is whether the case comes within the exception contained in S. 6. If it can be called a sale in execution of a decree of a civil Court then by virtue of that section no right of pre-emption can arise in respect of it. Having considered the language of the section we have come to the conclusion that the exception does not apply to

this case. The expression "sale in execution of a decree" is not identical with the execution of a sale-deed by the Court in pursuance of a decree. There has really been no sale in execution but the execution of a sale-deed, because the judgment-debtor Raushan Lal declined to execute it. We therefore think that there is no prohibition against the accrual of the right of pre-emption.

It is quite clear that the right of pre-emption accrues after a sale has taken place. There is no prospective right before such a contingency happens. It is therefore difficult to see how Ram Chand and Tej Ram or Raushan Lal could be said to have been able to put-forward their right of pre-emption in the suit for specific performance. Up to that time the position of Ram Chand and Tej Ram was merely that of pre-emptors in respect of the earlier sale-deed of 18th August 1922. The position of Raushan Lal was undoubtedly that of a vendee. But the sale which is now sought to be pre-empted is of date 25th November 1925, and the right of pre-emption which is now claimed has accrued in respect of it. We therefore fail to see how before the sale-deed was executed by the Court it could be said that Ram Chand and Tej Ram and Raushan Lal were bound to plead that they had a right of pre-emption, in anticipation of any sale-deed that might be in future executed under the orders of the Court. This being so it is difficult to hold that the present suit is barred by the principle of res judicata on account of the omission on the part of Ram Chand and Tej Ram and Raushan Lal to set up their right of pre-emption. Only one appeal has been preferred under S. 18 of the Act by Lal Chand and as a result of the consolidation of the suits in the Courts below our judgment governs both these cases. The appeal is accordingly dismissed with costs including in this Court-fees on the higher scale.

S N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 463

DALAL, J.

Debi Prasad—Plaintiff—Appellant.

v.

Shamsher Khan and *another*—Defendants—Respondents.

Second Appeal No. 1130 of 1927, Decided on 6th March 1929, against decree of Addl. Sub-Judge, Banda, D/- 24th March 1927.

U. P. Land Revenue Act, Ss. 111 and 233 (k)—Sale taking place after preparation of tarz taqsim—Suit to set aside such sale will not be barred by res judicata nor would it be barred by S. 233 (k) provided suit does not disturb partition—Civil P. C., S. 11.

The objection raising the question of title under S. 111 cannot be availed of after the tarz taqsim is prepared. And so a suit instituted to set aside a sale which took place subsequent to the preparation of the tarz taqsim cannot be barred by res judicata because the question of title was not raised in the partition proceedings, nor can such a suit be barred under S. 233 (k) provided the suit does not disturb the partition or union of mahals : 23 *All.* 291, *Dist.* [P 464 C 2]

P. L. Banerji—for Appellant.

M. Walliullah—for Respondents.

Judgment.—The plaintiff sued for possession of a certain share of zamindari property on the ground that the sale was effected by a joint brother in favour of the defendant Shamsher Khan and the transfer was not made for any valid necessity of the family. The question of the house need not be considered as the plaintiff has obtained a decree for possession thereof. Both the subordinate Courts held that Debi Prasad and his brother Chandrika Prasad were members of a joint Hindu family and that the sale was invalid. The sale included zamindari property, and the lower appellate Court held that with respect to that property the suit was barred under the provisions of S. 233 (k), Land Revenue Act of 1901. That part of the suit was, therefore, dismissed and Debi Prasad has come here in second appeal.

The lower appellate Court has failed to notice the time when the sale was effected in the course of partition proceedings. Shamsher Khan was also a co-sharer in the village in which Debi Prasad and his brother Chandrika Prasad

were cosharers. There were other cosharers. On 13th April 1915 one of the other cosharers, Kalyan Singh, applied for partition with a prayer that his zamindari property may be formed into a separate mahal. On 7th July 1915 Shamsher Khan made a similar application. On 24th July 1915 Debi Prasad applied his share to be formed into a patti and placed in the mahal of Shamsher Khan. On 10th September 1915 Chandrika Prasad made a similar application. Proceedings were then taken under S. 111 by issue of a proclamation. At that time Chandrika Prasad had not sold his property, and a partition proceeding (tarz taqsim) was prepared under S. 114 after sanction was given by the Collector that a partition may be made under S. 113. A copy of the "tarz taqsim" is on the record, and in that document Chandrika Prasad's name exists. A separate mahal was formed consisting of the patti of Shamsher Khan, a patti of Debi Prasad containing the shares of Debi Prasad and Chandrika Prasad, and many other pattis, altogether six. Separate revenue was assessed on the pattis, but the total of the mahal was jointly payable by all the cosharers of mahal Shamsher Khan. It was subsequent to the preparation of this tarz taqsim that Chandrika Prasad sold his share of the property on 23rd February 1916, to Shamsher Khan. It appears that in the partition proceedings Shamsher Khan applied for mutation of names, and an order for mutation in his favour after expunging the name of Chandrika Prasad was passed on 25th May 1916. A copy of the khewat of patti Debi Prasad shows that at first Debi Prasad and Chandrika Prasad were entered as owners in equal shares of this patti and subsequently a note was made in the remarks column that in place of Chandrika Prasad the name of Shamsher Khan was substituted. The partition proceeding was confirmed on 19th January 1917.

Having regard to the time at which the sale took place there was no opportunity for Debi Prasad to raise the question of title when proceedings were taken under S. 111, Revenue Act. The time was long past and the "tarz taqsim" had been prepared under S. 114 when the sale took place. There is no indication in Chap. 7 relating to the partition of mahals that the question of proprietary title may be raised by parties to the partition subsequent to the preparation of the "tarz taqsim." The objection raising the question of title under S. 111 has to be raised at the very commencement after a proclamation is made of the application for partition under S. 110. It is nowhere stated that a party to the partition can take advantage of the provisions of S. 111 subsequently to get proprietary rights settled. Once a tarz taqsim has been prepared all proprietary rights have been settled by the revenue Court. What may happen subsequently would merely be an order for mutation just as may happen with respect to properties not under partition at the time. It is clear, therefore, that no question of res judicata can arise. There was no proceeding before the revenue Court, as there cannot be, for the determination of the question of title.

The second question will be whether this suit disturbed the partition or union of mahals which is forbidden by the provisions of S. 233 (k), Revenue Act. As already explained, this suit will not affect the mahal which is shown in the khewat copy Ex. C-35 on the record. That mahal Shamsher Khan will remain the same and the revenue thereof will not be disturbed by the result of this suit. Moreover, the six pattis within the mahal will not be disturbed either. Shamsher Khan got his name substituted in place of Chandrika Prasad in patti Debi Prasad and did not have the share of Chandrika Prasad separated out of that patti and added to his own patti Shamsher Khan. What is desired by the plaintiff is merely the removal of the name of Shamsher Khan from the khewat of patti Debi Prasad which will not in any way disturb the partition of the village. The principle of the ruling of the case of *Md. Sadig* v. *Laute Ram* (1) does not apply because in that case the plaintiff had an opportunity under S. 111 of raising the question of title, and failed to do so. In the present case the plaintiff had no such opportunity because the sale took place subsequent to the completion of proceedings under S. 111. I set aside the decree of the lower appellate Court and restore the decree of the trial Court with costs of all the Courts.

S.N./R.K. *Decree set aside.*

(1) [1901] 23 All. 291=(1901) A.W.N. 86.

A. I. R. 1929 Allahabad 465

Full Bench

MUKERJI, KENDALL AND NIAMATULLAH, JJ.

Fazal Ahmad—Plaintiff—Appellant.

v.

R. B. S. Har Prasad and *others*—Defendants—Respondents.

First Appeal No 389 of 1925, Decided on 19th March 1929, from decision of Sub-Judge, Pilibhit, D/- 6th July 1925.

(a) Deed—Construction—Factors for consideration besides wording.

In construing a document antecedent events, subsequent conduct of the parties to it and the surrounding circumstances are as important as the words employed in disposing of a property. [P 467 C 1]

(b) Arbitration—Obiter dictum of arbitrator does not bind parties.

The obiter dictum of the arbitrator on a question which had not been formally referred to him by the parties in the agreement of reference is not binding on the parties : 18 *Cal.* 414 (*P. C.*) and 33 *Bom.* 401, *Dist.* [P 471 C 2]

(c) Transfer of Property Act, S. 8—(*Per Mukerji, J.*) "Property," does not mean mere title. (*Niamatullah, J.* contra)—Mussalman Waqf Validating Act (6 of 1913), S. 3.

Per Mukerji, J.—When S. 8 speaks of transfer of property it speaks of transfer of some property which may be tangible or intangible but not mere title. But when it speaks of interest it includes title, large or small. [P 474 C 2]

Per Niamatullah, J.—The expression : "any property," does not mean the physical object to which the ownership attaches but means rights which a person possesses in such object. The property of a person means the bundle of rights which he has in it. [P 466 C 2]

(d) Transfer of Property Act, S. 8—Object of S. 8 is to stabilise title—*M* selling property to *R* who was an heir and under contract *R* creating waqf of the properties—Sale in favour of *R* set aside—*R* selling property to defendants—*R's* share as heir was dedicated and could not be sold. (*Per Mukerji* and *Kendall, JJ.*, *Niamatullah, J.* contra.)

The object of S. 8 is to stabilise title and to remove from the region of pure speculation what passed in the mind of the transferrer or the transferee at the date of the transfer. [P 474 C 2]

One *M*, a Mahomedan sold certain property to one of his heirs stipulating that the sale price should be spent in charities and died three days later. The vendee *R* instead of giving the money to charities dedicated the property bought by way of waqf and constituted himself and after him among others one *F* who was also an heir to *M* as mutwallis. Sale to *R* was set aside by the Court and *R* sold his share in the properties as an heir to *M* to defendants and died. *F* as mutwalli brought a suit against defendants.

Held : (*Per Mukerji* and *Kendall, JJ.*) that as the waqf was otherwise valid it operated on the share of *R* it being not expressly or impliedly excluded and does not fail in its entirety simply because the sale in favour of *R* failed and, therefore, the sale by *R* in favour of the defendants was invalid as against *F*. [P 475 C 2 ; P 476 C 2]

(*Per Niamatullah, J.* contra) — Sale in favour of *R* being held void the waqf created in pursuance of it totally failed and so *R* had a right to sell his share. [P 469 C 1]

B. O'Conor and *H. S. Mohamed Hussain*—for Appellant.

Tej Bahadur Sapru and *U. S Bajpai*—for Respondents.

Niamatullah, J.—I regret I am unable to agree with my learned colleague on one of the questions, arising in this appeal, which goes to the very root of the matter in controversy. I am of opinion that the deed of waqf, dated 23rd June 1913, executed by Mt. Rahim Bibi does not affect the one-third share of villages Bhitaura Kalan and Amkhera, inherited by her on the death of her son, Manzur Ahmad who was admittedly the owner of the aforesaid villages. My learned colleague has so lucidly stated all the facts from which the proposition, on which we differ, emerges, that it would be needless repetition to recapitulate them in detail except in so far as is necessary to explain my views on that question. It is common ground that Manzur Ahmed executed a sale-deed on 29th August 1912, only three days before his death, conveying the two villages to his mother, Mt. Rahim Bibi, in lieu of Rs. 2,00,000 of which a sum of Rs. 10,000 was paid at the time of the registration of the deed and the remaining sum of Rs. 1,90,000 was left with the vendor who was authorized to spend it on such charities as she determined. Manzur Ahmed left three other heirs, besides his mother Mt. Rahim Bibi. These were his uncle Fazal Ahmad the plaintiff-appellant and two widows Mt. Kamrunnisa and Mt. Jilani Bibi, the last named being the daughter of Fazal Ahmad.

On 23rd June 1913, Mt. Rahim Bibi executed the deed of waqf by which she dedicated the two villages, professing to do so because she had been directed in the sale-deed to spend Rs. 1,90,000 on charities and the waqf of the two entire villages, instead of cash which would be diminished by user, was considered more desirable. The lady constituted herself mutawalli for her life and nominated

Fazal Ahmad, the plaintiff-appellant, and several others as her successors to the office of the mutawalli. Mutation of names followed the execution of the deed of waqf but later, the heirs of Manzur Ahmad other than Mt. Rahim Bibi, successfully asserted their right of inheritance and obtained mutation of names to the extent of their shares. They repudiated the deed of sale dated, 29th August 1912 executed by Manzur Ahmad as no more than a gift, in disguise, to one of the heirs and therefore void under Mahomedan Law. Two suits were instituted in the Court of the Subordinate Judge of Pilibhit (1) by Mt. Rahim Bibi, for establishment of her right under the sale-deed, insisting on its validity and (2) by the other heirs headed by Fazal Ahmad the plaintiff-appellant for recovery of certain moveables left by Manzur Ahmad. Ultimately it was decided on 5th December 1917 (p. 151) by a Bench of this Court that the so-called sale was

"a somewhat ingenious device to give the transaction the appearance of a sale so as to evade the Mahomedan law which forbade a Mussalman in his death illness to make a gift to one heir at the expense of the others."

The validity of the waqf made by Mt. Rahim Bibi was not directly in issue and apart from an obiter dictum nothing definite was ruled with regard to it. Subsequently there was an arbitration to which all the members of the family were parties in their personal capacity. The award declared that the waqf was invalid. I agree with my learned colleague that the question was not referred to the arbitrator and his decision thereon is not binding even if we ignore the fact that the Court refused to pass a decree in terms of it. In the meantime Mt. Rahim Bibi executed a sale-deed dated 20th June 1918 in favour of defendant 1 and Raja Lalta Prasad predecessor-in-title of the defendant-respondents 2 to 6. It recites that by the decree of this Court the two villages had been 'ultimately' held to be part of the assets left by Manzur Ahmad and that her own share thereon, as his heir was one-third which she conveyed to the vendee in lieu of Rs. 80,000. Mt. Rahim Bibi died on 15th August 1921. The present suit was brought by Fazal Ahmad on 9th September 1924 in his capacity as mutawalli for establishment of the waqf as regards the one-third share to which Mt. Rahim Bibi was entitled at the date of waqf as heir of Manzur Ahmad, under the Mahomedan law. I am in entire agreement with my learned colleague in the view that the waqf was validly created in all other respects and all legal formalities including such delivery of possession as was possible under the circumstances, were observed. The waqf was fully intended by the lady to be operative in its inception. There is no satisfactory evidence to support the plea that it was a fictitious deed brought into existence to defeat the creditors of Mt. Rahim Bibi. I also endorse the view that Fazal Ahmad is not estopped from setting up the waqf as mutawalli, though in his capacity as Manzur Ahmad's heir he might have repudiated it in course of the litigation which ensued after his death.

But I think the waqf, though otherwise valid, cannot take effect as the property which formed its subject-matter, viz, rights acquired by Mt. Rahim Bibi under the sale-deed dated 29th August 1912, has been found to be non-existent. Waqf like transfers can operate only on the property made the subject thereof, "waqf" according to its definition given in the Mussalman Waqf Validating Act:

"means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable."

The expression "any property" does not mean the physical object to which ownership attaches, but means rights which a person possesses in such object. When we speak of something as the "property" of a person we mean by that term the bundle of rights which he has in it. The incidents of such property depend on the nature and extent of his rights. Mt. Rahim Bibi's right to the two villages, acquired under the sale-deed, assuming it to be valid, is a property not identical with that depending on the right she inherited from her son, Manzur Ahmad. The one may be described as the vendee's estate and the other as that of an heir. They are not subject to the same incidents. For instance, the former is subject to unpaid vendor's lien while the latter is not. Again the latter is liable for the debts of the deceased while the former is not

except those charged on it when the sale-deed was executed. The right on which one rests may be illusory as the vendee's estate in this case while the right on which the other is based is substantial. If the sale had been made in favour of a person not his heir there could be no difficulty in separate treatment of the right or property of the vendee and of that of the heir in case of conflict between them. I feel no difficulty in conceiving the possibility of Mt. Rahim Bibi making a waqf of whatever she acquired under the sale-deed alone without reference to any other right which might be found to have been vested in her. There can be no doubt that, if she had expressly stated in the deed of waqf that the waqf would operate only on such rights as shs acquired under the deed of sale from Manzur Ahmad, her right as an heir, of failure of the sale, would no more be affected than if the sale had been in favour of a third person who subsequently made a waqf of what, he believed, belonged to him. In short she had two capacities and had different rights or properties vested in her in each capacity. It is equally possible that a person may not act in any particular capacity and may profess to deal with all right whatever their sources. Of course, if there are no indications to the contrary in the deed the entire right of the transferrer will be conveyed thereby but the deed properly construed may lead to a different conclusion. The principle underlying S. 8, T. P. Act, lays down no more. The general rule there enacted is made subject to an exception, viz., "unless a different intention is expressed or necessarily implied." In each case the question resolves itself into one of construction of tho particular document. In construing a document antecedent events, subsequent conduct of the parties to it and surrounding circumstances are as important as the words employed in disposing of a property. The deed of waqf so far as it bears on this question runs thus:

"My son Manzur Ahmad, sold the zemindari property in Bhitaura Kalan and Amkhera mentioned below to me for Rs. 2,00,000, took Rs. 10,000 a portion of the consideration money from me and left the remaining amount of Rs. 1,90,000, with me as an amount dedicated for religious purposes and authorized me to spend the same. Out of the said amount Rs. 15,000 has been spent up to this time. Instead of spending the amount of consideration after which the charity shall come to an end, it is more beneficial, to make a waqf of the said property and utilize the income therefrom in charitable deed as it will be a continual gift and permanent charity. I, therefore, while in a sound state of body and mind and of my own accord withdraw my possession from the entire 20 biswas "asli" zamindari property in the village of Bhituaura Kalan . . . . . and the entire 20 biswas "asli" zamindari property together with the cultivated lands in mauza Amkhera, together with all the rights appertaining thereto and make a waqf of the same in the name of the Almighty."

Now the language of the deed is quite clear to my mind as conveying no more than what the lady believed, or pretended to believe, to have purchased under the sale which is mentioned in the forefront of the deed and is a governing factor in the entire frame work of it. Instead of spending the unpaid price of "the property," which would sooner or later be exhausted she proceeds to make a waqf of the "said" property. The only property which was previously mentioned in the deed is the "zamindari property" which her "son Manzur Ahmad sold" to her. It is repeated later on in the deed that she made a "waqf of the same." I cannot pursuade myself to hold that these words mean no more than the villages named without any reference to the particular estate which the executant declared she possessed in them. It is not permissible, in my opinion, to read the deed as if it merely stated that "villages Bhituaura and Amkhera are made waqf" and to ignore the qualifying expressions which raise important implications and confine the property affected thereby to the rights acquired under the sale-deed. The words "together with all the rights appertaining thereto" following the expression "with the cultivated land" have reference only to the various sources of income such as sewai etc., and cannot have the effect of enlarging the rights acquired under the sale-deed previously disposed of.

This interpretation of the deed finds support from the events that had preceded it. Manzur Ahmad was not on the best of terms with his uncle and father-in-law, Fazal Ahmad and one great object which he and his advisers had was to keep the property out of the reach of his heirs. It does appear that he or his advisers inteuded to label the property as waqf, whether real or illusory it is need-

less to consider. If he had executed a deed of waqf it could take effect only to the extent of one-third of his property, being made in a state of death illness. A sale was, therefore, preferred as it was not affected by that rule, if made for a fair price. Of the consideration the major part was left with the mother who was trusted to spend it in charity. It is probable that it was then contemplated that in lieu of cash the vended property be made waqf by the vendee who laboured under no disabilities. Whatever his intentions might have been, there can be no doubt that the mother was in his confidence, and she executed the deed of waqf ten months later, when the heirs other than herself asserted their right of inheritance repudiating the sale-deed and she, on the other hand, maintained that the two villages did not form part of the assets of her son who had sold them to her in his lifetime. She could not have the remotest intention of making waqf of her right as an heir of her son or even of asserting it. Such a right according to her then professions did not exist. I am inclined to think that the deed of waqf was purposely so drawn up as to make it clear that she dedicated only what she had purchased. An express reservation of her right as an heir was considered, as it was, highly inexpedient in view of pending disputes and the attitude she was adopting to exclude the heirs.

This Court pronounced the sale-deed as invalid on 5th December 1917 and her conduct shortly afterwards is very significant. She was examined as a witness on 15th March 1918 in one of the many proceedings between the present plaintiff-appellant and herself. The questions put to her and answers given by her are illuminating. These are :

"*Q.* What arrangement will you make for the payment of the amount under account, found due by you ?

"*A.* I shall execute a sale-deed in respect of my legal shares in mouza Amkhera. Pargana Richha, tahsil Baheri, and mouza Bhitaura Pergana Pilibhit or pay the amount in cash.

"*Q.* You have made a waqf of your shares in villages Amkhera and Bhitaura Kalan. How can you execute a sale-deed in respect of them.

"*A.* Manzur Amad sold these villages to me on 29th August 1912. The said sale-deed has been declared invalid by the Hon'ble High Court on account of its being executed at the time of death. Hence the will (waqf ?) too, which had been executed by me, by right of purchase, has become invalid. I can execute a sale-deed in respect of my legal shares in the villages aforesaid. I have not made a waqf of them."

The intention herein declared was carried out on 10th June 1918 when she executed the sale-deed in favour of Raja Har Prasad and Raja Lalta Pershad the predecessor-in-title of defendant-respondents 2 to 6 in consideration of Rs. 80,000 out of which Rs. 61,000 was left with the vendee for payment to the plaintiff-appellant in respect of what is mentioned in her statement above quoted. As soon as the sale-deed was out of question she asserted her right of inheritance which was no more affected by the deed of waqf than the right of any other heir. It was not due to a change of front but to a conciousness in her mind that she had made a waqf of what she thought she owned under the deed of sale.

It should be borne in mind that she was a pardanashin lady and unless it is established by those who rely on the deed of waqf that this aspect of it was fully explained to her and understood by her, it cannot be upheld so as to divest her of the right which she was subsequently declared to have inherited from her son. For aught we know, if it had been brought home to her that the effect of the deed was, as is now contended for, she might have preferred to drop the matter altogether or to make express reservation in respect of it. There is absolutely no such evidence on the record. In a comparatively recent case, *Faridunnisa* v. *Mukhtar Ahmad* (1), their Lordships of the Privy Council refused to uphold a deed of waqf which was found to have been drafted on instructions given by a pardanashin lady but before it was faired out on the stamp paper slight variations were made in regard to some matters of detail, even though the faired out deed containing the alterations was subsequently read out and explained before the registering officer. Their Lordships re-affirmed the rule which enjoins extreme caution in giving effect to the deeds executed by pardanashin ladies in view of the peculiar disabilities under which they labour.

Another process of reasoning besides the one based on the construction of the

(1) A. I. R. 1925 P. C. 204=47 All. 703=28 O. C. 338=52 I. A. 342 (P. C.).

document, leads me to the same conclusion. Reading the sale-deed and the waqf deed together, as I think we ought to, we find that Mt. Rahim Bibi was made a trustee as regards the sum of Rs. 1,90,000 left with her for charities. The beneficiaries under such a trust were the charities—let us designate them as God Almighty in whom it would vest through human agency according to Mahomedan conception. In discharge of her obligation to God Almighty she made a waqf of the villages in lieu of the aforesaid sum of money. The sale-deed failed and with it the trust under which charities or God Almighty were the beneficiaries, also failed. The waqf which took the place of such a trust cannot stand. A concrete instance will better explain the position. Suppose, Manzur Ahmad had directed in the sale-deed that the sum of Rs. 1,90,000 be paid to an individual named and suppose also that Mt. Rahim Bibi made a gift of the two villages to such individual instead of paying cash to him, it is impossible to maintain that the donee would be allowed to retain the villages in the event of the sale and with it the direction to the vendee to pay the consideration to him, being set aside. The charities or God Almighty in the one case and the donee in the other must restore the advantage gained under an arrangement of that kind. Dedication is tantamount to gift to the deity. I think S. 65, Contract Act, fully applies to a case like this. It runs as follows :

"When an agreement is discovered to be void, or when a contract becomes void, any person, who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received it."

There was an agreement between Manzur Ahmad, the vendor and Mt. Rahim Bibi, the vendee that Rs. 1,90,000 would be spent on 'charitable purposes.' In pursuance of that agreement she assigns certain properties to charities by making waqf of them. The charities or God Almighty received to that extent an advantage under the agreement embodied in the sale-deed which is subsequently 'discovered to be void.' Every 'person' whether a party to the agreement or not, 'is bound to restore it.' The word 'person' in that section includes a juristic person and is not limited to a human being.

For the foregoing reasons I am unable to accede to the contention put forward on behalf of the plaintiff-appellant by his learned counsel that the deed of waqf, though it cannot take effect as regards the two villages in their entirety is operative to the extent of one-third which belonged to Mt. Rahim Bibi as an heir of her son. But for the view that I have taken of the waqf not being annexed to the property she inherited from Manzur Ahmad as distinguished from the property she purchased I am in full agreement with my learned colleague. I hold also that the suit is not barred by res judicata or S. 233 (K), Land Revenue Act for the reasons so lucidly set forth in his judgment. The result, however, of my finding on the vital question, whether the deed of waqf divested Mt. Rahim Bibi of her one-third share in the two villages, which she has been found to have inherited from Manzur Ahmed is that plaintiff-appellant has no right as mutwalli in the property in dispute which remained unaffected by waqf. I would uphold the decree of the Court below dismissing his suit with costs.

Kendall, J.—The suit out of which this appeal arises was filed by Shaikh Fazal Ahmad mainly for a declaration that a 1/3rd share in each of the villages, Bithaura Kalan and Amkhera is property dedicated in a deed of waqf and that defendants 1 to 6 have no right in it. The facts which led up to the suit will need some preliminary explanation, and in the first place the short pedigree given in the plaint and in the judgment of the lower Court may be consulted. Fazal Ahmad the plaintiff-appellant had a brother Zahur Ahmad (deceased) who married Mt. Rahim Bibi, and they had a son named, Manzoor Ahmad. Manzoor Ahmad possessed considerable property, but though he married more than once he had no family. He appears to have been on bad terms with his uncle, Fazal Ahmad. On 29th August 1912 he executed a document purporting to be a sale-deed of the whole of his property in favour of Mt. Rahim Bibi. This deed was subsequently held to be invalid, but this question was not finally decided until 8th December 1917 when the matter was set at rest by the High Court. The main question for decision in the present suit is whether a deed of waqf which was executed by Mt. Rahim Bibi on 23rd June 1913, dedicating two of the villages which

had been conveyed to her by that invalid deed of Manzoor Ahmad is valid to the extent of the share which Mt. Rahim Bibi inherited from Manzoor Ahmad.

Two or three days after executing the invalid sale-deed Manzoor Ahmad died. Mt. Rahim Bibi believed herself to be the owner of the whole of this property under the sale-deed which had not yet been declared to be invalid. It was about ten months later that she executed the deed of waqf. Before considering that deed in detail it may be as well to give a brief history of subsequent events, in order to explain the attitude of the parties to these proceedings, especially that of the plaintiff Fazal Ahmad. After the death of Manzoor Ahmad there was litigation between Mt. Rahim Bibi and Manzoor Ahmad's other heirs, who claimed that the deed executed by Manzoor Ahmad was not a sale but a gift. A suit was brought by the widows of the deceased for possession of their shares by inheritance, and for avoidance of the so-called sale-deed. Mt. Rahim Bibi, however, acted as if that deed was valid, and after executing the deed of waqf in June 1913 applied for and obtained mutation of names in both villages on the basis of the deed of waqf. From the revenue Court proceedings printed at pp. 85 and 89 of the printed book it is clear that mutation had been obtained in her name after the death of Manzoor Ahmad, and that she had mutation effected, after from her own name "in favour of God the Almighty." The present plaintiff, Fazal Ahmad, who as one of the heirs of Manzoor Ahmad was at that time disputing the deed of sale and the wakf, had by some means become the lambardar of these villages, and succeeded in preventing the lady from realizing the profits, and in consequence she had to execute leases and also sale-deeds of the arrears of profits. As to the amount she realized and the manner in which she disposed of the money there is very little evidence. But it appears that she was doing her best to realize the profits and that she was being baulked as far as possible by her brother in-law, Fazal Ahmad.

On 3rd January 1918, after the decision of the High Court, several matters that were in controversy between Fazal Ahmad and Mt. Rahim Bibi were referred to arbitration. It may be mentioned that Mt Rahim Bibi had conveyed some property to her two nephews Taj-uddin and Wasal-uddin whose names appear in the pedigree, and who in these arbitration proceedings were supporting her. The arbitrator made his award on 22nd April 1918, and this is printed at pp. 173 to 185. The validity of the waqf was not one of the matters which had been submitted to him for decision. but he did express an opinion in his award that that deed like the sale deed was fictitious, unlawful, null and void, and he gave a decree by which Mt. Rahim Bibi was directed to pay to Fazal Ahmad Rs. 61,480-6-1 within two months or else to transfer her shares in the villages of Bithaura Kalan and Amkhera to him. Instead of doing this Mt. Rahim Bibi executed a sale deed of these villages in favour of Rai Bahadur Har Prasad, defendant 1 and the predecessor of defendants 2 to 6. These are the contesting defendants. The award was filed in Court and was at first embodied in an ex parte decree, but an application to set aside this decree was ultimately successful, and the case was remanded, with the result that on 14th September 1920 the Subordinate Judge refused to make the award a rule of the Court.

On the strength of the sale-deed executed by Mt, Rahim Bibi in 1918 the contesting defendants sued for partition of the property which they had bought from her. Fazal Ahmad naturally found his position considerably changed since the days when he had contested the execution of the deed of waqf. If that deed was invalid Mt. Rahim Bibi had a right to sell the property to the respondents. On the other hand if the deed of waqf was a good one, the respondents could claim no title at all. In filing the present suit therefore he has pleaded that the deed of waqf is a good one and that the sale to the respondents is invalid.

The learned Subordinate Judge has dismissed his suit on various grounds. He has held that the waqf was invalid. His reasons for his finding are not very clearly defined, but the main ones appear to be that the deed of waqf was executed in order to defeat creditors and to fortify the invalid deed of sale in favour of Mt. Rahim Bibi. He also found that the suit was barred by the doctrines of estoppel and res judicata.

These last issues may conveniently be dealt with in the first place. The Sub-

ordinate Judge found that there were certainly elements of estoppel present in the case, arising out of certain representations and declarations made before the suit by Fazal Ahmad. These need not be enumerated here, but they were made as may be readily understood at a time when Fazal Ahmad was contending that the deed of waqf was invalid. He was doing this in his capacity as one of the heirs of Manzoor Ahmad. Fazal Ahmad however, is now suing in his capacity as a mutwalli under the deed of waqf having succeeded Mt. Rahim Bibi who died on 15th August 1921. It will be seen from the deed of waqf (p. 61 of the printed record) that Mt. Rahim Bibi appointed herself the first mutwalli, and after her death Shaikh Wasal-uddin, Shaikh Shams-uddin, Shaikh Fazal Ahmad and Khalil-ul-Rahman. These other gentlemen have been made pro-forma defendants, and after the question of estoppel had been raised, one of them, Khalil-ul-Rahman, made an application to be impleaded as a co-plaintiff but his application was rejected. It appears to me that the Subordinate Judge would have been well advised to allow the application if he considered that Fazal Ahmad was personally estopped from proceeding in this suit on behalf of the waqf, for it would certainly have been an advantage to have the issues between the representatives of the waqf and the contesting defendants, who denied the waqf, settled once for all. However, I think it is clear that Fazal Ahmed was not estopped. Whatever his private views may have been about the validity of the waqf and however he may have expressed them, they would not estop him from supporting the valdity of the waqf in his capacity as mutwalli.

It has been urged in argument, however, that Fazal Ahmad is bound by the order of the arbitrator. Although this was not made a decree of the Court, it is claimed that it will nevertheless be binding on the parties to the reference. This is a wider question than that of the personal estoppel of Fazal Ahmad because Mt. Rahim Bibi was herself a party to the reference. The terms of reference are printed on p. 161 and it is admitted that they do not empower the arbitrator to decide the question of the validity of the waqf. It is not, therefore, necessary to consider whether the decision of the arbitrator on such a point would have been binding on the parties to the agreement, or whether the parties had the power to refer such a matter to arbitration. The fact remains that they did not do so. It is true that the arbitrator expressed an opinion on the subject, viz: that the waqf was invalid, and apparently both Fazal Ahmad and Mt. Rahim Bibi were prepared to accept that decision and to act upon it. In fact the lady proceeded forthwith to execute the sale-deed in favour of the respondents within a few months of the arbitrator's award, evidently in the belief that she was now free to regard the waqf property as her own. It does not follow from this, however, that the obiter dictum of the arbitrator on a question which had not been formally referred to him by the parties in the agreement of reference was binding on the parties to the arbitration. The cases of *Muhammad Newaz Khan* v. *Alem Khan* (2) and *Bhaurao* v. *Radhabai* (3), on which the lower Court has relied, show that a refusal of the Court to file the award does not have the effect of making the award invalid, and that it may be binding on the parties to the reference, but they go no further. The Subordinate Judge has also held that S. 233K, Land Revenue Act, bars the plaintiff's suit, but the same argument applies to this issue as well. In the partition proceedings of 1919 Fazal Ahmad had made an objection to the application of the present respondents on the ground that the property which they claimed belonged to him as a result of the arbitration award. The question between him and the respondents was raised and decided in the revenue proceedings, but he did not represent the waqf property at that time, and it does not appear that he had any title to raise an objection on behalf of the waqf even if it had been in his interest to do so, which at that time it was not.

The chief question in the appeal, however, is whether the deed of waqf itself is a valid one. It has been contended on behalf of the appellant by Mr. O'Conor that the learned Subordinate Judge was not justified in finding that the property in dispute is not a waqf property and that the deed was a colourable and ficti-

(2) [1891] 18 Cal. 414=18 I. A. 73=6 Sar. 26 (P.C.).
(3) [1909] 33 Bom. 401=2 I. C. 431=11 Bom. L. R. 406.

tious document. The deed has been attacked mainly on the ground that it is closely connected with the sale-deed executed by Manzoor Ahmad in August 1912, and this question needs close examination. In the so-called sale-deed, Manzoor Ahmad purported to sell the whole of the zemindari property in the two villages to Mt. Rahim Bibi for a consideration of Rs. 2,00,000. Of this some Rs. 10,000 was stated to have been received in cash, and the balance of Rs. 1,90,000 was left with the vendee with instructions that she should spend it at her discretion in charitable purposes "for the eternal benefit of my soul."

As has already been stated, Manzoor Ahmad died within a few days of executing this deed and Mt. Rahim Bibi obtained mutation in her own name. She did not spend the cash on charity, but on 23rd June 1913 executed a waqf of the corpus of the property. The important clauses in the deed are as follows :

"My son Manzoor Ahmad deceased sold the zamindari property in Bhitaura Kalan and Amkhera mentioned below to me for Rs. 2,00,000, took Rs. 10,000 a portion of the consideration money from me and left the remaining amount of Rs. 1,90,000 with me as an amount dedicated for religious purposes and authorized me to spend the same. Out of the said amount Rs 15,000 has been spent up to this time. Instead of spending the amount of consideration after which the charity shall come to an end, it is more beneficial to make a waqf of the said property and utilize the income there from in charitable deeds as it will be a continual gift and permanent charity. I, therefore, while in a sound state of body and mind and of my own accord withdraw my possession from the entire 20 biswas asli zemindari property.....together with all the rights appertaining therein and make a waqf of the same in the name of the Almighty."

I am not clear whether the Subordinate Judge intended to find that the waqf was absolutely fictitious, that is to say, that the lady never intended to execute a waqf deed or never intended to transfer the property by means of this deed and to dedicate it, or whether he considered that there was a transfer and dedication but that it was made in order to defeat creditors, or for some other indirect purpose. No fault can be found with the form of the deed, or with the catalogue of objects on which the income from the property is to be expended. Some attempt has been made to show that the waqf was never carried into effect. We know, as has been stated earlier in this judgment, that Mt. Rahim Bibi obtained mutation in favour of Almighty God, and that she executed leases of the villages because she was unable to collect the profits herself owing to the obstruction of the present plaintiff-appellant, Fazal Ahmad. There is evidence to show also that she sold the profits which she had not been able to collect. It is argued that in obtaining mutation she was merely completing the fiction initiated by the deed itself. That of course is a possible theory, but it does not account for the leases and the sale-deeds of profits. In these she describes the property as waqf property and herself as the mutwalli; for instance in the sale-deed in favour of Tasdiq Husain, dated 1916, three years after the execution of the waqfnama, she is still maintaining the existence of the waqf. All the evidence on the file points to the conclusion that whether the waqfnama was colourable or not it was intended to be a real dedication and not merely a fictitious deed. It is argued that even if Mt. Rahim Bibi did obtain the profits of these villages as mutwalli yet it is not proved that she spent the money on the charitable objects set forth in the deed. It is true that there is very little evidence to show how the money was spent. It must, however, be remembered that the suit was brought in 1924 and that it must be extremely difficult to produce in Court direct evidence of the manner in which the deceased lady disposed of the profits over a period which started 11 years before. The plaintiff was not called upon by any definite pleading in the written statement, or by any direct issue, to account for the disposal of these profits. In fact it was for the defendants to prove if they wished to do so that the profits had not been properly spent, if they wished to support their plea that the deed of waqf was fictitious and colourable. There is on the record a long statement which was made by the lady herself in a suit between her and the heirs to Manzoor Ahmad's estate. In this she deposed that she had spent a great deal of money on pilgrimages to Mecca and very little on herself, that she did execute this deed as a deed of waqf though the validity of the waqfnama was not being agitated in those proceedings and that she did so for the peace of Manzoor Ahmad's soul. She had also executed a deed of waqf for

the salvation of her elder son who died before Manzoor Ahmad. Such evidence as there is on the file, therefore, shows that she did intend to execute an effective waqfnama, that the waqfnama is unimpeachable in form and that she did take steps to carry it into effect. To meet this there is nothing except hypothesis.

The argument that has been pressed most strongly in this Court is that the wording of the deed of waqf itself shows that Mt. Rahim Bibi intended to dedicate the interest that she had derived in the two villages from Manzoor Ahmad under the invalid sale-deed, and that as it has now been proved that she derived no interest from him under that sale-deed it necessarily follows that in executing the waqfnama she really transferred or dedicated nothing at all, and the terms of the deed cannot be made to cover the interest in the property which she derived by inheritance on Manzoor Ahmad's death. In fact it is sought by the respondents to trace the closest possible connexion between the waqfnama and the deed of sale executed by Manzoor Ahmad. This was what the arbitrator did when he came to the conclusion that the waqfnama like the sale-deed was null and void. It is argued that this waqfnama was the consideration for the sale of villages by Manzoor Ahmad, and that as the sale has been held to be invalid the consideration must fail. It is perfectly true that the sale-deed contains an instruction to the lady to spend the purchase money in charitable purposes, and that instead of doing so she executed the waqfnama. Even if it could be held, however, that there was a contractual obligation with Manzoor Ahmad to execute the waqfnama, yet when the waqfnama had been executed the matter had passed beyond the stage of a contract with Manzoor Ahmad, and there had been a definite transfer of property and dedication to the Almighty. It does not seem to me that this could be revoked merely because the sale had failed. Nor do I believe that in executing the waqfnama Mt. Rahim Bibi made any such mental reservation as is suggested by the respondents. The argument is to the following effect. In the waqfnama Mt. Rahim Bibi first states that Manzoor Ahmad sold the property to her and left the purchase money with her. She, therefore, withdrew her possession and made a waqf of the property in the name of the Almighty. That is to say, she only executed the waqfnama because Manzoor Ahmad has sold her the property and left the purchase money with her, and it follows that she was only dedicating the interest which she had derived from Manzoor Ahmad. At the time when she executed the waqf the lady was legally entitled to 1/3rd of the property as the heir of Manzoor Ahmad and not to the whole of it as purchaser under the sale-deed. She did not know that this was her legal position, but she believed herself to be the owner by purchase of the whole property. Did she say to herself :

"I am executing this waqf on the understanding that the sale-deed holds good, but I do not intend to dedicate the property I inherited from Manzoor Ahmad in the event of the sale-deed being invalid ?"

It is argued that this was her attitude when she executed the waqfnama, but I cannot bring myself to believe that these doubts really passed through her mind. What she was thinking of was not the interest that she had bought from Manzoor Ahmad, or the interest that she might have inherited from him in the course of law but she was thinking of "the zamindari property in Bithaura Kalan and Amkhera" and whether she derived her title to it from the sale-deed or from inheritance this is what she dedicated in the waqfnama. Under S. 8, T. P. Act :

"Unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferee, all the interest which the transferrer is then capable of passing in the property and in the legal incidents thereof."

On the face of the waqfnama it is a transfer or dedication of the zamindari property in the two villages and not of the questionable interest which she had derived under the sale-deed. If she had no interest in the property, of course she could transfer nothing ; but she did legally own one-third of these villages, and was capable of passing that interest by means of the waqfnama. It appears to me that she must be held to have passed that interest, and that the waqfnama must be held to be valid to the extent of a third share in these villages.

Mr. O'Conor on behalf of the appellant has frankly stated that he cannot expect the sympathy of the Court of behalf of his client and in this I fear that

be is right. It is, however, in evidence that the respondents knew all the circumstances of the case when they bought the property from Mt. Rahim Bibi, that is to say they knew there was in existence a waqfnama and they were warned of this by the plaintiff-appellant himself. Whether they ultimately lose their money or not, however, it is clear that a valid deed or waqf cannot be set aside for sentimental reasons. I would, therefore, allow the appeal, set aside the decree and order of the lower Court and direct that the plaintiff-appellant's suit be decreed with costs in both Courts.

Order of Reference.—As the two Judges composing this Bench are divided in opinion on a question which is decisive of the appeal and as it is one of law and of considerable importance to the parties it is referred to a larger Bench.

The question to be referred to such Bench is :

"Whether the deed of waqf dated 23rd June 1913, assuming it to be otherwise valid, operates on the one-third share of Mt. Rahim Bibi in villages Bithaura Kalan and Amkhera or whether it is confined to such estate as she was believed to possess in them under the sale-deed dated 29th August 1912."

The Hon'ble Chief Justice, will be requested to form such larger Bench for the decision of the question referred to above.

Mukerji, J.—A single question of law has been referred to this Bench because of a difference of opinion between the learned Judges who constituted the Bench hearing the first appeal. The question is formulated as follows :

"Whether the deed of waqf dated 23rd June 1913, assuming it to be otherwise valid operates on the one-third share of Mt. Rahim Bibi in villages Bhitaura and Amkhera or whether it is confined to such estate as she was believed to possess in them under the sale-deed dated 29th August 1912."

(After stating the facts the judgment proceeded). It will be noticed that the question before this Bench is one of pure law. It is necessary to emphasize this fact, because it was sought to raise certain questions of fact in the course of argument, on behalf of the respondents. For example, it was suggested that Rahim Bibi had no knowledge that she had an alternative title to the property, that she had no competent advice and so on. In my opinion, for the purpose of deciding the question, we have to assume, as the question itsel assumes, that the deed of waqf of 23rd June 1913 is a perfectly valid document and has no flaw of any kind.

The point for decision is rather narrow although many facts had to be narrated to fully appreciate the position. It is common ground that the guide furnished by law, in this case, to the Court, is S. 8, T. P. Act. That section lays down a rule of construction in the absence of a different intention being expressed or necessarily implied. It runs as follows:

"Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee of the interest which the transferrer is then capable of passing in the property and in the legal incidents thereof."

For the plaintiff it is contended that Rahim Bibi made a waqf of the entire villages and, if from want of title to the entire villages, the waqf cannot attach to them, in their entirety, it must attach to her one-third share. On the other hand it is contended that Rahim Bibi had two titles to the property, one title being that which she got by virtue of the sale-deed executed by her son in her favour and the other title, which was in the alternative, was that of inheritance, on the death of her son It is further urged that Rahim Bibi by the deed of waqf, transferred or purported to transfer only such title as she thought she possessed by virtue of the sale-deed and this necessarily shows that she excluded from the operation of the transfer, such title as she got by right of inheritance. I have to find out which of these two contentions is right.

To start with, an examination of S. 8, T. P. Act, shows that it lays down a rule of construction which must be applied to the case of a transfer which, ex hypothesi, does not tell us whether any particular interest, possessed by the transferee, was meant to pass by the conveyance or not. The object of the section is therefore, to stabilize title and to remove, from the region of pure speculation, what passed in the mind of the transferrer or the transferee at the date of the transfer. It seems to me to be also reasonably certain that, when S. 8, speaks of 'transfer of property', it speaks of transfer of some property which may be tangible or intangible, but not mere title. But when it speaks of "interest" it includes title, large or small. For

example, a man may possess two titles to a property. He may be an executor, entitled to dispose of the property in its entirety, and he may also own a beneficial interest, in a fractional share in the property. Under S. 8, therefore, when such a man transfers the property, without clearly signifying whether he has transferred the property as the executor or as a part owner of it, it will be presumed that the larger interest, namely, that of an executor also passed along with the smaller interest as a part owner: see *Bijraj Nopani* v. *Purasundari* (4) and *Ganga Bai* v. *Sona Bai* (5).

I have found it necessary to make these remarks as it was argued at the Bar that a man transfers not a "property" but his "title" to the property. In my opinion S. 8, T. P. Act, contemplates the transfer of property and, then lays down what are the "interests" in that property that should be deemed to have passed. The reason for this argument was that in the deed of waqf Mt. Rahim Bibi makes no mention, whatsoever, of her right to inherit a one-third share in the villages and makes mention of only the fact that she purchased the property from her son.

There can be no doubt that Rahim Bibi purported to transfer, by way of a waqf, the entire villages. There can also be no doubt, to my mind, that the result would be the same, if Rahim Bibi executed a sale-deed of the villages, instead of a waqf. If Rahim Bibi had sold the entire villages instead of making a waqf of the same, it having been held that she got no title under the sale-deed executed by her son, the purchaser would still have got a title to the one-third share Rahim Bibi inherited from her son. On the language of S. 8, T. P. Act, therefore, the presumption is that when Rahim Bibi transferred the two villages, she, thereby, passed not only such title (good, bad or indifferent) as she had acquired or she believed she had acquired from her son, by virtue of the sale-deed but also such title as she had, as a matter of law, acquired by inheritance on the death of her son.

It was contended that the deed of waqf and the sale-deed should be read together and when read together, they afforded a clear indication that Rahim Bibi was not transferring her such interest as she had inherited on the death of her son. As I have said before, the question, therefore, narrows itself down very much. We have to find out whether the deed of waqf expresses an intention to the effect that such right as Rahim Bibi might hold in the villages in question, by right of inheritance from her son, were meant not to pass to the Almighty and that it was the intention of Rahim Bibi, either clearly expressed or necessarily implied, that if Rahim Bibi's title by purchase from her son, to the entire villages, failed, the Almighty would be deprived of all interest in the villages and that Rahim Bibi would be at liberty to sell her one-third share in the two villages to any party she liked. In my opinion, the sale-deed and the deed of waqf, even if read together, do not afford any such indication.

I have already mentioned that the sale-deed executed by Manzur Ahmad recites that he left almost the entire consideration with his mother to be spent on charitable purposes. It has been found by this Court and the finding is res judicata, that nothing whatsoever was paid as the sale consideration. The transaction was one of pure gift. Rahim Bibi, however, says in the deed of waqf that she was executing the document in pursuance of the wishes of her son. She knew that she had a third share in these two villages gifted to her, as much and no more as she had, in the other properties of Manzur Ahmad, inherited by her along with other heirs. She must have therefore known that by executing the deed of waqf she was giving away her third share in the two villages. If, therefore, she wanted to make a waqf, conditionally, that is to say, if it was her intention that the waqf should take effect only in the case of the ostensible sale-deed in her favour being good in law, she would have said so. We need not here consider, if she had made a conditional waqf, how far it would have been valid in law. I need not repeat, but the whole point is, there is nothing in the deed of waqf which indicates. unmistakeably, that the deed of waqf was a conditional deed and was to be of no effect at all, if the sale in favour of Rahim Bibi fell through. The fact that she makes mention of the sale-deed in her favour is,

(4) A. I. R. 1914 P. C. 92=42 Cal. 56=41 I.A. 189 (P.C.).
(5) [1916] 40 Bom. 60=28 I. C. 544=17 Bom. L. R. 303.

only because she had to recite the source of her title, according to the practice of the country. If she mentions that it was the wish of her son that the sale proceeds should be spent on charity, she does so, to explain the motive for her action, although she does not profess to fully comply with her son's wishes, which were to the effect that the sale proceeds should be spent and not the corpus of the estate. Giving the case my best consideration, I am clearly of opinion that the waqf does not attach to the one-third share of Rahim Bibi.

I am not at all concerned as to how far morally justified is the plaintiff in making the claim. At one stage of the argument before us, it was said that the sale proceeds of the property, now in dispute, went to satisfy a debt due to the plaintiff himself, from Rahim Bibi. That may be so. The debt was a just debt and it was the duty of Rahim Bibi to pay it; but that did not mean that she should have sold the property which she had dedicated to the Almighty. She had owned other properties which she had given away to her brother's sons. Some part of that property should have been sold to pay Rahim Bibi's just debts, or, if Rahim Bibi could not pay her debts, she might have chosen to take shelter in the insolvency Court. But she chose to sell unsaleable property and raised money, there is nothing morally wrong, on the part of the plaintiff, to accept the money and then say that the sale was not justified. The plaintiff could not compel Rahim Bibi to sell other properties, in order to pay him. He did not persuade her to sell the waqf property. As I have said, my answer to the question is that the waqf does attach to the one-third share of Rahim Bibi.

Kendall, J.—For the reasons given in my judgment of 1st August 1928, I agree.

Niamat Ullah, J.—I am of opinion that the deed of waqf dated 23rd June 1913 does not operate on the one-third share of Mt. Rahim Bibi which she inherited from Manzur Ahmad, in villages Bhitaura and Amkhera, and that it is confined to such estate as she was believed to possess in them under the sale-deed, dated 29th August 1912. No further light was thrown on the matter in controversy and the arguments before the Full Bench proceeded on the same lines as before. My reasons are fully set out in the judgment, delivered as a member of the Division Bench making the reference which should be referred to as indicating my views on the questions involved in the reference.

By the Court.—The answer to the question of law, referred to the Bench of of three Judges is the answer of the majority, viz. the waqf does attach to the one-third share of Rahim Bibi, in the two villages and does not fail, in its entirety, because the transaction of sale by Manzur Ahmad, in her favour, fails.

Kendall, J.—The question referred to the Full Bench was :

"Whether the deed of waqf dated 23rd June 1913, assuming it to be otherwise valid, operates on the one-third share of Mt. Rahim Bibi in villages Bhitaura Kalan and Amkhera or whether it is confined to such estate as she was believed to possess in them under the sale deed dated 29th August 1912?"

This question has been answered in the decision of the Full Bench, dated 5th March 1929, viz :

"the waqf do s attach to the one-third share of Rahim Bibi in the two villages and does not fail, in its entirety, because the transaction of sale by Munzur Ahmad in her favour, fails."

On the appeal coming before the original Bench for disposal after this decision it was argued by Sir Tej Bahadur Sapru for the respondents that although the decision of the Full Bench showed conclusively that the waqf must attach to the one-third share of Mt Rahim Bibi, yet the question was still open whether Mt. Rahim Bibi as a pardanashin lady could be held to be bound by the deed, seeing that it had not been proved that the legal position had been fully explained to her before or at the time when she executed the deed of waqf, that is to say, it had not been explained to her that in the event of the sale-deed executed by Manzur Ahmad being held to be invalid, the waqf which she was executing would attach to the estate which she would inherit as the heir of Manzur Ahmad. In support of this argument reference was made to the decision in the cases of *Kamawati* v. *Digbijai Singh* (6) and *Farid-unnissa* v. *Mukhtar Ahmad* (1). In these cases it is to be observed it was held that the pardanashin lady was not bound by her deed in which owing to a misapprehension she had parted with larger estates that she believed herself to be possessed

(6) A. I. R. 1922 P.C.14=43 All. 525=48 I. A. 381.

of, that is to say, the effect of the deed was detrimental to her owing to her ignorance. In the present case when it was originally argued before us the way in which the respondent's contention was put forward was rather different. In discussing the construction of the deed of waqf it was suggested that, as the lady was not aware that in the event she would be found to be possessed of the estate inherited from Manzur Ahmad not of the estate sold to her by Manzur Ahmad it cannot have been her intention to transfer the former estate by the deed of waqf, and consequently the deed of waqf could not attach to that estate. This was the point on which my learned brother and I disagreed, and this was the point decided by the Full Bench.

The question whether the circumstances were fully explained to the lady was not one which ever had any pre-eminence in the proceedings. In the plaint the case in support of the waqf is set forth in paras. 3 and 4, and in the written statement in reply to para. 3 of the plaint it was said :

"Mt. Rahim Bibi had never the intention to make a "waqf" in respect of any portion of the estate of Manzur Ahmad, nor has she done so. If any deed of "waqf" referred to in this paragraph was brought into existence in any way, it is simply fictitious."

It was not set forth that the legal position had not been explained to Mt. Rahim Bibi, or that the deed of waqf was invalid because of any misapprehension on her part due to her being a pardanashin lady. The plaintiff was, therefore, never called on to answer this allegation or to bring evidence to prove that the legal position had been explained to the lady or that she herself understood it. Evidence was, however, brought to show that the waqf had been carried into effect and my own decision was that the evidence was sufficient to show that the lady believed herself to be the full proprietor of the whole estate, that she intended to transfer the whole estate by the deed of waqf, that she did so transfer it and that the deed was, therefore, effective as regards the smaller estate of which the subsequent event showed that she was the owner. As she was fully satisfied that she possessed the whole sixteen annas and was under no misapprehension as to the effect of the waqf on the estate, it was clear to me that the execution of the waqf was the free and intelligent act of the lady, and, therefore, there was no obligation on the plaintiff to bring positive evidence to prove that the whole legal position had been explained to her, viz., that if her title as vendee of the whole estate should fail, the waqf would attach to the lesser estate inherited from Manzur Ahmad. There was no doubt in my mind and I believe there was none in that of my learned brother as to the circumstances in which the waqf was executed, viz., that she believed herself to be the owner of the full estate and that she intended to execute a waqf of it in that belief. The point in which we differed was this. I considered that she could not in the circumstances have had any intention of reserving any possible estate that she might be found to have inherited from her son : whereas my learned brother held that there might have been such an intention. There was, therefore, no question of fact before the Full Bench, and for this reason the Full Bench did not allow it to be discussed. The question whether on these facts Mt. Rahim Bibi as a pardanashin lady would be bound by the deed of waqf appears to me, therefore, to be one that is entirely covered by the decision of the Full Bench. The result is that I would allow the appeal, set aside the decree and order of the lower Court and direct that the plaintiff-appellant's suit be decreed with costs in both Courts.

Niamatullah, J.—I agree with my learned brother in allowing the appeal but for somewhat different reasons. I have already expressed my opinion on the contention now reiterated on behalf of the respondents, viz., that in the absence of evidence establishing that the effect of ths deed of waqf, dated 23rd June 1913 (as found by the Full Bench) was explained to Mt. Rahim Bibi, admittedly a pardanashin lady, and that, therefore, it cannot operate to convey the interest which, in the events that happened, she must be deemed to have inherited from her son. The law is well settled that those who rely upon deeds containing dispositions by pardanashin ladies must establish not only that they executed the deeds intelligently but also that the nature and effect of the

dispositions were explained to them and that it was with full knowledge of the correct legal import of such dispositions that they executed the deeds. Clear dicta in support of this proposition are to be found in *Kamawati* v. *Digbijai Singh* (6) and *Farid-un-nissa* v. *Mukhtar Ahmad* (1). It is not necessary to make reference to earlier cases in which the Privy Council have likewise laid stress on the necessity of such proof being given by those who seek to enforce deeds executed by pardanashin ladies. The requirement of the above rule exists even in cases where a deed is impugned by a pardanashin lady, or those claiming under her without specifically repudiating on the ground that the legal effect of the deed was not brought home to her: see *Sudisht Lal* v. *Mt. Sheobarat Koeri* (7); *Shambati Koer* v. *Jago Bibi* (8). Moreover, the pleadings in this case raised the question, in my opinion, with sufficient clearness. In para. 3 of the written statement, in answer to the corresponding paragraph of the plaint which was denied, it has been averred that

"Mt. Rahim Bibi had never the intention to make a waqf in respect of any portion of the estate of Manzur Ahmad, nor has she done so. If any deed of waqf referred to in this paragraph was brought into existence in any way it is simply fictitious. The genuineness and validity of the papers mentioned in the said paragraph are not admitted."

To interpret the plea herein contained it should be remembered that the case of the defendants has throughout been that Mt. Rahim Bibi made waqf of what she believed at that time to have been conveyed to her by the sale-deed executed by her son, Manzur Ahmad, and not what she was subsequently held to have inherited from him. On the supposition that title passed to her under the sale-deed the village conveyed thereby would form no part of "the estate of Manzur Ahmad" at the time of his death. On the other hand, if the sale-deed was invalid as eventually held by this Court, the villages would form part of "the estate of Manzur Ahmad" which would partly devolve upon her as one of his heirs. The plea embodied in para. 3 of the written statement carefully analyzed comes to the allegation that she did not make waqf of what she had inherited from her son, Manzur Ahmad, nor did she ever intend to make waqf of such interest. This being so, even according to a strict rule of pleading, the defence raised the question whether Mt. Rahim Bibi intended to make a waqf of what she inherited from her son, and the plaintiff who seeks to enforce the deed against such interest should, therefore, have established by satisfactory evidence that the effect of the deed, viz., that it operates to convey what she inherited from Manzur Ahmad, was explained to her or was otherwise present to her mind when she executed it. It is conceded on behalf of the appellant that no such evidence was adduced. It follows that she cannot be deemed to have intended to give such effect to the deed.

While I maintain now as I did before that the effect of the deed, dated 23rd June 1913 is not to convey one-third of the villages Bhitaura and Amkhera, I think that in view of the answer returned by the Full Bench to the reference made by us, the question cannot be raised at this stage. The Full Bench refused merely to entertain any questions of fact and not the consideration of law bearing on the reference. Mukerji, J., who delivered the judgment of the Full Bench, observes:

"It will be noticed that the question before this Bench is one of pure law. It is necessary to emphasise this fact, because it was sought to raise certain questions of fact in the course of argument, on behalf of the respondents. For example, it was suggested that Rahim Bibi had no knowledge that she had an alternative title to the property, that she had no competent advice and so on. In my opinion, for the purpose of deciding the question, we have to assume, as the question itself assumes, that the deed of waqf of 23rd June 1913 is a perfectly valid document and has no flaw of any kind."

He proceeded to consider the question referred to the Full Bench and held that the deed of waqf, dated 23rd June 1913, operates in law on what Mt. Rahim Bibi inherited from Manzur Ahmad. In my earlier judgment I referred to the necessity of establishing by cogent evidence that Mt. Rahim Bibi intended the deed to be operative to that extent only as an argument leading to the conclusion that the deed cannot have such effect. No question of fact arises now or arose then, it being conceded that such evidence has not been given. It is only a proposition of law that we are concerned with, viz.,

(7) [1881] 7 Cal. 245=8 I. A. 33=4 Sar. 222 (P.C.).

(8) [1902] 29 Cal. 749=29 I. A. 127=6 C. W. N. 682=8 Sar. 304 (P.C.).

whether in the absence of evidence that this effect of the deed was present to her mind the deed can operate so as to have that effect. The answer given by the Full Bench is wide enough to have impliedly disposed of all arguments of that kind. This Bench is bound to give effect to the opinion expressed by the Full Bench on the question referred to it. For the reasons stated by me above I allow the appeal with costs.

By the Court.—The appeal is allowed, the decree-order of the lower Court set aside and the plaintiff-appellant's suit is decreed with costs in both Courts.

M.N./R.K. *Appeal allowed.*

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* A. I. R. 1929 Allahabad 479

ASHWORTH, J.

Mt. Ashrafunissa Begam—Appellant.

v.

Sahdeo Pande and *others* — Respondents.

Second Appeal No. 1460 of 1927, Decided on 5th March 1929, against decree of Sub-Judge, Ghazipur, D/- 6th June 1927.

(a) Hindu Law—Alienation—Transfer by manager, otherwise than for legal necessity or antecedent debt, if avoided by other coparceners is wholly inoperative.

An alienation or transfer of the joint family property by a manager (otherwise than for legal necessity and otherwise than for an antecedent debt) if avoided by other coparceners, is entirely ineffectual and will not operate to transfer his own share : *A. I. R.* 1917 *P. C.* 41 ; *A. I. R.* 1917 *P. C.* 61, *Rel. on.* [P 480 C 1]

*** (b) Hindu Law—Joint family—Manager for securing economical management of family property taking up management of neighbouring property and creating charge on family property to secure honest management—Manager does not exceed his powers nor does he burden family property without legal necessity.**

A manager cannot use the joint family property to obtain a post profitable to himself alone, but where he takes up the management of the neighbouring property with the object of securing economical management of his own family property, and creates a charge on the joint family property to secure the honest management of that property, it cannot be said that the manager exceeded his powers or burdened his family property otherwise than for legal necessity. [P 480 C 2]

Mushtaq Ahmad—for Appellant.

N. Upadhiya—for Respondents.

Judgment. — This second appeal arises out of suit brought by the plaintiffs against their father, defendant second party, and the wife of a decree-holder against their father, for a declaration that a decree obtained by the husband of defendant 1 against their father on the basis of a deed of security, dated 18th January 1919, is void as against the plaintiffs. The plaintiffs lost the case in the trial Court, but were successful in the lower appellate Court. Hence this appeal. The plaintiffs and their father admittedly formed a joint Hindu family in comfortable circumstances. The father in addition to his own zamindari undertook the management of the zamindari belonging to defendant 1, and to secure his keeping correct accounts executed a mortgage-deed of his own joint family property. On this deed a decree was obtained. The sons pleaded that the joint family property was not liable under the security bond or under the decree obtained thereon.

The trial Court held that even if the family income was sufficient for the maintenance of the family, the extra income derived, namely Rs. 5 a month was for the benefit of the family and worth the risk incurred by hypothecating as security family property worth Rs. 500.

In appeal the Subordinate Judge held that as the family was in comfortable circumstances, it was unnecessary for defendant 2 to enter into service or risk the joint family property by a security bond to secure the faithful discharge of his duties. He remarked that if the joint family had consisted of the father and the sons only, he was inclined to the view that the ancestral property could be liable, because the sons were under a pious obligation to discharge their father's debt, but he found that there was an uncle of the plaintiff, who was also a member of the joint family, and this uncle was under no such pious obligation. Consequently as the plaintiffs, their father and their uncle were coparceners and not cosharers the security bond could not be enforced by selling the shares in the joint family property that would fall to the father and the sons on partition.

The points urged in this appeal are in effect that the lower appellate Court was wrong in holding that a mortgage on the family property executed to secure an alleged advantage to the family could be

held not to be for legal necessity, because the family were comfortably off. It is pleaded also that in any case the share of the plaintiffs and their father in the joint family property should be held liable even if the share of the uncle was exempted.

I will deal with the second plea first, The lower appellate Court appears to me to have entertained an incorrect view of Hindu law in suggesting that the obligation of the sons to discharge their father's debt unless tainted with illegality or immorality, had any bearing on the present case. When the father executed the mortgage, there was no debt due from him, and the mortgage was executed to secure not an antecedent debt but merely a possible one. The doctrine of the pious obligation of a son to pay his father's debt only extends to an antecedent debt. An alienation or transfer of the joint family property by a manager (otherwise than for legal necessity and otherwise than for an antecedent debt), if avoided by other coparceners, is entirely ineffectual and will not operate to transfer his own share: *Lachhman Prasad* v. *Sarnam Singh* (1) and *Sahu Ram Chandra* v. *Bhup Singh* (2). Coming to the first plea, the lower appellate Court clearly misdirected itself, when it stated that the manager of a family in comfortable circumstances is not entitled to use the family property to improve still further those circumstances. The decree, therefore, of the lower appellate Court cannot be sustained on the reasons advanced by it.

We are thus left with a finding of fact of the trial Court that the mortgage was for the benefit of the family. I might refer the case back to the lower appellate Court for a finding of that Court whether it agreed or disagreed with this finding, but the materials before me are sufficient to enable me to decide that matter myself. In case of doubt I should feel inclined to leave undisturbed the finding of fact of the trial Court. I may say that I agree with that finding. It is true that the income to be derived from the father's assuming the management of the neighbouring estate was small, namely Rs. 5 a month and the risk to the property of his own family was considerable, Rs. 500, but I am informed that what influenced the father in accepting the management of the neighbouring estate was that he could combine it with little expenditure of time and trouble with the management of the estate of his family, and moreover would be in a position to manage his own estate more conveniently when combined in management with the other estate as a single unit. It is the essence of economical management that the manager should neither have too much to do or too little to do. The presumption is that the father believed that the combination of the management of the two estates would be for the benefit of his own estate, and in such matters the exercise of an honest and reasonable discretion by the manager cannot ordinarily be questioned.

The lower appellate Court has stated that the defendant's counsel were unable to show him a single case in which it had been held that a manager of the joint family can charge the family property for the honest performance of his duties in the service of another. This may be so, but the question has to be decided on the general principles applicable to the powers of a manager. I should have little hesitation in holding that a manager cannot use the joint family property to obtain a post profitable to himself alone, but on the other hand, where, as in this case, it must be held that the manager took up the duties of the new post with the object of securing economical management of his own family property, then I am unable to say the manager exceeded his powers or burden his own family property otherwise than for legal necessity. The consequence is that this appeal is allowed and the decree of the trial Court is restored. The appellant will get her costs in the lower appellate Court and in this Court.

S.N./R.K. *Appeal allowed.*

(1) A.I.R. 1917 P.C. 41=39 All. 500=44 I.A. 163 (P.C.).
(2) A.I.R. 1917 P.C. 61=39 All. 437=44 I.A. 126 (P.C.).

A. I. R. 1929 Allahabad 481

ASHWORTH AND SEN, JJ.

Padam Singh and *others*—Defendants—Appellants.

v.

Reoti Saram and *others*—Plaintiffs—Respondents.

Second Appeal No. 2134 of 1927, Decided on 6th March 1929, against decree of Sub-Judge, Meerut, D/- 25th May 1927.

(a) Hindu Law—Alienation—Mortgage by father—Recitals in deed as to necessity are of little evidential value although they may assume value when they amount to representation of family need or when owing to length of time it is impossible to produce other evidence.

The recital by a father in a mortgage deed to the effect that the deed is executed for family necessity is an admission by him as a manager of the Hindu family, but is of little evidential value as it may have been a false recital made by him for his own purposes, except when under circumstances they amount to a representation of the need of the family or owing to length of time it is impossible to produce other evidence: *A. I. R.* 1914 *P. C.* 38 and *A. I. R.* 1916 *P. C.* 110, *Expl.* and *Foll.* [P 483 C 1]

(b) Civil P. C., S. 100—Finding of fact.

Second appellate Court can set aside a finding of fact not based on admissible or reasonable evidence. [P 483 C 2]

N. C. Vaish—for Appellants.

K. C Mital—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-respondents on the basis of a mortgage bond executed on 23rd June 1914. The plaintiffs are the daughter's sons of the mortgagee. The defendants, when the suit was filed included the two mortgagors and their sons. During the pendency of the suit one of the mortgagors died. The mortgage bond was for Rs. 300 and this amount was recited in the deed as money for the price of a bullock previously purchased (because interest is calculated) and for the settlement of a running bahi khata account in respect of petty items of food.

The plaintiffs in para. 5 of their plaint based the liability of the sons of the actual mortgagors on the allegation that the debt was contracted for lawful necessity of the family and that the family had been benefited by the debt. It is important to notice that the liability of the sons of the mortgagors was not based on any allegation that the money was required to meet the antecedent debts of their respective fathers.

The trial Court found that legal necessity was not proved. The reasoning on which it came to this finding is as follows: It quoted two decisions of their Lordships of the Privy Council, *Brij Lal* v. *Inda Kunvar* (1) and *Banga Chandra* v. *Jagat Kishore* (2) as laying down that recitals in deeds could ordinarily only be evidence as between the parties to the conveyance or those who claimed under them, although, when a transaction was so ancient as to make it impossible for the parties to the suit to produce evidence to prove necessity, a recital as to necessity might be treated as of evidential value when consistent with the probability and circumstances of the case. The trial Court proceeded to consider the evidence apart from the recital and came to the conclusion that the evidence of Wazir Ahmad, an attesting witness, did not add any thing to the recital and that the evidence of Ishaq Lal was rendered unreliable by the fact that he was a pairokar of the plaintiffs and had not explained sufficiently his presence when the mortgage was executed. It further noted that, although in the bond there was a reference to the bahi khata accounts and to the page of the plaintiffs' bahi khata, those accounts had not been produced and there was no satisfactory reason given for their non-production. Lastly it held that the plaintiffs had delayed in bringing their suit on the mortgage and consequently were responsible for the difficulty of proving that the money was borrowed for legal necessity.

In appeal the Subordinate Judge held that the recital as to the debts was supported by the evidence of the marginal witness and might therefore be believed. He held that the mortgagors Bahadur and Jal Singh would not have recorded the necessity of the debts against their own interest and that of their family. He commonted on the fact that Bahadur, the surviving mortgagor and the defendant, had not come into the witness-box. He excused the non-production of the bahi khata by saying that it was expecting too much from the grandsons of the mortgagee that they would have retained their grandfather's bahi khata for a period going back to 13 or 15 years. Lastly he was much impressed by the mention in the bond of the exact page of the bahi

(1) A. I. R. 1914 P. C. 38=36 All. 187 (P.C.).
(2) A. I. R. 1916 P. C. 110=44 Cal. 186=43 I. A. 249 (P. C.).

khata alleged to show the balance due on the running account for petty items of food. For these grounds he set aside the finding of the trial Court and found that the bond was executed for legal necessity.

We are not impressed by the reasons of the lower appellate Court for holding that there was evidence apart from the recital justifying the conclusion that the bond was executed for legal necessity and we would go as far as saying that there was no reasonable evidence apart from the recital (which we shall consider later) for holding legal necessity proved. The marginal witness Wazir Ahmad merely stated that Bahadur and Jal Singh had admitted to him that the money was due. We are not denying the fact that the recital did admit the money to be due. Consequently Wazir Ahmad in his evidence adds nothing to the recital. As regards the suggestion that the mortgagors would not have been so foolish as to admit a debt against their own or their family's interests, it is clear that, on the case of the defendants' sons, these brothers were using the family property to get money for themselves. Ex hypothesi therefore there would be nothing foolish in their making out that the money was required for the family necessity. It would only be by so doing that they could procure the loan from the mortgagee. As regards the failure of Bahadur, the defendant mortgagor, to come into the witness-box and deny the consideration, the lower Court was in error in confusing Bahadur's case with that of the sons. Bahadur was clearly bound by his admission in the deed, but on the supposition that the sons are not bound by the recital in the deed, the failure of Bahadur to come into the witness-box and give evidence which would be of no value, considering his own recital, cannot be held to affect the position of the sons in contesting the bond. The fact that in the bond the precise page of the mortgagee's bahi khats being entered does not appear to us to support the truth of the recital. If the mortgagors were attempting to mortgage the family property for their own personal advantage, it must in the circumstances of this case have been with the connivance of the mortgagee. Consequently the mortgagee might very well enter a page of his bahi khata in order to make the recital look more reliable. If the bahi khata had been forthcoming then no doubt the effect of the entry in the bahi khata, corresponding with the entry referred to in the deed would have been of some value, but in the absence of the production of the bahi khata, it appears to us to have been of no value. The lower appellate Court has itself stated that the loss of the bahi khata was not satisfactorily proved. When it states that the grandsons could not be expected to have retained their grandfather's bahi khatas relating to a period of 13 or 15 years ago, we would remark that, even if this were so, which we think open to doubt, the fact remains that by not retaining the bahi khata the grandsons have deprived themselves of the power of proving something, the burden of proof of which was on themselves. Whether the preservation of the bahi khatas was to be expected of them or not, the fact remains that they cannot take advantage of the bahi khatas which they have not produced. The lower appellate Court in fact is allowing the mention of the page of the bahi khata in the bond to operate as secondary evidence of the entry in the bahi khata which is not permissible.

We would further add that the real importance of the entry in the bahi khata would be to prove that the debt was an antecedent debt but the liability of the sons on this bond was never based in the plaint or in the pleadings or in the arguments in either Court on the liability of the sons to pay an antecedent debt and we are not prepared to consider the case from that point of view now. We would also add that the liability of sons might possibly have been based on a third ground, namely, that one of the mortgagors must have been the manager and the other the sole adult coparcener in the family, and that, in view of the fact of the only other adult coparcener in the family being a party to the deed, he must be deemed to have admitted on behalf of the coparceners other than the manager that the debt was for legal necessity ; but this argument again was not advanced in either of the lower appellate Courts and we are not therefore disposed to consider it.

There remains then the question whether the recital in the deed was sufficient evidence in the particular circumstances

of this case to prove that the bond was executed for family necessity. In Privy Council case *Brij Lal* v. *Inda Kunvar* (1) see *p.* 193 *of* 36 *All.* referred to above, their Lordships of the Privy Council stated :

"Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Board that to substantiate the allegation there must be some evidence aliunde."

Again in *Banga Chandra* v. *Jagat Kishore* (2), at the foot of p. 195 (*of* 44 *Cal.*), it is stated :

"under ordinary circumstances and apart from statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them".

Now it is difficult to see how the latter remark is reconcilable with the statement in the former ruling that recitals are evidence against the sons. Reading the two together it appears to us that what was laid down by their Lordships amounted to this.

The recital by a father in a deed to the effect that the deed is executed for family necessity is an admission by him as manager of the Hindu family, but is of little value as it may have been a false recital made by him for his own purposes. Such recitals however, although unreliable, can in certain circumstances assume value. One case is whether they are recitals, which amount to a representation of the need of the family. In such a case it would not matter whether the money was really needed for the family provided that the representation was sufficient for the lender to act upon.

Another circumstance is where, owing to length of time it is impossible to produce other evidence, in which case the evidence assumes an importance which it would not in other circumstances possess. In the present case there was no question of the mortgagee being entitled to act on representation. He knew for what purpose the money was used and he was bound to prove that purpose. He could not fall back on any allegation that the mortgagor represented to him that it was necessity. This was not a case where no other evidence could have been produced. There was the evidence which could have been furnished by bahi khata if retained by the grandsons. On their own evidence these bahi khatus were in existence in about 1923 although they stated that they had been stolen then—a fact held not to be proved by both the lower Courts. It was also open to them to examine Bahadur, the surviving mortgagor. We do not find that the facts existing in the case of *Banga Chandra* v. *Jagat Kishore* (2) are at all similar to the present case and that decision cannot help the plaintiffs.

For the above reasons we consider that the decision of the trial Court was correct and that in setting aside the decision the lower appellate Court invoked certain consideration which were not relevant and certain facts which did not in fact prove the recital to be true and could be used as aliunde evidence in support of the recital. We are therefore entitled to set aside the finding of the lower appellate Court, even if it were to be considered a finding of fact, as a finding not based on admissible or reasonable evidence.

For the above reasons we accept this appeal and set aside the decree of the lower appellate Court and restore that of the trial Court with costs to the appellants both in this Court and the lower appellate Court. There is a cross-objection by the plaintiff-respondents as to the rate of interest. It maintains that they should have got the contractual rate of interest, but this interest was obviously of the nature of a penalty as held by both the lower Courts. The lower appellate Court was therefore justified in fixing what it considered a fair amount of interest. We dismiss the cross-objection with costs.

S N./R.K. *Decree set aside.*

A. I. R. 1929 Allahabad 483

ASHWORTH AND KENDALL, JJ.

Achhaibar Singh—Plaintiff — Appellant.

v.

Rajmati and *others* — Defendants — Respondents.

Second Appeal No. 699 of 1927, Decided on 5th March 1929, against decree of Addl. Sub-Judge, Jaunpur, D/- 11th February 1927.

Transfer of Property Act, S. 65(a)—Estoppel in Cl. (a) operates not only against mortgagor but also against his transferee.

The estoppel referred to in S. 65 (a) is an estoppel that operates not only personally against the mortgagor but also against a subsequent transferee of the mortgagor : 30 *Mad.* 67, *Dist.*; 10 *C. L. J.* 150, *Rel. on. Doe* v. *Stone*, (1846) 3 *C. B.* 176, *Ref.* [P 484 C 2]

P. L. Banerji—for Appellant.

Haribans Sahai—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-appellant for sale of certain property on the basis of a mortgage. The property was mortgaged to him by one Behari Das Goshain. The mortgage was a simple mortgage. Subsequently Behari Das sold the equity of redemption to Mt. Rajmati who is the mother of the defendant-respondents.

One plea taken in defence was that the property being waqf property, Behari Das, the mortgagor, was not entitled to mortgage it. This plea was repelled by the trial Court on two findings. One finding was that the property was not waqf property, and the second was that in any case the defendants having obtained possession of the property from their mother who got the equity of redemption from Behari Das were estopped under S. 65 (a), T. P. Act, from denying the right of Behari Das to mortgage the property.

In first appeal the Subordinate Judge set aside the finding of the trial Court as to the property being waqf property. Whether he considered the plea of estoppel is not clear. He has made some remarks which appear unintelligible and at any rate have not been relied upon by the respondents' counsel and with good reason. In this second appeal the main point taken is that the respondents were in possession through their mother and any interest acquired by their mother was the interest of Behari Das as it existed subsequent to the mortgage. Therefore, neither their mother nor the defendants themselves can take up a position which it was not open to Behari Das as mortgagor to take. Now Behari Das either had or had not power to make the mortgage. Assuming that he had not power still he could not, in a suit by the mortgagee, take up the position that he had no power to transfer the property by mortgage. That is clearly barred by S. 65(a), T. P. Act. His successors-in-interest are in no better a position.

Respondents' counsel has attempted to argue in two ways. He first of all maintained that the respondents, although they were the sons of Mt. Rajmati, had somehow got possession of the property quite independently of their mother. This plea was not set up in the written statement and it would take a great deal to persuade us that when their mother was in possession under her sale-deed the respondents, her sons, got possession in some way independently of their mother. This view of the case was never considered by the lower Courts and obviously because it was neither maintained nor was maintainable.

A second argument is that the estoppel referred to in S. 65 (a), T. P. Act, is an estoppel that will only operate personally against the mortgagor and not against a subsequent transferee of the mortgagor. In support of this contention we are referred to the case of *Ranga Srinivasa Chari* v. *Gnanaprakasa Mudaliar* (1). It was there held that the implied contract mentioned in S. 65 (c), T.P. Act, that the mortgagor will pay all public charges accruing due in respect of the mortgaged property so long as the mortgagee is not in possession is an implied contract which will not be binding on a subsequent transferee of the equity of redemption. Whether that case was rightly decided on this point it is unnecessary to consider because the liability to pay public charges would arise subsequent to the mortgage. The implied contract that the mortgagor has a right to sell the property that he mortgages is one that arises at the moment of the execution of the mortgage. It has been held in *Debendra Nath Sen* v. *Abdul Samed* (2) (at 164) wherein reliance is placed on the English case of *Doe* v. *Stone* (3) that it is no more open to a person standing in the shoes of the mortgagor than to the mortgagor himself to set up as against the mortgagee any preceding estate which he himself had created. That is to say that a successor-in-interest of the mortgagor cannot deny that the estate which he mortgaged was vested in him. We would also refer to the last paragraph of S. 65, T.P. Act, which mentions that the right of a mortgagee to take advantage of the implied contract stated in S. 65 can be enforced by every successor-in-interest of the mortgagee. This provision would be of no effect if it was only the mortgagor personally against whom they would be invoked. For the above reasons we accept this appeal and restore

(1) [1907] 30 Mad. 67.
(2) [1909] 10 C. L. J. 150=1 I. C. 264.
(3) [1846] 3 C. B. 176.

the decree of the trial Court with costs to the appellant both in the lower Court and in this.

S.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 485

BOYS AND YOUNG, JJ.

Baldeo Prasad Shukul—Applicant.

v.

Sukhdeo Prasad Shukul — Opposite Party.

First Appeal No. 143 of 1927, Decided on 7th March 1929, against order of Sub-Judge, Gorakhpur, D/- 13-4-1927.

(a) Civil P. C., O. 9, R. 13—Application for setting aside ex parte order in execution proceedings is not maintainable and S. 141 does not operate to make O. 9, R. 13, applicable to execution proceedings—Civil P. C., S. 141.

An application to have an ex parte order in execution proceedings set aside is not maintainable under O. 9, R. 13 and S. 141 does not operate to make O. 9, R. 13 applicable to execution proceedings. An application, however, to have the ex parte order passed in execution proceedings set aside, if not possible under O. 9, R. 13, must at least be held to be an application entertainable in the discretion of the Court uuder its inherent powers for a litigant could not be left without remedy if an execution Court passed an order under a complete misapprehension as to what the matter before it for consideration was. If an execution Court had no power to set aside an order passed by it ex parte merely because the sections and rules of O. 9, R. 13, were inapplicable to execution proceedings, it would also have no power, an impossible situation, to dismiss in default of appearance : 17 *All.* 106, (*P. C.*) *Expl.* and *Foll.* [P 487 C 1, 2]

(b) Limitation Act, Art. 173—Application for review of order is barred if not filed within 90 days of that order.

An application for review of an order is barred by limitation under Art. 173 if it is not filed within 90 days from the date of the order sought to be reviewed. The fact that the judgment-debtor had no knowledge of the order makes no difference. It is open to the judgment-debtor in such a case to apply under S. 5, Limitation Act, for an extension of the period of limitation if in fact he could prove that he had no knowledge [P 487 C 2, P 488 C 1]

(c) Limitation Act, S. 3—Scope.

An appellate Court is not bound to take notice suo motu of the fact that an application made at the trial Court, was barred by limitation : 29 *Cal.* 167 (*P. C.*) ; 12 *All.* 461 (*F. B.*), *Dist.* ; 15 *All.* 123, *Ref.* [P 489 C 1]

(d) Civil P. C., O. 21, R. 92—Court could not use its inherent powers of relief where application to set aside execution sale was time-barred.

Where the original application to set aside an execution sale was found to be timebarred the Court could not by the use of its inherent powers give the appellant a relief to which he was not entitled. [P 492 C 1]

N. Upadhiya—for Applicant.

K. Verma—for Opposite Party.

Boys, J. — This is a decree-holder's first appeal from an order in execution proceedings.

The decree-holder (who was also the auction-purchaser) had secured an order setting aside a sale on the ground that the judgment-debtor had no saleable interest in the property. The judgment-debtor secured a reversal of that order, and the decree-holder comes in appeal The history of the case is both intricate in its facts and further involves a number of questions of law. It is, therefore, essential to state the facts at some length in order to appreciate the situation which has arisen. There have been many other proceedings since the decree-holder obtained his decree, but after a protracted hearing there is no reason to suppose that any fact material to this appeal is not now before us as a result of the contentions of counsel amplified by a perusal by the Court of the proceedings on the record.

In 1915 the appellant, Baldeo Prasad Shukul, obtained a decree against Sukhdeo Prasad Shukul, the respondent, on the basis of a promissory-note.

On 19th May 1925, the decree-holder applied for execution of this decree by the sale of two mahals Nos. 2 and 4 which he stated to belong to the judgment-debtor.

On 20th June 1925, these two mahals Nos. 2 and 4 were sold at auction and purchased by the decree-holder himself.

At some date subsequent to his purchase the decree-holder is said to have discovered that the mahals Nos. 2 and 4 did not belong to the judgment-debtor but the numbers should have been stated as Nos. 3 and 5. We have no information how this mistake, if it was a mistake, arose.

The decree-holder thereupon filed an application for amendment of the sale-certificate. On 18th August 1925, this application for amendment was rejected and it is now in question before us whether the rejection was proper or otherwise.

On 16th September 1925, the decree-holder applied under O. 21, R. 91, alleging that the judgment-debtor had no

saleable interest in the mahals Nos 2 and 4 which had been sold and which he had purchased, and asking that the sale be set aside. 12th December 1925 was fixed for disposal of this application, and in the ordinary course on that date the merits of the application would have held to be determined under O. 21, R. 92 but on this date the decree-holder failed to appear when the case was called on and the application was dismissed for default. But later on the same day the decree-holder appeared in Court and made an application (paper 146/C) asking for restoration of the application. Various dates were fixed and finally the matter came up for disposal on 27th March 1926.

The ordinary procedure would have been for the execution Court to give notice to the judgment-debtor and hear the application for restoration, to decide whether it should be restored, and if it is decided in the affirmative then to decide whether the application to set aside the sale should be finally allowed or not. When, however, the case came up for hearing on 27th March 1926, the Court under a misapprehension that notice had been duly served and that this date was fixed for final determination of the question whether the sale should be set aside or not, forthwith set the sale aside. It is not clear how the mistake arose, but it is admitted and clear beyond doubt now that this particular order was passed under a misapprehension. The situation at this time, then was that the auction sale of 20th June 1925, stood set aside.

On 17th June 1926, the decree-holder made a fresh application for execution this time asking to be allowed to proceed by sale of the mahals Nos. 3 and 5 (paper 154/C).

Eventually 8th September 1926 was fixed for the disposal of what we may for the purposes of this case call this second application for execution. On this date the judgment-debtor appeared and filed an application (paper 167/C) asking the Court to set aside its order of 27th March 1926, by which the sale of mahals Nos. 2 and 4 had been set aside, and praying further that the application for execution (semble of 17th June 1926) be dismissed.

On 8th January 1927, the Court heard this applic tion of the judgment-debtor, set forth the circumstances under which a mistake had been made and set aside its order of 27th March 1926. The position now was that it remained for the Court to hear the application of 12th December 1925, asking for restoration of the application of the decree-holder under O. 21, R. 91, of 16th September 1925, which had been dismissed for default.

On 29th January 1927, the Court heard the application for restoration and restored the application of the decree-holder of 16th September 1925, asking for the sale to be set aside. For some reason not before us it did not forthwith hear and decide this application of 16th September 1925. There was no decision upon it till 13th April two and half months later.

Meanwhile on 5th March 1927, the Court heard some argument in the course of which on behalf of the judgment-debtor it was objected that the application of 16th September 1925, was barred by limitation, and the vakil for the judgment-debtor further stated on his behalf that :

"it is not true that the judgment-debtor has no interest in mahals Nos. 2 and 4."

In consequence no doubt of this raising of the question of limitation the decree-holder became alarmed and on 12th March 1927, he put in an application under S. 47 (2) ,Civil P. C., asking that the execution proceedings might be converted into a suit. Whether the hoped for result of saving limitation would have followed if this application had been granted it is not necessary now to determine, but it is no doubt in that hope that the application was made.

On 13th .April 1927, the Court proceeded to dispose of two of the decree-holder's pending applications by one order. As to the application of 16th September 1925, asking for the sale of mahals Nos. 2 and 4 to be set aside, it held that the application had not been made within one month and was therefore barred by limitation under Art. 166. As to the prayer of 12th March 1927, to be allowed to convert the proceedings into a suit it held that the application should be rejected as the period within which the decree-holder could have brought a regular suit had passed.

I am unable to find that the prayer which the judgment-debtor had made in his application of 8th September 1926,

asking for the second execution application of 17th June 1926, to be dismissed, was ever specifically dealt with by the Court, probably because if the original sale was likely to be eventually upheld by the Court, the second application for execution might possibly fall of itself.

Appealing from the order of 13th April 1927, the decree-holder now comes to this Court.

It is contended by Mr. Narbadeshwar Upadhiya, counsel fos the appellant, that the application of the judgment-debtor dated 8th September 1926, asking for cancellation of the order of 27th March 1926, by which the sale was set aside, was not open to him. That application purported to be filed under O. 9, R. 13, or in the alternative as an application asking for review under O. 47, R. 1, or, again, asking the Court to exercise its powers under S. 151. The appellant contends that O. 9, R. 13, has no application to execution proceedings, that any application for review was barred by limitation, and that the circumstances were not such that the Court could be asked to exercise the inherent powers reserved to it under S. 151.

In view of what has transpired after the arguments of both sides were concluded, I do not think it necessary to discuss these contentions in great detail. But the conclusions at which we had arrived we had reached after hearing lengthy arguments on both sides and giving our best consideration to the questions raised. Though therefore we appreciate that our conclusions may, in view of the final decision of the case, be regarded as obiter dicta, we think it desirable to leave those conclusions on record.

As to the applicability of O. 9, R. 13, to the judgment-debtor's application of 8th September 1926, I have no doubt that S. 141, Civil P. C., does not operate to make O. 9, R. 13, applicable to execution proceedings. The matter is concluded by the decision of their Lordships of the Privy Council in *Thakur Prasad* v. *Fakirulla* (1). It is true that in that case there was question of the applicability to execution proceedings of a different section of the Civil Procedure Code then in force relating to suits. It is true also that the decision of their Lordships as to the scope of S. 647 of Act 14 of 1882, now S. 141, may have been influenced in the particular case by the fact that both practice and the terms of the Limitation Act suggested that successive applications for execution were permissible, and that therefore S. 373 of the Act of 1882 could not be applied to execution proceedings, but the language of their Lordships was of general application, and on the principle of that case it must be accepted that none of the sections or rules of the present Code applicable to suits are made applicable to proceedings in execution by the terms of S. 141. It is manifest, however, that an application under consideration, if not possible under O. 9 R. 13, must at least be held to be an application entertainable, in the discretion of the Court, if only under the inherent powers of the Court, for it is clear that a litigant could not be left without all remedy if an execution Court passed an order under a complete misapprehension as to what was the matter for decision before it, and it is clear further that if an execution Court had no power to set aside an order passed by it ex parte merely because the sections and rules of the Civil Procedure Code were inapplicable to execution proceedings, it would also have no power, an impossible situation, to dismiss in default of appearance.

Before, however, considering inherent powers of the Court at all I turn to the next contention of the appellant that the judgment-debtor could not apply in review. Against this position the appellant made two attacks. Firstly, that the allegations made in the petition of the judgment-debtor did not come within the words "for any other sufficient reason" in O. 47, R. 1, it being contended that those words must be interpreted as meaning a reason ejusdem generis with the reasons immediately preceding. It is not necessary for us to consider this, for a perusal of the application shows clearly that the reasons given in that application are in fact ejusdem generis.

The second line of attack was that the application regarded as an application for review was barred by limitation, since it had not been filed within 90 days of the order passed on 27th March 1926, the period laid down by Art. 173. To this Mr. Kamalakant Varma, counsel for the respondent, made two replies :

(1) [1895] 17 All. 106=22 I.A. 44=6 Sar. 526 (P.C.).

First, he stated confidently that in all such cases limitation could only run from the day on which it might be proved that the judgment-debtor had knowledge of the facts. Despite, however, this confident assertion he was unable to give us any authority of any sort for departing from the plain language of Col. 3, Art. 173. The language is there and we are bound by it. But it may be permissible to note that the Article is not as unreasonable as at first sight it might seem. It would be open to a judgment-debtor in such a case to apply under S. 5, Limitation Act, for an extension of the period of limitation, if in fact he could prove that he had no knowledge.

Next it was urged by counsel for the respondent that this plea of limitation has not been taken in the memorandum of appeal, and that we ought not to allow it to be taken now seeing that it was not taken even in the trial Court.

To this counsel for the appellant has two replies. He has contended first that S. 3, Limitation Act, not only binds the trial Court itself to consider suo motu whether an application is barred by limitation, but that it is also incumbent on the appellate Court to consider suo motu whether the application was barred by limitation. Counsel asserted that this position was beyond dispute. He was not, however, able to quote any authority of this Court in which the question had been considered. Eventually he referred us to *Bechi* v. *Ehsanullah* (2), a Full Bench decision. But it is clear that the real question there was not concerned with the position now taken before us, and that S. 4, corresponding to the present S. 3, was only incidentally referred to. Counsel for the respondent was not prepared to contest the position asserted by counsel for the appellant. We, however, were unable to accept the view. It appeared to us manifest that all that the section lays down is that the trial Court must suo motu consider whether the suit has been filed within time, that an appellate Court must suo motu consider whether the appeal has been filed within time, and that a Court originally hearing an application must suo motu consider whether the application is filed within time. There is nothing whatever in the section to justify any other interpretation. Counsel for the appellant was forced to concede that if the view he desired us to take was correct, it would be possible for a litigant, knowing that the suit filed against him was barred by limitation, to fight it and lose it all the way up to the Privy Council and then to say to their Lordships of the Privy Council:

"I knew the suit was barred by limitation, but I preferred if I could, to suit the purposes of other litigation, to get a decision on the merits. I do not wish to risk a final decision on the merits against me and so now I draw the attention of the Court to the fact that the suit was barred by limitation. Although I have not even now taken it in my grounds of appeal, your Lordships must take cognizance of it suo motu and dismiss the suit."

I need only draw attention to the fact that the words in S. 3 "shall be dismissed" are wholly inapplicable to the actual present case of the appellant. If we were bound suo motu to take cognizance of the fact that the application was barred by limitation, though no objection was taken in the trial Court and though no objection finds place in the present memorandum of appeal, we would, such is the contention of the appellant, have to allow the "appeal." The section only provides for an appeal being "dismissed," and clearly refers only to an appeal being dismissed which was filed after the period of limitation had expired. However, I need not labour the point further for, though counsel for the appellant did not refer to the case, and counsel for the respondent did not meet the appellant's point by quoting the case, the matter has been set at rest by the decision of the Full Bench in *Ahmad Ali* v. *Waris Husain* (3). The case is quoted in the forefront of the notes on S. 3 in Rivaz on Limitation, and it is difficult to understand why it was not brought to our notice by either counsel.

Counsel for the appellant knew that he was going to urge the plea of limitation and it was his duty to be prepared with the law on the point and not to urge a view of the law in direct conflict with the decision of a Full Bench the existence of which a few minutes research would have brought to his knowledge. As to the other side, it is true that the point was not taken in the grounds of appeal but counsel for the respondent had known for two days that the point was now being taken and might possibly succeed.

(2) [1890] 12 All. 461=(1890) A.W.N. 149 (F.B.).

(3) [1893] 15 All. 123=(1893) A. W. N. 47.

In this connexion our attention was drawn at a late stage of the case by counsel for the appellant to the decision of their Lordships of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* (4). It was suggested, on the strength of the passage to be found at the bottom of p. 185, that their Lordships had held that an appellate Court was bound by the terms of the Lim. Act to take note of the fact that the application in the lower Court was barred by limitation. It is manifest that nothing of the sort was held. Their Lordships were giving certain reasons why the lower Court should not have entertained the application, and they merely held that among other reasons for rejecting was the reason that the matter was concluded by the Lim. Act.

It is clear, therefore, that an appellate Court is not bound to take notice suo motu of the fact that the application was barred by limitation.

The question of limitation, then, becomes nothing more nor less than a point of law like any other point of law which might be taken in appeal and which, if not taken in the memorandum of appeal, could only be argued with the permission of the Court Appellant's counsel then fell back on his last position and urged that leave should be granted to take the point. Here I think he would have been on much firmer ground. We must consider the circumstances when exercising our discretion. It is noticeable that the judgment-debtor in drafting his application of 8th September 1926, manifestly felt himself to be on very insecure ground. He found it necessary to call in aid every conceivable section which he might hope would be applicable: O. 9, R. 13; O. 47, R. 1, and such inherent powers as the Court may have and which are saved, not granted, by S. 151. Next it is clear that the judgment-debtor himself carefully refrained from saying anything throughout the whole of his lengthy application which might draw the attention of the Court or the decree-holder to the fact that his application was barred by limitation. It is true that he said that he had no knowledge of the proceedings which led up to the order of 27th March 1926, setting aside the sale, but he could not of course avoid saying thus much. He, however, carefully refrained from any suggestion that his application was barred by limitation, and that he desired an extension of the period under S. 5.

It is contended for the respondent that it was the duty of the decree-holder to challenge the validity of the judgment-debtor's application, and that if he had so challenged it, he, the judgment-debtor, would have made a definite application for extension of time; and it is urged that even now, if the appeal is to be allowed, we should treat his very prudently worded application as virtually an application asking for an extension of the period. The plea is wholly untenable. In the first place, as I have already noted, the judgment-debtor carefully evaded raising the question of limitation.

In the second place, it was manifestly the judgment-debtor's duty and the duty of his legal adviser, to bring all the facts to the attention of the Court. It was he who was asking primarily for the Court's assistance, and he was wholly unjustified in adopting a course based on the hope that the fact that the application was barred by limitation would pass unnoticed. It was their manifest and bounden duty to consider whether the application was barred by limitation and, if it was so barred, as it plainly was, to bring that fact to the attention of the Court by an application for extension of time.

Thirdly, I note that the application as drafted does not even contain any allegation that the judgment-debtor had any interest in the mahals Nos. 2 and 4, of which the decree-holder says he obtained a sale by mistake. It is true that when he was driven to do so by a question from the Court, the judgment-debtor's vakil on 5th March 1927, made the statement that it was not true that the judgment-debtor had no interest in mahals Nos. 2 and 4. Even then the judgment-debtor was not prepared to say :

> "I have in truth such and such a specified interest in mahals Nos. 2 and 4."

Fourthly, another curious fact has come to light, not through the assistance of counsel on either side but upon inquiry by the Court. Counsel on both sides had to admit that it is the usual practice for an officer of the Court to note

(4) [1902] 29 Cal. 167=29 I. A. 51=4 Bom. L.R. 161=8 Sar. 154 (P.C.).

whether an application is being made within the period of limitation, and this note is made for the information of the Court. On other applications we find such a note, but in the case of this application mysteriously enough there is no note of any sort, and I cannot but feel that there is some justification for the suspicion, reading this fact in the light of the other circumstances I have noted, that this particular application was somehow smuggled through to the stage of its being laid before the Court for disposal without any note being made as to the period of limitation, in order particularly to evade raising the question. I think, therefore, that there would have been ample ground for allowing the objection to be taken, for refusing to accept the application as in effect asking for an extension of time, and for refusing to hinder the course of justice any further than we are compelled, by now allowing the judgment-debtor to contest the question whether he had real grounds for asking for an extension of time if he had asked at the proper time.

The application of 8th September 1926, regarding as an application under O. 47, R. 1, was therefore in our view, barred by time and there were no sufficient grounds for permitting the judgment-debtor to invoke the inherent powers of the Court.

So far, then, as the decision of this appeal would have been based on the contentions of Mr. Narbadeshwar Upadhya, for the appellant, and Mr. Kamalakant Verma, for the respondent, we would have allowed this appeal and set aside the order of 13th April 1927, on the first ground taken by the appellant that the application of 8th September 1926 was barred by limitation, thereby restoring the order of 27th March 1926, by which the sale of mahals Nos. 2 and 4 was set aside. A reference to the chronological history of these proceedings at the commencement of this judgment will show that one of the reliefs asked by the judgment-debtors in his application of 8th September 1926, was that the application for execution (that is, the second application for execution dated 17th June 1926) be dismissed. This relief does not appear to have been dealt with in either of the three orders of the Court dated 8th January 1927, 29th January 1927, or 13th April 1927, all three of which orders were consequent on the application of the judgment-debtor of 8th September 1926. The result would be that second application for execution directed against the mahals Nos. 3 and 5 of date 17th June 1926, would remain undisposed of and could have been dealt with by the trial Court on its merits, and so justice, as we see it in this case, has been done.

While, however, judgment was being delivered it occurred to us that this appeal had been directed against the wrong order. The order of 27th March 1926, had been set aside by the order of 8th January 1927, and that later order has been allowed to become final. The order of 13th April 1927, against which this appeal has been filed, had in fact nothing to do with the order of 27th March 1926, or the application of 8th September 1926. It deals only with the two applications of 16th September 1925, and 12th March 1927, and rejects them both. When counsel for the appellant opened the case he made no reference whatever to the order of 8th January 1927, and counsel for the respondent, who could have founded an instant and complete answer to this appeal on the existence of that order, did not draw it to our attention. It was only mentioned to us incidentally during the second day's hearing of the case by counsel for the appellant.

There is no reason to suppose that when counsel filed the appeal he knew of that order, but he should have known of it for to counsel preparing the case with a view to the appeal it must have been manifest that there was a serious hiatus between the application of 8th September 1926, and the order of 13th April 1927, and when he did become aware of it he must have realized that there was at least something very wrong with his appeal.

Moreover he must have realized that he had obtained admission of his appeal on what was essentially a misstatement of fact. He had taken as his first ground that the matter was concluded by "res judicata," manifestly meaning that the order of 27th March 1926, had not been disturbed and bound the respondent. The instant he realized that the admission of the appeal had been induced by a misstatement, however bona fide, to the Court, it was his absolute duty to bring

the order of 8th January 1927, to the attention of the Court, not merely casually leaving the Court to find out for itself the significance of that order, but with an expression of regret for the misstatement and, if he considered proper, a request to be allowed to amend his memorandum. Neither counsel had read to us the order of 13th April 1927, and we were allowed to assume from the statement of counsel for the appellant and from the silence of counsel for the respondent that the order filed and appealed from dealt with the matter which counsel for the appellant was arguing. The unfortunate result of neither counsel, whose duty it was at least to be aware of the facts of the case, drawing our attention to this point is that nearly two days hearing of the case was entirely wasted so far as the addresses of counsel on either side are concerned. On being questioned on this point, that he had directed his appeal against the wrong order, counsel for the appellant had nothing to urge.

Judgment having been delivered thus far a further hearing of the case became necessary. Counsel for the appellant admitted that there was nothing further to be said and that his lengthy plea of limitation dlrected against the application of the judgment-debtor of 8th September 1926, was untenable unless the Court was prepared to exercise its inherent powers reserved to it by S. 151. He was, however, unable to suggest any reason for our exercising those powers. He urged that he had no right of appeal against the order of 8th January 1927, by which the order of 27th March 1926, had been set aside. But he admitted that the very arguments he has raised here could have been raised in revision. He could give no explanation as to why his client had rested with the order of 8th January 1927, standing against him. We therefore see no justification now for exercising our inherent powers.

We then heard counsel for the appellant on the second point which he desired to raise before us and with which the judgment of 13th April 1927, appealed against does deal, that the execution Court should not have refused his prayer to be allowed to convert the proceedings in execution of 16th September 1925, into a regular suit. He was, however, compelled to admit that the only reason for the filing of his application of 12th March 1927, to be allowed to convert the proceedings into a regular suit was that he had realized, upon the filing of the judgment-debtor's application of 8th September 1926, in which the objection was taken, that his application of 16th September 1925, under O. 21, R. 91 was hopelssely barred by limitation, and that he hoped by converting the proceedings into a regular suit that he might be able to meet the objection of limitation. We did not consider that that reason was, in the absence at any rate of any explation whatever of the delay in filing the application of 16th September 1925, a sufficient reason for allowing it to be converted into a suit, and on this point we did not call on the counsel for the appellant.

In this connexion one final point calls for notice illustrating the carelessness on all sides which has pervaded these proceedings from beginning to end, as a result of which a perfectly simple proceeding has become more and more tangled and a wholly disproportionate amount of private and public money been wasted. The point was noticed by my learned brother and not brought to our notice by either counsel. The single judgment of 13th April 1927, actually appealed against dealt with two matters arising out of separate applications made by the decree-holder. In that judgment the prayer of the decree-holder to be allowed to convert the execution proceeding into a suit was dealt with at length and dismissed ; the application to set the sale aside was dealt with in five lines and dismissed. The formal order drawn up never even mentions the former application. What effect, if any, this careless omission might have had it is unnecessary to consider for nobody drew it to our attention.

The amount of time occupied by the hearing and the length of this judgment are the unfortunate consequences of the way in which the case has been contested.

The result is that this appeal must be dismissed with the consequence that the decree-holder, partly owing to his own negligence and partly owing to the advice which he has received, is left without any remedy, unless he can obtain anything from his purchase at the auction of 20th June 1925.

Young, J.—I concur in dismissing this appeal, and particularly in the comments on the way in which it has been conducted.

The appellant is a decree-holder. Two mahals which did not belong to the judgment-debtor were sold in execution of the decree and bought by the decree-holder. The date of the sale was 20th June 1925, and the appellant applied for the sale to be set aside on 16th September 1925. Eventually this application was dismissed on 13th April 1927 as timebarred under Art. 166, Lim. Act, which requires such an application to be made within one month of the sale. The appellant appeals against this order.

By a succession of errors the lower Court did set aside the sale on 27th March 1926, but itself cancelled this order on 8th January 1927. This series of errors is deplorable but immaterial as the appellant has omitted to appeal against the order of 8th January 1927. He, however, now asks us to use our inherent power and set it aside. In view of the fact that the original application to set aside the sale was timebarred we cannot by the use of our inherent power give the appellant a relief to which he is not entitled.

The appellant's application to convert the proceedings into a regular suit is also barred by O. 21, R. 92 (3).

The order of the Court is that the appeal is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 492

SULAIMAN AND KENDALL, JJ.

Gomti Singh—Appellant.

v.

Anari Kuar and *others*—Respondents.

Second Appeal No. 1142 of 1926, Decided on 18th March 1929, against decree of Dist. Judge, Ghazipur, D/- 10th March 1926.

Deed—Construction—Hindu of Mitakshara School executing tamliknama making his two wives along with himself joint owners of his property—Tamliknama providing that neither he nor his wives could transfer share without consent of all—Shares not specified—Subsequently he executing another document purporting to cancel tamliknama—Tamliknama created tenancy-in-common and each was to get 1/3rd share—It could not be cancelled by subsequent document—Provision prohibiting transfer was absolute restraint on alienation within Transfer of Property Act, S. 10.

A Hindu governed by the Mitakshara School of Hindu family executed a tamliknama whereby his two wives along with him were to be joint owners in possession of his property. It was further provided that neither he nor his wives would have the right to transfer the property separately unless all combined to make such transfer. The document did not state specifically as to what share each was to get. Soon afterwards he executed a fresh document purporting to cancel the previous tamliknama.

Held: that the intention in executing the tamliknama was to create a tenancy in common with the wives and each of his wives were to get 1/3rd share, and he could not cancel the tamliknama by a subsequent deed.

Held further: that the provision prohibitting transfer was an absolute restraint within the meaning of S. 10 and so void; 23 *Cal.* 670 (*P.C.*), *Ref.*; 3 *A.L.J.* 621, *Rel. on*; 25 *Cal.* 869, *Dist.* [P 493 C 1, 2]

K. Verma—for Appellant.

P. L. Banerji—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit brought by Mt. Anari Kuar, wife of Basdeo Singh, against him and his transferees for the cancellation of a deed of gift dated 23rd April 1925. According to the findings of fact of the District Judge, which we must now accept as final, it appears that Basdeo Singh married two wives and the usual quarrels ensued between his wives. The matter came to a head in 1924 and Basdeo Singh executed a document called a tamliknama on the 25th August 1924 under which he made himself and his two wives Mt. Parbati Kuar and Mt. Anari joint owners of his property on the following terms:

(1) The deed was to come into force immediately.

(2) Basdeo Singh gave his property to his two wives who along with Basdeo Singh were to be the owners in possession of the property and would remain so.

(3) Basdeo Singh would get the names of his wives entered in the revenue papers along with his own name and if he failed to do so his wives would have a right to get their names entered.

(4) Neither Basdeo Singh nor his wives would have the right to transfer the property separately unless all combined. They would have the right to manage their affairs from the income of the property.

(5) From the date of the execution of the document Basdeo Singh and his two wives became the owners of the property jointly.

The document did not specifically state whether the three persons would have a definite share, viz., 1/3rd each in the property which was the subject-matter of the tamliknama, nor did it

specify who would be the heir after the death of one of them. The learned District Judge has recorded a finding that this tamliknama was the result of settlement between Basdeo Singh and his wives to put a stop to the quarrels and "to settle 2/3rds of his property on his wives" Soon afterwards, viz, on the 21st April 1925 Basdeo Singh executed a fresh document purporting to cancel the provious tamliknama of 1924. Having revoked the previous document, he proceeded to transfer his property on account of which the present suit has arisen. The contention on behalf of the appellant who has been impleaded as a pre-emptor of this property is to the effect that the tamliknama was void inasmuch as it purported to create a joint tenancy which is unknown to Hindu Law, and that in any case the restraint on alienation, being absolute, was void, and that Basdeo Singh had authority to transfer his own share of the property.

So far as the question of the creation of a joint tenancy is concerned there is no doubt the observation of their Lordships of the Privy Council in the case of *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1), that joint tenancy, except in the case of the members of a Mitakshara joint Hindu family, is unknown to Hindu Law. We may assume for the purpose of this appeal that Basdeo Singh had no power to create a joint tenancy in the sense known in English Law with the necessary consequence of the rights of survivorship on the death of one of the beneficiaries. But it does not follow that Basdeo Singh. who had an absolute power of disposal over his own property, could not make his wives joint owners of the property along with himself. We have quoted the terms of the tamliknama, and they do not necessarily amount to the creation of a joint tenancy with a right of survivorship. We accept the finding of the Court below that his intention was to create a tenancy-in-common with them, with the result that 2/3rds share in the property was transferred to his two wives, that is to say it was a gift of 1/3rd share to eaeh of his wives. The remaining 1/3rd remained vested in him. In these circumstances Basdeo Singh had no power to revoke the tamliknama so as to deprive his wives of the property which had passed to them.

The next question is whether the alienation by Basdeo Singh so far as his own 1/3rd share is concerned is without authority and void. The answer to this question will depend on whether the restraint on alienation was an absolute restraint within the meaning of S. 10, T. P. Act, or it was only a partial restraint which is not prohibited by that section. No doubt there was one extreme possibility in which when Basdeo Singh and his two wives all agreed there could be a valid transfer under the deed But in order to determine whether the restraint was absolute or partial one must gather the intention of the transferrer from the contents of the document. It seems to us that the idea underlying the execution of the tamliknama was to protect the property and retain it in the family and prevent it from passing out of the family. Although on the one hand the donor transferred 2/3rds share to his wives he reserved to himself the power to refuse consent for alienation. It seems to us that for all practical purposes Basdeo Singh reserved to himself the absolute power of preventing alienation of any kind. Unless he himself was prepared to waive this condition, he gave no power to his wives to transfer the property gifted to them under any circumstances. We therefore think that this amounted to an absolute restraint on alienation within the meaning of S. 10.

A similar case arose in *Khiali Ram* v. *Raghunath Prasad* (2) which was disposed of by a single Judge of this Court. There too one of the terms of the compromise embodied in a decree was that the party to whom the house was conveyed under it was not at liberty to transfer it without the consent of the other party to that compromise decree. Knox, J., held that such a condition was void as being a restraint upon alienation and the house could be transferred in spite of that condition. Our attention has been drawn to the case of *Kuldip Singh* v. *Khetrani Kuar* (3) where a condition in restraint of alienation without mutual consultation in an iqrarnama was held not to be void. It appears,

(1) [1896] 23 Cal. 670=23 I. A. 37=7 Sar. 13 (P.C.)

(2) [1906] 3 A. L. J. 621=(1906) A. W. N. 214.

(3) [1898] 25 Cal. 869=2 C. W. N. 463.

however, that the learned Judges regarded that iqrarmana as a mere agreement not amounting to transfer but a settlement of a dispute. In the present case Basdeo Singh was the sole proprietor and his wives could have laid no claim to any share in the estate. The present case is therefore distinguishable. We accordingly hold that the tamliknama was a valid document and under it 1/3rd share in the property was conferred on each of the wives which prevented Basdeo Singh from revoking it, but there was no valid restraint on Basdeo's power of alienating his own 1/3rd share.

The result therefore is that we allow this appeal in part and modify the decree of the lower appellate Court in this way, that we give the plaintiff a declaration that proprietary title to the extent of 1/3rd in the property in suit was conferred upon her under the tamliknama dated 25th August 1924 and that the attempted revocation of it by the document dated 21st April 1925, did not affect her right in any way and was void so far as her interest was concerned, and we grant her a decree for 1/3rd share in the one anna share in mauza Bilahri transferred by Basdeo Singh under the deed dated 23rd April 1925 which has been held by the lower appellate Court to be a sale and not a gift. Parties will pay and receive costs in proportion to success and failure.

S.N./R.K. *Decree modified.*

A. I. R. 1929 Allahabad 494

NIAMATULLAH, J.

Mohammad Sher Khan— Defendant — Appellant.

v.

Amjad Husain and *others*—Plaintiffs —Respondents.

Second Appeal No. 919 of 1927, Decided on 19th March 1929, against decree of Addl. Sub-Judge, Farrukhabad, D/- 14th March 1927.

Easement Act, Ss. 56 and 60—Riyayas in cities and towns, unlike in agricultural areas being presumed to have right of transfer, licensor suing to eject transferee has not only to prove his ownership ,but must prove custom, or terms of original grant, entitling him to recover possession of site.

In case of riayas occupying houses in cities and towns, it is to be presumed that they have a right of transfer, unlike those who inhabit agricultural areas, and so if a licensor sues to eject the transferee of a riyaya he has to prove not only his ownership but must also prove the existance of custom or terms of the grant under which the house in dispute was built which make the transfer thereof invalid, entitling him to recover possession of the site: 16 *I.* C. 353 and *A. I. R* 1924 *All.* 112, *Rel. on.* [P 496 C 2]

S. Majid Ali—for Appellant.

K. N. Katju—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-respondents for ejectment of the defendant-appellant from a house situate in mohalla Balapir in the city of Kanauj, within the municipal limits, on the allegation that it had been built over 25 years ago by one Murtaza Khan with the leave and license of the plaintiff-respondents who own all lands lying within the ambit of the aforesaid mohalla Murtaza Khan sold the house in question to the defendent-appellant by a deed, dated 30th September 1923. The plaintiff-respondents thereupon intimated to the defendant-appellant that the license had been revoked and that they (the plaintiffs) desired to take actual possession of the site in suit, which was eventually instituted against the appellant as the sole defendant and out of which the present appeal arises. The plaintiff-respondents claimed the relief of actual possession subject to the defendant's right to remove the materials of the house if they so desired.

In defence it was pleaded that the plaintiffs were not the owner of the site, that by custom obtaining in the city of Kanauj every occupier is the owner of his house with its site and that transfers have been

"all along made in respect thereof, the city of Kanauj not being an agricultural village in which zamindars have the right of interference."

I have mentioned, with some precision the defendant's plea, which refers to custom, as I find that the lower appellate Court has overlooked it and held:

"that the suit is not barred by time and adverse possession and as the appellants are owners of the site on which the house in dispute stands they are entitled to take back their land and of course the respondent is entitled to take materials of the house and he requires time for doing so and, therefore, I give him two months' time for removing the materials."

I do not think the finding that the plaintiffs are the owners of the site is

decisive of the case as the lower appellate Court has assumed. Unless it can be found that the transfer of his house by a riyaya in mohalla Bilapir in the city of Kanauj is invalid entitling the owner of the site to re-enter on the site belonging to him, the plaintiffs cannot recover possession of the house in dispute. The Court of first instance did not frame a specific issue upon this question, but evidence bearing on this question was adduced. The learned Munsif appears to have been inclined to uphold the defendant's plea but infortunately mixed it up with the question of limitation and adverse possession. He says:

"Further more the land in question having residential house is located in a mohalla forming part of the city of Kanauj and located within the four corners of the municipal area of the said city. The plaintiffs' own witness Babu Lalta Prasad states that he is a mortgagee of the mohalla on behalf of the plaintiffs yet admits that he has recently purchased a house along with its site. It is further admitted and proved that certain transfers of the houses with sites have taken place here. These being the facts I am clearly of opinion that Art. 142 and not Art. 144 applies to the present case."

On the findings arrived at by the lower appellate Court it must be conceded that the plaintiff-respondents are the owners of the land on which the house in dispute stands and that Murtaza Khan from whom the defendant-appellant derives his title was no more than a riyaya. As already stated the owner of the land is not necessarily entitled to actual possession of the land on the licensee or the riyaya making a transfer of his house with such right of occupation as he himself has in the site. On this aspect of the case being put to the learned advocate for the respondents, I was referred to S. 56, Easement Act, which runs thus :

"Unless a different intention is expressed or necessarily implied, license to attend a place of public entertainment may be transferred by the licensee; but save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents."

It is contended that a license is declared to be non-transferable in explicit terms and that in so far as a riyaya is no more than a licensee, having the landowner's permission to build and to occupy he cannot transfer the house so as to entitle the transferee to occupy the same. It should be observed that an important reservation is made by the words "save as aforesaid" which refer to the opening words of the section, viz.,

"unless a different intention is expressed or necessarily implied."

Such an intention may be gathered from the terms of the grant, be inferred from surrounding circumstances, or be found as an incident of local usage. It may be implied in the particular right permitted by the licensee. The section, taken apart from the saving clause, forbids not only transfers but also the enjoyment of the license by servants and relations of the licensee. It cannot be contended, with any show of reason, that a riyaya cannot allow the members of his family, his guests and servants to occupy the house. The extent to which a license can be allowed by the licensee to be enjoyed by persons other than himself may easily appear from surrounding circumstances: see, for example, Ill. (b) appended to S. 56, Easement Act. As regards the license to build and occupy a house it has never been laid down as a general rule that a riyaya cannot transfer it. After the riyaya or licensee has constructed work of a permanent character acting on the faith of the license, the land owner, cannot revoke it: see S. 60, Easements Act. If the riyaya, in a given case has no right to transfer his residential house, it may well be maintained on behalf of the owner of the site, that the transferee acquires no right to possession of his land against his wishes and may be ejected. Having regard to conditions prevailing in agricultural areas it is to be presumed till the contrary is proved that the right of transfer is not an incident implied in the license under which riyayas occupy the sites of their houses. In urban areas, however, the presumption is otherwise. It has been held in at least two cases decided by Benches of this Court that occupiers of houses in cities and towns should be presumed to possess a right to transfer them unless contrary is shown: see *Jamna Kuer* v. *Abdul Nabi* (1) and *Govind Prasad* v. *Kundan A. I. R.* 1924 *All.* 112. They do not refer to S. 56, Easement Act, but the underlying principle is reconcilable with that section only on the hypothesis that a right of transfer is implied in the circumstances attending the grant of the license for building purposes in a city or

(1) [1912] 16 I. C. 353.

town where houses for substantial value may be erected by riyayas or licensees.

The plaintiff-respondents have not pleaded that there was any restriction in the grant to Murtaza Khan as regards his right to transfer the house, or that there was any local usage prohibiting transfers by his riyayas of their houses in mohalla Balapir. They relied merely on "law and justice" which according to them, make the transfer "quite null and void." This being so, they cannot succeed in their action for ejectment against the defendant on mere proof of their titles as owner of the site.

The defendant-appellant has challenged the finding of the lower appellate Court on the question of plaintiffs' ownership of the site. It has been arrived at on a consideration of oral and documentary evidence bearing on the question and is purely one of fact. It cannot, therefore, be allowed to be impugned on second appeal and must be upheld. The plaintiffs' right to the site of the house in dispute is, therefore, established. The defendant's plea of adverse possession has no force. He never asserted a right of ownership in the site before the present litigation and in the face of the plaintiffs' evidence, believed by the lower appellate Court, that Murtaza Khan entered on the land as a riyaya no question of limitation can arise.

On the record as it stands, the suit of the plaintiff-respondents for ejectment of the defendant-appellant cannot succeed in the absence of allegation and proof that occupiers of houses generally in mohalla Balapir, city Kanauj, cannot transfer their houses and with them the right of occupation of the site under any local custom or that under the terms of the particular grant or license under which Murtaza Khan built the house in dispute he had no right to transfer his house. I have taken time to consider the question whether an issue should be remitted to the lower appellate Court for a finding on the question whether such custom or restriction exists. In view of the plaintiffs' case as put in the plaint which relies solely on their right as owners in support of their claim to recover possession of the site I think no issue arises. It is true the defendant did refer to such a custom in his written statement and adduced some evidence in support thereof. It was only incidentally that the defendant-appellant made a mention of such a custom. It was necessary for him to do so. I must accept the rule of law laid down by this Court in the cases to which reference has already been made, that in case of riyayas occupying houses in cities and towns, it is to be presumed that they have a right of transfer unlike those who inhabit agricultural areas. In that view the plaintiffs should have alleged and proved not only their ownership but also the existence of custom or terms of the grant under which the house in dispute was built which make the transfer thereof invalid, entitling them to recover possession of the site. The case has already been fought out in three Courts and I do not think the plaintiffs are entitled to raise that essential question now and to have the case remanded for determination of it. Under these circumstances, the plaintiffs' suit for actual possession must fail.

Murtaza Khan sold the house to the defendant as if he were the owner of the site. The latter has throughout disputed the title of the plaintiffs. It is not, therefore, just and proper to withhold all relief from the plaintiffs. As was done in one of the two cases quoted by me above the plaintiffs ought to be awarded a declaratory relief as regards their ownership of the site, though their claim for ejectment of the defendant from the house in dispute may be dismissed. It is, therefore, declared that the plaintiff-respondents are the owners of the site of the house in dispute and that the defendant-appellant like Murtaza Khan is only a riyaya entitled to occupy the house as such. The plaintiffs' claim to eject the defendant is dismissed. The decrees passed by the Courts below shall be discharged and a decree in terms of this judgment shall be substituted therefor.

Under the circumstances of the case parties shall bear their own costs throughout.

S.N./R.K. *Decree discharged*

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A. I. R. 1929 Allahabad 497

PULLAN, J.

Partap Singh—Appellant.

v.

Hemraj and *others*—Respondents.

Second Appeal No. 1660 of 1927, Decided on 20th March 1929, against the decree of the First Sub-Judge, Saharanpur, D/- 16th August 1927.

Limitation Act, S. 26—Right of easement established—Failure to exercise it for two years prior to suit does not extinguish it—Easements Act, S. 15, Expl. 2.

Where an easement to carry water in a channel across the defendant's land for purposes of irrigation was established. The mere failure to exercise the right for a period of two years prior to suit does not extinguish the right of easement, nor does the mere fact that for one year the plaintiffs irrigated one of their fields from another well affect their right of easement : 26 *C. W. N.* 121, *Ref.* [P 497 C 2]

Hem Chandra Mukerji—for Appellant.

Akhtar Husain Khan and *K. D. Malaviya*—for Respondents.

Judgment.—This is a second appeal in which the plaintiffs challenge the decision of the Subordinate Judge of Saharanpur reversing the finding of the Munsif of Saharanpur on a question of easement. The plaintiffs claim that they have for many years irrigated certain numbers from a well situate in the abadi plot No. 402. The channel leading from the well to the fields passes through plot No. 138 which belongs to the defendants, and the water is distributed from there to the fields of the plaintiffs. The view taken by the first Court was that the plaintiffs had proved their case. It is pointed out that the defendant Hemraj himself admitted that there was an old irrigation channel passing through his field and although he said that the plaintiffs made it six or seven years ago and had only used it once, this statement is an admission that the well was used for the irrigation of their fields and that the channel passed through his land. The first Court has also pointed out that the khasra of the year 1867 shows that most of the plaintiffs' plots were irrigated from this well, and the same fact is borne out by the khasras of 1323 and 1324-F. The Munsif appointed a commissioner who made a report and his report was to this effect that if the plaintiffs' fields have been watered at all by this well, the water must have been carried by means of this nali across the street and the defendants' plot. There is, therefore, ample evidence to show that the plaintiffs have irrigated their land from this well for a long period of years and that the only channel passes through the plaintiff's plot, and has been obstructed by the building recently erected by the defendant. The lower appellate Court did not doubt the evidence as to the previous irrigation of the fields from this well, but held that it was necessary for the plaintiffs to prove that the right was exercised within two years from the institution of the suit, and appears to have thought that in recent years another well has been used for irrigation of these fields. The view taken by the lower Court that the suit should have been brought within two years of the cessation of the exercise of right is not correct. The lower Court appears to have overlooked S. 26, Lim. Act and Expln. 2, S. 15, Easements Act. Both these sections lay down that nothing is an interruption in a right of easement unless there has been an actual cessation of the enjoyment by reason of an obstruction by the act of some other person. The mere failure to exercise the right for a period of two years does not extinguish a right of easement. This view has been expressed in the case of *Gopal Chandra Sen* v. *Bankim Behari* (1). Apart from this error in law I am not prepared to agree with the lower appellate Court that the khasras of the years 1327 and 1331 F. clearly show that in those years plaintiff's plots were irrigated not from this well, but from another well.

The khasra of 1327-F shows that three of these numbers were irrigated by a well which was described as a well in No. 138. There is no well in No. 138 and this must refer to the channel passing through No. 138 from the plaintiff's well in No. 402. Some other numbers are mentioned as being irrigated by a well of which no number is given, and it cannot be said that this is not the well in question. In the year 1331 F. only one number is mentioned as being irrigated

(1) [1920] 23 C. L. J. 421=51 I. C. 372=26 C. W. N. 121.

by a well. This certainly is not the well in suit, but the well in No. 249. But the mere fact that for one year the plaintiffs irrigated one number from another well does not affect their right of easement. Lastly I am not prepared to accept the finding of the lower Court on the value of a local inspection. The local inspection appears to have been made in accordance with the wishes of the parties, and I have no doubt that the commissioner was well able to say that this was the only route by which water could be carried from the well to the plaintiff's fields. In my opinion the plaintiff's established their case and were entitled to the decree given them by the learned Munsif.

I allow this appeal with costs, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance.

K.N /R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 498

SULAIMAN AND KENDALL, JJ.

Babu Paras Ram Singh—Plaintiff—Appellant.

v.

Raj Kumar Singh and *others*—Defendants—Respondents.

Second Appeal No. 1700 of 1926, Decided on 19th February 1929, against the decree of the District Judge, Ghazipur, D/- 25th June 1926.

(a) Agra Tenancy Act (2 of 1901), S. 10—Mere occupying land for many years professedly as ex-proprietary tenant does not confer upon a person ex-proprietary tenancy.

The fact that a person has occupied land professedly as an ex-proprietary tenant for so many years does not necessarily confer upon him the ex-proprietary tenancy, inasmuch as such tenancy is the creation of the statute and cannot be acquired otherwise.

[P 498 C 2]

(b) Agra Tenancy Act (2 of 1901), S. 10—No ex-proprietary right accrues on the passing of a foreclosure decree.

In order to create an ex-proprietary tenancy there must either be a sale in execution of a decree or order or there must be a voluntary alienation. Mere order by a civil or revenue Court is not sufficient, it being impossible to hold that the word 'by' is understood before the word "order." Hence it follows that no ex-proprietary right accrues on the passing of a foreclosure decree. 10 *M. I. A.* 340 (*P.C.*). *Ref.*

[P 499 C 1, 2]

K. Verma—for Appellant.

Kedar Nath for *N. P. Asthana*—for Respondents.

Judgment.—These four connected appeals arise out of four separate suits for pre-emption. On 18th March 1925, Mt. Rajkali Kunwar sold 2 pies share in 10 villages to three vendees Raj Kumar, Paras Ram and Ram Raj Singh for Rs. 500 without any specification of shares. The suits were decreed by the first Court on the ground that Ram Raj was a stranger, and the plaintiffs had therefore a right to pre-empt the property against all the vendees. The learned District Judge has allowed the appeals and dismissed the suits. His judgment is based on the findings that Raj Kumar is a recorded cosharer, that Paras Ram although not recorded is the brother of Kagji who is a recorded cosharer and with whom he forms a joint Hindu family, and that Ram Raj is an ex-proprietary tenant in this mahal though not in the villages in which the shares are situated.

It is not disputed before us that Raj Kumar is a recorded cosharer. We must also accept the finding of the Court below that Paras Ram being joint with his brother Kagji is also a proprietor though not recorded as such. The finding that Ram Raj is an ex-proprietary tenant is challenged before us.

No doubt Ram Raj is recorded in the revenue papers as ex-proprietary tenant in three out of 10 villages, all of which lie in one mahal. But a mere entry of the name is by no means conclusive. Nor does the fact that Ram Raj has occupied this land professedly as an ex-proprietary tenant for so many years necessarily confer upon him the ex-proprietary tenancy, inasmuch as such tenancy is the creation of the statute and cannot be acquired otherwise.

It appears that in 1906 a foreclosure decree was passed against Ram Raj and thereafter his proprietary interest passed out of his hands. The question whether Ram Raj became an ex-proprietary tenant on the passing of this foreclosure decree raises a point which we have to decide.

No doubt the opinion has prevailed in the Board of Revenue that ex-proprietary rights can be acquired on the foreclosure of a mortgage by conditional sale. This view was expressed as early as 1903 and has been followed in some cases

since then, although it also appears that at least on one occasion in 1910 the two learned members differed on the point. Although the opinion of the Hon'ble Members of the Board is entitled to great weight we are not bound to follow their view. Nor can we accept that view on any principle of stare decisis. The learned counsel for the parties have not been able to cite before us any case of this Court in which this point has been decided one way or the other. We accordingly propose to examine the language of S.10 Agra Tenancy Act, under which an ex-proprietary tenancy can be created. It provides that every proprietor whose proprietary rights in a mahal or in any portion thereof, whether in any share therein or in any specific area thereof, are transferred on or after the commencement of this Act, either by sale in execution of a decree or order of a civil or revenue Court or by voluntary alienation otherwise than by gift or by exchange between the cosharers in the mahal shall become a tenant with the right of occupancy in his *sir* land etc. No doubt the word 'transfer' is used, but it is qualified by the expression 'by sale in execution of a decree or order or by voluntary alienation.' Unless therefore the foreclosure can amount to a sale in execution of a decree or order or to a voluntary alienation, the section is inapplicable. We may point out that according to the language employed in the section it is impossible to hold that the word 'by' is understood before the word 'order'. We cannot therefore hold that any transfer by order of a civil or revenue Court would be sufficient. In our opinion the words 'decree' and 'order' are connected with each other by the conjunction 'or' and are part of one expression 'sale in execution of a decree or order etc.' It follows therefore that there must either be a sale in execution of a decree or order, or there must be a voluntary alienation.

Before the Transfer of Property Act was passed there was good ground for holding that the proceedings in Court following upon a mortgage by conditional sale were a mere ministerial act and not a judicial act; *Alexander John Forbes* v. *Amir-un-nissa Begam* (1). But after the passing of the Transfer of Property Act foreclosure proceedings which were governed by the Transfer of Property Act are now governed by the Code of Civil Procedure. Sale is defined in S. 54 as a transfer for a price paid or promised or part paid and part promised. Under S. 87, T. P. Act, which was in force in 1906 when the foreclosure decree was passed, on failure to deposit the mortgage money, the plaintiff mortgagee had to apply to the Court for an order that the defendant and all persons claiming through and under him be debarred absolutely of all rights to redeem the mortgaged property, and the Court had to pass such an order On the passing of such an order the debt secured by the mortgage stood discharged. Thereafter the right to redeem the property was obviously extinguished. In view of these provisions it is impossible for us to hold that the foreclourse was in the nature of a sale in execution of a decree. Nor can we hold that the foreclosure amounted to a voluntary alienation by the mortgagor on the date when the foreclosure decree was passed. The proceedings in Court were not a mere ministerial act, but were the result of a preliminary decree passed by the Court. We are accordingly compelled to hold on the language of S. 10 as it stood that no ex-proprietary right accrued on the passing of such a foreclosure decree. It is admitted that no such rights accrued on the date when the mortgage by conditional sale was executed which had happened before 1903. We are glad to note that the legislature has intervened to cure this defect, and S. 14, New Agra Tenancy Act makes it clear that ex-proprietary rights do accrue even on the passing of a foreclosure decree.

In this view of the matter we must hold that Ram Raj Singh is not an ex-proprietary tenant. It is therefore unnecessary to consider whether his being an ex-proprietary tenant of only three out of ten villages would entitle him to resist the claim as regards the other villages also, on the ground that they all are in one mahal. The learned advocate for the respondents has lastly contended that the continuous possession of Ram Raj Singh, coupled with the non-payment of rent by him for over twelve years, has by adverse possession made him the proprietor of the land. No such specific plea was taken in the written statement and there was no specific issue

(1) [1863-66] 10 M. I. A. 340=1 Suther. 621 =2 Sar. 153 (P.C.).

on this point in the first Court. The judgment of the first Court also does not indicate that any such plea was urged before it. No doubt the point was taken for the first time in the grounds of appeal before the lower appellate Court, but that ground does not appear to have been pressed, and there is no reference to this plea in the judgment of the lower appellate Court. The plea was inconsistent with the other plea that Ram Raj was an ex-proprietary tenant, which was pressed and has been discussed at considerable length. As the plea raises a mixed question of law and fact we cannot allow it to be raised at this stage. It must therefore be held that Ram Raj is neither an ex-proprietary tenant nor a cosharer in the mahal, and is accordingly a stranger. The other vendees having associated themselves with Ram Raj have lost their right to resist the plaintiff's claim for pre-emption. The appeals are accordingly allowed and the decrees of the lower appellate Court set aside and those of the first Court restored with costs in all Courts including in this Court fees on the higher scale.

S.N./R.K. *Decree set aside.*

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* A. I. R. 1929 Allahabad 500

BOYS AND BENNET, JJ.

Sakina Bibi and *another*—Plaintiffs—Appellants.

v.

Sairi Bibi and *others*—Defendants—Respondents.

Second Appeal No. 1791 of 1927, Decided on 5th April 1929, against decree of Sub-Judge, Benares, D/- 23rd August 1927.

*** Civil P. C., S. 11—One member of one of two branches of deceased Mahomedan suing other members of his branch and *S* a member of other branch for partition—Suit property decided to belong to common ancestor—*S* then acquiring interest in suit property of *P* a member of his branch—*S* with *X* and *Y*, two more members of his branch bringing subsequent suit for partition of their share—Although *X* and *Y* were not parties to former suit and although *S* was now suing also as assignee of *P*, decision in former suit would be res judicata in subsequent suit.**

The former suit was brought for partition by one of several members of one of the two branches of a deceased Mahomedan against the other members of that branch and against *S* a member of the other branch. In that suit certain property was decided to belong to the common ancestor and the share of the plaintiff was ascertained. The subsequent suit was brought by *S* together with *X* and *Y*, two other members in his branch, for partition of their share. Before bringing this suit *S* had also acquired the shares in the suit property of *P* another member of his branch.

Held: that the decision in the previous suit was binding on the parties to that suit; and although *X* and *Y* were not parties to the previous suit, they were not interested in denying that the property belonged to the common ancestor. Hence their presence in the later suit made no difference. Further even so far as the right of *S* as assignee of *P* the principle of res judicata would apply for although now *S* sued in the capacity of *P*'s assignee, the rights of both *S* and *P* were based on inheritance from the common ancestor. The decision in the former suit, that the suit property belonged to the common ancestor, would, therefore, operate as res judicata in the subsequent suit. [P 501 C 1, 2]

K. N. Katju and *A. M. Khwaja*—for Appellants.

Mukhtar Ahmad—for Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit for partition. We have had considerable difficulty in extracting the facts of the case. Once, however, those facts have been ascertained, the disposal of the matter before us gives rise to no difficulty. The pedigree of the family concerned is set out at p. 10 of the printed book. One Shah Muhammad had three sons, Khuda Baksh, Taj Muhammad and Karim Bakhsh. All of these three sons have a number of descendants, but we are informed that the branch of the family of Karim Bakhsh made no claim to the property in dispute. With the reason for this we are not concerned. We have only to consider the rights of the descendants of Khuda Bakhsh and Taj Muhammad inter se. The present suit for partition was brought by Sakina Bibi, a granddaughter of Taj Muhammad, against original 18 defendants. Of these, numbers 1 to 6 and 9 to 17 are of the branch of Khuda Bakhsh. Defendants 7 and 8 were sons of Taj Muhammad. Defendant 18 Abdul Qadir not to be confused with the two Abdul Qadirs in the branch of Khuda Bakhsh, was a grandson of Taj Muhammad. Defendant 8 Nur Muhammad, was subsequently made a co-plaintiff with Sakina Bibi.

In the year 1922 Mt. Saera Bibi and her son Muhammad Ismail, defendants 3 and 4 in the present suit brought a suit

against the other heirs of Khuda Bakhsh and Sakina Ribi, granddaughter of Taj Muhammad, but not making the other heirs of Taj Muhammad parties viz., Wali Muhammad (defendant 7) Nur Muhammad (defendant 8 and plaintiff 2 in the present suit), and Abdul Qadir (defendant 18 in the present suit), asking for partition of the four houses, subject matter of the present suit. The case for Mt Saera Bibi and Muhammad Ismail in that suit was that the four houses had never belonged to Shah Muhammad, the common ancestor, but had been originally acquired by Khuda Bakhsh. It was, however, found in fact, and the decision was upheld by both the appellate Courts, that the four houses had belonged to Shah Muhammad, and on the basis of that finding a decree was passed in favour of Saera Bibi and Muhammad Ismail for 3-annas 9-45/80 pies share. There has been no final decree in that suit up to the present date. We may note further that there was no specification of the shares of any other parties to the suit than Mt. Saera Bibi and Muhammad Ismail.

Subsequent to the date of the preliminary decree in that suit, Mt. Sakina Bibi present plaintiff 1 alleges that she has acquired certain further rights in these houses by gift and purchase of the shares of other persons alleged to be entitled, e. g., Mt. Sakina Bibi claims to have purchased a share of Abdul Qadir, defendant 18 in the present suit. The present suit has been brought by Sakina Bibi, Nur Muhammad, the original defendant 8 being subsequently joined with her as a plaintiff, against the heirs of Khuda Bakhsh, and including also in the array of defendants, defendant 7, Wali Muhammad, and defendant 18 Abdul Qadir (heirs of Taj Muhammad), who like Nur Muhammad were not parties to the earlier suit.

The lower appellate Court has held that the decision in the first suit as to whether the houses belonged to Shah Muhammad or were originally acquired by Khuda Bakhsh does not constitute res judicata, and that it was open to the Court to determine this question of fact in the present suit, and it held that the plaintiffs had failed to establish that the houses had belonged Shah Muhammad. The only question which we have to decide in this appeal is whether the view of the lower appellate Court that this question was not res judicata is correct or not.

We can see no reason why the finding that the houses were the property of Shah Muhammad and the finding that the share of Mt. Saera Bibi and Muhammad Ismail was 3-annas 9-45/80 pies should not be held to be res judicata as between all the persons who were parties to that suit. This would mean that subject to any other points that may further have to be determined in the suit, Sakina Bibi and Nur Muhammad are entitled to get their shares partitioned on the basis that Mt. Saera Bibi and Muhammad Ismail are entitled to 3-annas 9-45/80 pies, and that the remainder is divisible between the other heirs of Khuda Bakhsh and Taj Muhammad.

There is further a matter which needs to be noted in this connexion. Defendant 7, Wali Muhammad, and defendant 18 Abdul Qadir, and defendant 8, Nur Muhammad who subsequently became a co-plaintiff, were not parties to the first suit. But it is clear that it was not to their interests to contend and they did not contend other than that Shah Muhammad was the original owner of the houses. As regards Wali Muhammad and Abdul Qadir, therefore, there was no burden on Mt. Sakina Bibi or Nur Muhammad to establish that the houses were the property of Shah Muhammad. As between them and the plaintiffs that proposition was admitted.

There ramains to consider the question of Mt. Sakina Bibi's acquisition of certain shares by gift or purchase, e. g., her alleged purchase from Abdul Qadir, defendant 18. It has not been contended before us that any of these gifts or purchases stand on any different footing from each other. It has been contended on behalf of the defendant-respondents, particularly on behalf of Mt. Saera Bibi and Muhammad Ismail, that there can be no question of res judicata as between them and Abdul Qadir was not a party to the previous suit, and that though the matter may be res judicata as between these two defendants and Mt. Sakina Bibi in her capacity as heir of Shah Muhammad, it is not res judicata between them and Mt. Sakina Bibi in her capacity as assignee of Abdul Qadir's share. We do not think that there is any force in this contention. The matter was fought out as between Mt. Sakina Bibi

and on the other side Saera Bibi and Muhammad Ismail, and moreover Mt. Sakina Bibi though in this particular respect an assignee of Abdul Qadir's share, both Sakina Bibi's and Abdul Qadir's rights are based on inheritance from Shah Muhammad. We think, therefore, that the principle of S. 11 undoubtedly applies in this respect also.

Accordingly reversing the decision of the lower appellate Court on the question of res judicata on the issue as to whether the property belonged to Shah Muhammad or was originally acquired by Khuda Bakhsh, we remand the case to the lower appellate Court for decision on the other points arising. Costs of this appeal and hitherto in the Courts below will abide the result.

S.N./R.K. *Case remanded.*

A. I. R. 1929 Allahabad 502

BOYS AND BENNET, JJ.

Sobha Ram Gopal Rai—Decree-holder—Appellant.

v.

Tara Chand—Judgment-debtor—Respondent.

Execution First Appeal No. 190 of 1928. Decided on 18th April 1929, against decree of Sub-Judge, Meerut, D/- 21st April 1928.

Civil P. C., O. 21, R. 18—*A* in execution of his decree against *B* securing attachment of *B*'s decree against himself—*B* then applying for execution of his decree against *A*—O. 21, R. 18 applied and Court could set off smaller amount due from *A* against larger amount due to *A*.

A in execution of his decree against *B* secured attachment of the decree obtained by *B* against *A*. *B* then applied for execution of his decree against *A*.

Held: that as, there were applications for execution of both the decrees, O. 21, R. 18, applied and Court could set off smaller amount due from *B* against the larger amount due to him from *A*, although *A* had already secured attachment of *B*'s decree against himself. [P 502 C 2]

Ambika Prasad for *N. P. Asthana*—for Appellant.

Panna Lal—for Respondent.

Judgment.—This is an appeal by the firm Sobha Ram-Gopal Rai against an order in execution objecting to the application of Tara Chand, respondent decree-holder of decree No. 343 of 1926 for setting off decree No. 579 of 1925, in which he was a judgment-debtor, against his larger decree No. 343. There were three decrees as follows :

(1) 556 of 1924, *Firm Sobha Ram-Gopal Rai* v. *Firm Ram Narain Johari Mal*, (2) 579 of 1925, *Johri Mal*, son of *Ram Narain* and *Banarsi Das*, son of *Johri Mal* v. *Firm Pat Ram Das, Ram Saran Das* and *Lallu Mal*, (3) 343 of 1926, *Pat Ram Das, Ram Saran Das* v. *Johri Mal*, son of *Ram Narain* and *Banarsi Das*, son of *Johri Mal*.

The objection of the appellant is that he had already attached decree No. 579 on his own decree, and therefore it cannot be set off now by the respondent. The question is whether O. 21, R. 18, applies in the present execution case or not. No question of res judicata was argued before us, and the appeal has been argued solely on whether O. 21, R. 18 applies or not. The present application of Tara Chand is dated 6th February 1928, and it is admitted by the appellant that previous to that application the appellant had not only secured attachment of decree No. 579 of 1925, but he had taken out execution of decree No. 579 of 1925, and moveable goods of Tara Chand, the judgment-debtor, had been advertised for sale. Therefore there were applications before the execution Court for execution of both the cross-decrees Nos. 579 and 343 and the primary condition of O. 21, R. 18, which requires that applications for execution shall be made to the Court for each of the cross-decrees is satisfied. Accordingly it appears to us that O. 21, R. 18 (1) (b) applies and that the lower Court was correct in setting off the smaller amount due from Tara Chand under decree No. 579 against a larger amount due to Tara Chand under decree No. 343. We accordingly dismiss this appeal with costs.

S.N./R.K *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 503

MUKERJI AND NIAMATULLAH, JJ.

Angan Lal and *others* — Defendants — Appellants.

v.

Saran Behari Lal and *others*—Plaintiffs—Respondents.

First Appeal No. 202 of 1927, Decided on 28th February 1929, against decree of Sub-Judge, Muttra, D/- 17th Jan. 1927.

*** (a) Contract Act, S. 62 — Scope — Registration Act, S. 50.**

A mere executory contract which has to be specifically enforced to procure the contract and which is to be substituted for the old contract, would not supersede a registered mortgage-deed by which an interest in the property has passed. [P 503 C 2]

(b) Hindu Law — Alienation — Father — Necessity for Rs. 9,800 proved—Necessity for balance of Rs. 200 should he assumed.

Where it is proved that there was justification for raising a loan of Rs. 9,800, it may well be assumed that the father had full justification for raising tho balance of Rs. 200 also: 40 *Cal.* 342, *Rel. on.* [P 504 C 1]

S. C. Das—for Appellants.

K. N. Katju, N. P. Asthana and *K. C. Bhatia*—for Respondents.

Judgment.—One Jagan Prasad, for himself and as the natural guardian of his three sons, two of whom are among the appellants, executed a mortgage bond for Rs. 10,000 in favour of the ancestors of the respondents to this appeal on 17th July 1915. The suit out of which this appeal has arisen was brought to enforce that mortgage One of the sons of Jagan Prasad is dead and is represented in this litigation by his wife, Mt. Manbhari, one of the three appellants.

Several pleas were taken in defence, but only three of these are pressed before us, and, therefore, need be noticed. The first plea was that the parties agreed that a certain mortgage transaction should be entered into by the parties in satisfaction of not only the bond in suit but also of another mortgage bond, and that being the case, the present suit was not maintainable. The second plea was that there was effected, between the father and the sons a partition in 1911, and, therefore, the present suit for the sale of properties, which fell into the shares of the sons was not maintainable. The third plea was that there was no legal necessity for the loan.

On the first point the learned Subordinate Judge found that there was, no doubt, an agreement that a fresh transaction of mortgage and a lease should be entered into, but he held that no documents creating the lease or the mortgage having been executed and completed, it was open to the plaintiffs to maintain the suit. The learned counsel for the appellants has contended that under S. 62, Contract Act, it is enough if there was an "agreement" to substitute a contract, although no contract was completed in the shape of execution and registration of a mortgage and a lease. We are unable to accept this contention of the learned counsel. In the deed in suit we have a contract and a transfer of property. If this transaction is going to be superseded by a contract, that transaction also must be a complete transaction. It should be a contract which is enforceable in law. The substitution, as we have said, must be by a contract and a mere agreement to execute, in future a usufructuary mortgage-deed and a lease cannot be said to be a contract. To put the same thing in different language, the defendants' case is that the bond in suit was to be replaced by a usufructuary mortgage for a sum of Rs. 37,000 which was to be raised under circumstances to Rs. 44, 000. It was further the case of the defendants that there was to be a lease of the mortgaged property iu favour of the defendants. These are transactions which can only reach a stage of completed contract on being executed on stamped documents and on being registered. As we read S. 62 there should be an actual substitution of the old contract by a new contract. A mere agreement that there would be in future a substitution would not be sufficient to wipe out the mortgage in suit. "Agree to substitute" is (equivalent) to "agree in substituting". Till the second contract, contemplated, is brought into existence, the old contract will still exist and continue to be enforceable.

Let us take, for example, the illustration which one of us put to the learned counsel for the appellants in the course of the arguments. Suppose that for three years after the completion of the "agreement" relied on by the defendants, nobody took any action. The plaintiffs did not bring any suit for sale and the defendants did not bring any suit for specific performance of the contract. Could is

then be argued that, when a suit is instituted, after the end of three years, the plaintiffs' mortgage has become extinguished? We think that such an argument would be utterly untenable. We are of opinion that the learned Subordinate Judge was right in holding that a mere executory contract which has to be specifically enforced to procure the contract and which is to be substituted for the old contract, would not supersede a registered mortgage-deed by which an interest in the property has passed.

As regards the question of partition, we are satisfied, for reasons given by the learned Subordinate Judge in his judgment, that the transaction of partition was merely illusory. It was entered into to defeat creditors. Two attempts at defeat of creditors failed. On a third occasion it was expressly pleaded by the defendants themselves, at least by one of them, that the family was joint in spite of the alleged partition. This plea, therefore, fails.

As to the legal necessity it has been found that two of the sums out of the nine items which made up the sum of Rs. 10,000 went to pay off two decrees held by the creditors not only against the father but also against the sons. Various items, in all amounting to Rs. 2,121, were left with the creditors to pay land revenue. Evidence has been produced that these sums were actually paid into the Government Treasury and receipts have been taken. It has been urged that there is no evidence that there was specific necessity for payment of these dues to the Government. There can be no doubt that these amounts were payable by the father and can be regarded, irrespective of other aspects, as antecedent debts payable by the father. A sum of Rs. 285 was handed over to the father a few days before the execution of the bond to meet the costs of the execution. It has been urged that this was a very large sum and all the money was not possibly required for the purpose. A sum of Rs. 199 15-8 was paid before the Sub-Registrar, and it is urged that no necessity for this loan has been substantiated This is no doubt true. But where it has been proved that there was justification for raising a loan of Rs. 9,800, it may well be assumed that the father had full justification for raising the balance also: see *Biswanath* v. *Jagdeep* (1). According to the recital in the deed of mortgage itself which is very full, the family was in a state of perpetual embarrassment. Money was needed not only to pay antecedent debts, to pay land revenue, but also for the upbringing of the sons. We are of opinion that sufficient justification for borrowing the additional sum of Rs. 200 has been made out. Under these circumstances the appeal fails and it is hereby dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1913] 40 Cal. 342=17 I. C. 577=17 C. W. N. 1025.

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* A. I. R. 1929 Allahabad 504

BENNET, J.

Bahal Singh and *others*—Plaintiffs—Appellants.

v.

Mohammad Yusuf and *others*—Defendants—Respondents.

Second Appeal No. 1811 of 1927, Decided on 9th April 1929, against decree of First Sub-Judge, Saharanpur, D/- 30th July 1927.

(a) Civil P. C., S. 100—Scope.

The finding that a public lane has not been narrowed down so as to cause damage to the residents in the lane is a finding of fact which cannot be called in question in second appeal in the High Court. [P 505 C 1]

*** (b) Easements Act (5 of 1882), S. 4—Residents in houses situate in public lane cannot sue for encroachments over such lane.**

Private persons who merely happen to reside in houses in public lane cannot sue for alleged encroachments in that lane, for no right of easement can be acquired over a public lane : *A. I. R.* 1924 *All.* 715, *Dist.* [P 505 C 2]

K. N. Malaviya—for Appellants.

Akhtar Hussain Khan—for Respondents.

Judgment.—These are two second appeals by the plaintiffs whose suit for removal of certain alleged encroachments have been dismissed by the two lower civil Courts The plaintiffs are residents in houses in a certain lane in the town of Gangoh in the District of Saharanpur, and they alleged that in that lane, which is a public lane, the defendants, who are Muhammadans, have constructed a mosque, and that that mosque encroaches on the lane to an extent which has made it too narrow for carts to pass to the houses

of the plaintiffs. It is not alleged that the plaintiffs have suffered special damage otherwise which would entitle to maintain the suit for removal of the alleged encroachments. Both the lower Courts have made local inspections and have come to the conclusion of fact that there is no narrowing of the lane which would cause any special damage to the plaintiffs. The lane is according to the finding at least 7 feet 7 inches wide at the spot where the mosque has been built and carts can easily pass through it as the lower appellate Court observed at the time of inspection. This finding is a finding of fact, and no authority has been shown to this Court by the learned counsel for the appellants that such a finding of fact can be called in question in second appeal in this Court. Reference was made in the first ground of appeal to the ruling *Hanuman Prasad* v. *Raghunath Prasad* (1) on which the plaintiffs desired to base their case, and it was alleged that the lower Courts had construed this ruling too narrowly. That ruling, however, has no application whatever to the present case. That ruling was in regard to a suit brought by plaintiffs who alleged that they had acquired by prescription a right of way over certain ground, which was originally private property and which had been sold to the defendants who proceeded to erect a house on it and interfered with the right of way acquired by the plaintiffs. In the present case the lane is a public lane in a town, and it is not alleged that it was ever private property. I am of opinion that S. 4, Act 5 of 1882 (the Indian Easements Act) does not apply to a public lane, and that the plaintiffs did not acquire a right of easement over a public lane. It cannot be said that a lane is a servient heritage over which the plaintiffs acquired a right of easement. No doubt persons may acquire a right of way over Government property which is held by Government for private enjoyment or use, but I consider that in the case of Government property held for public use such as a public street where the public are intended to pass, the passing of the public does not confer a right of easement on the public. Otherwise members of the public could bring suits against any Municipal Board when a street is closed or altered. On this ground also I consider that the plaintiffs have failed to show that any suit such as the present one could lie in the civil Court. There is a proper procedure where encroachments are alleged to occur on a public street or lane and action is taken by or on behalf of Government against the persons who make those encroachments. No authority whatever is shown to this Court for the proposition that private persons who merely happen to reside in houses situated in a public lane can sue for alleged encroachments in that lane. It is on this point that a distinction arises from the case of *Hanuman Prasad* v. *Raghunath Prasad* (1), a case where the plaintiffs had themselves acquired a right of easement over private land. I consider that on the various points which I have indicated above, the suit of the plaintiffs must fail. Accordingly I dismiss these second appeals with costs.

In Second Appeal No. 1811 there is filed a cross-objection on behalf of respondents. This, however, has been very unfortunately worded. It is intended to be on behalf of the respondents but is signed by "counsel for the appellants." It is intended to ask for costs for the respondent-defendants but actually asked for costs for the plaintiffs. Further an objection is taken in regard to the lower appellate Court not having granted plaintiffs costs of the trial Court. Now whatever the merits of that objection, it should have been taken by way of cross-objection by the defendant-respondents to the lower appellate Court. No such cross-objection was taken. It is true that after the order in appeal an application in revision was filed which was refused. But I consider that the matter is now time barred, because it was not taken at the proper time before the lower appellate Court by way of cross-objection. I therefore refuse this application for costs of the trial Court to the defendant-respondents.

S.N /R.K. *Appeals dismissed.*

(1) A. I. R. 1924 All. 715=46 All. 573.

A. I. R. 1929 Allahabad 506

MUKERJI AND NIAMATULLAH, JJ.

Mahadeo Bharthi—Plff.—Appellant.

v.

Mahadeo Rai and *another*—Defendants—Respondents.

First Appeal No. 133 of 1926, Decided on 6th March 1929.

(a) Charitable and Religious Trusts Act (14 of 1920). S.(5)—Alleged trustee failing to institute suit for which permission given under S. 5—District Judge passing order against him—He can bring regular suit for declaration of his right to property—(*Per Niamatullah, J.*, Contra *Mukerji, J.*,)—Civil P. C., S. 11.

Per Niamatulla, J.— Where the alleged trustee fails to institute a suit for which permission is granted to him under S. 5, and consequently an order against him is passed by the District Judge, a regular suit by him for declaration that the property is held by him in private ownership or in the alternative that it is not held in trust which is governed by Act 14 of 1920, is maintainable—*Mukerji, J* Contra: 30 *All.* 44; *A. I. R.* 1925 *All.* 615, *not Applied.* [P 508 C 1]

(b) Civil P. C, S. 11—Scope.

A plea in bar can be allowed to succeed only where the law expressly provides for it or the implication is so irresistible that its provisions are inconsistent with a contrary hypothesis. [P 508 C 1]

K. N. Katju, P. L. Banerji & Shah Zamir Alam—for Appellant.

B. Malik and *Shiva Kumar Roy*—for Respondents.

Niamatullah, J.—The suit out of which the present appeal has arisen was brought by the plaintiff-appellant Mahadeo Bharthi in the Court of the Subordinate Judge, Ghazipur for a declaration that the property specified in list A annexed to the plaint is his private property in absolute ownership, and in the alternative for a declaration that it is not held in trust created for public purposes of a charitable or religious nature governed by Act 14 of 1920. It was necessitated by an order, dated 31st August 1925, passed by the District Judge of Ghazipur under S. 5, Act 14 of 1920 (Charitable and Religious Trusts Act) declaring the property in dispute to be held in trust of a charitable and religious nature existing for public purposes. Madho Rai alias Mool Bharthi and Sheo Prasad Pandey, the respondents to this appeal, were impleaded as defendants to the action, as the aforesaid order was obtained by them on their application for examination of accounts of the alleged trust property.

The defendants put forward two main defences, viz.: (1) that the suit is not maintainable in view of the order of the District Judge, dated the 31st August 1925, already referred to, and (2) that the properties in question are in fact held by the appellant in trust for public, charitable and religious purposes, being dedicated to Math of. Sanyasis at Nasirpur The lower Court ruled that the suit before it was not barred by the order of the District Judge, but held on the merits that the trust set up by the defendants has been established. The plaintiff's suit was accordingly dismissed.

At the hearing of the appeal the plea in bar of the suit was reiterated by the defendants. This being in the nature of a preliminary objection going to the root of the case should be first examined, and the appeal can be considered on facts if that plea fails. On a careful consideration of the provisions of Act 14 of 1920, I am of opinion that the plea has no force. The object of the Act is :

"to provide a more effectual control for the administration of charitable and religious trusts."

The scope of the Act as stated in the preamble is:

"(1) to provide facilities for the obtaining of information regarding trusts created for public purposes of a charitable or religious nature and (2) to enable the trustee of such trusts to obtain the directions of a Court on such matters and to make special provision for the payment of the expenditure incurred in certain suits against the trustees of such trusts."

Section 3 enables one interested in the trust to obtain from the Court an order:

"(1) directing the trustee to furnish the petitioner through the Court with particulars as to the nature of objects of the trust and of the value, condition, management and application of the subject matter of the trust, and of the income belonging thereto, or as to any of these matters, and (2) directing that the accounts of the trust shall be examined audited: Provided that no person shall apply for any such direction in respect of the accounts relating to the period more than three years prior to the date of the petition."

The petition shall specify, as far as may be, the particulars of the audit which he seeks to obtain (S. 4). The Court, if satisfied prima facie that the alleged trust exists, shall fix a date for hearing, calling upon the trustee to show cause. S. 5 (1).

"5 (2) On the date fixed for the hearing of the petition . . . . . the Court shall proceed to hear the petitioner and the trustee, if he appears,. . . . . and shall make such

further enquiries if any as it thinks fit. The trustee may and, if so required by the Court, shall at the time of the first hearing or within such tims as the Court may permit present a written statement of his case. . . . . (2) If any person appears at the hearing of the petition and either denies the existence of the trust or denies that it is a trust to which this Act applies, and undertakes to institute within three months a suit for a declaration to that effect and for any other appropriate relief, the Court shall order a stay of the proceedings, and if such suit is so instituted, shall continue the stay until the suit is finally decided.

(4) If no such undertaking is given, or if after the expiry of three months any such suit has been instituted, the Court shall itself decide the question.

(5) On completion of the enquiry provided for in sub-S. (2), the Court shall either dismiss the petition or pass thereon such other order as it thinks fit;

Provided that, where a suit has been instituted in accordance with the provisions of sub-S. (3), no order shall be passed by the Court which conflicts, with the final decision therein.

(6) Save as provided in the section the Court shall not try or determine any question of title between the petitioner and any person claiming title adversely to the trust.

6. If a trustee without a reasonable excuse fails to comply with an order made under sub-S. (5), S. 5, such trustee shall, without prejudice to any other penalty or liability which he may incur under any law for the time being in force, be deemed to have committed a breach of trust affording ground for a suit under the provisions of S. 92, Civil P. C. 1908, and any such suit may, so far as it is based on such failure, be instituted without the previous consent of the Advocate-General."

Section 7 enables a trustee to obtain "opinion, advice or direction of the Court on any question affecting management or administration of the trust property and the Court shall give its opinion, advice or direction as the case may be, thereon: provided that the Court shall not be bound to give such opinion, advice or direction on any question which it considers to be a qusstion not proper for summary disposal."

The Court is to give opportunity to all interested persons of being heard before giving such opinion, advice or direction (sub-S. (3), S. 7).

Section 8 empowers the Court to make appropriate orders for payment of costs etc., from the income of the trust property. S. 11 makes certain provisions of the Code of Civil Procedure applicable to proceedings under this Act and declares that the provisions of that Code relating to execution of decree shall apply to the execution of orders as to costs etc., S. 12 enacts that:

"no appeal shall lie from any order passed or against any opinion, advice or direction given under this Act,

I have summarised the entire frame work of the Act which consists only of twelve sections and have quoted in full the provisions with which we are immediately concerned. It is quite clear to my mind that it provides a summary remedy to persons interested in public trusts of religious or charitable nature to obtain, through Court, information relating to the disposal of income from trust property. The District Judge can exercise his powers only if he is satisfied that the trust is of such a character as would make the provisions .of that Act applicable. It is not the object of the Act to obtain decision of questions relating to the very existence of such trusts except in so far as it may be necessary for the District Judge to ascertain if he has jurisdiction under the Act.

The provision which entitles a person to obtain determination of the question whether the trust exists is for his benefit and if the alleged trustee denies the existence of the trust and desires determination of that question by a Court of competent jurisdiction, it is imperative that the District Judge should give him a reasonable opportunity of doing so. If he fails to avail of that opportunity, he must abide by the decision of the District Judge on that question passed in a summary proceeding and for a given purpose, viz , that the person applying for inspection and examination of accounts should inspect and examine, through Court, the accounts for a period not exceeding three years, relating to the trust property. By not availing himself of the opportunity which the Act affords him to obtain the determination of such a disputed question by a competent Court the alleged trustee subjects himself to two disadvantages viz., (1) a suit under S. 92, Civil P. C., can be instituted against him without the formality of the permission of the Advocate General, a corresponding advantage conferred upon the person interested in the trust who moved the Court and who could not otherwise have instituted a suit under S. 92 without the preliminary sanction of the Advocate-General and (2) the alleged trustee must submit to the examination of his accounts as ordered by the District Judge, without any further objection on the ground that the property in his hands was not held in trust for a public, religious or charitable nature.

Till such time that he is not armed with a declaration by a Court of competent jurisdiction that the property is not so held by him, he will continue to be subject to the provisions of Act 14 of 1920. He will also continue liable to be sued under S. 92, Civil P. C., which if instituted may result in his removal or in the Court having jurisdiction giving certain directions or imposing conditions on his continuing to hold the office of the trustee if he is found to be one. But it is always open to him to invoke the jurisdiction of a Court competent to entertain suits relating to questions of title and obtain a declaration of his right to the property if he is otherwise entitled to it.

The argument that a regular suit instituted after the alleged trustee failed to institute a suit for which permission had been granted to him under S. 5 of Act 14 of 1920 is not maintainable, is not based on any rule of law contained either in that Act or in any other enactment. It must be conceded that there is no express provison of law to that effect. There is no implication of bar arising from any part of Act 14 of 1920. The Act nowhere provides expressly or impliedly that the order of the District Judge passed under S. 5 is conclusive and cannot be challenged in a regular suit before a Court of competent jurisdiction. The consequences ensuing from such an order have already been mentioned. It is an elementary rule of law that a plea in bar can be allowed to succeed only where the law expressly provides for it or the implication is so irresistible that its provisions are inconsistent with a contrary hypothesis. The test in my opinion is whether the order of the District Judge passed under S. 5, Act 14 of 1920, fulfils all the requirements of the rule of res judicata as contained in S. 11, Civil P. C., If it does not the subsequent regular suit is not barred and is maintainable. Assuming that the question whether a trust of a public, religious or charitable nature exists as regards the property in dispute was a question not merely incidentally in issue but was directly and substantially in issue before the District Judge exercising his powers under Act 14 of 1920 which I greatly doubt, the proceedings before the District Judge were not proceedings in "suit" in which he could pass any decree in favour of any of the contending parties. His order, as regards res judicata, is no better than the one passed in any miscellaneous proceedings. The District Judge may well decide under S. 5, Act 14 of 1920, that no trust exists and may dismiss the application for examination of accounts relating to the alleged trust property. It seems to me that the applicant may, in that case, institute a declaratory suit or a suit under S. 92, Civil P. C, with the permission of the Advocate-General, challenging the order of the District Judge which cannot bar such a suit. It is not logical to maintain that the order is not conclusive against him but is conclusive against the alleged trustee if he is found by the District Judge to be a trustee. Looking to the summary character of the proceedings, it is not conceivable that the legislature should have intended to give conclusive effect to the order passed by the District Judge under S. 5, Act 14 of 1920. It will be observed that he is not obliged to hear all such evidence as the parties may adduce. He is at liberty to hear such evidence as he "thinks fit". The provisions of Civil Procedure Code regarding the mode of recording evidence have not been made applicable to the proceedings under the Act. Many other provisions of that Code of a salutary nature are not applicable to proceedings under the Act. The District Judge has the last word on the subject. No appeal lies from his orders under it.

I do not think that any embarrassing results would ensue if the subsequent regular suit is held maintainable because of two so-called inconsistent positions, viz. (1) the trustee being:

> "deemed to have committed a breach of trust affording ground for a suit under the provisions of S. 92, Civil P. C."

and (2) the decree in the subsequently instituted regular suit, if successful, declaring that the claimant is not a trustee at all. Technically a suit under S. 92, Civil P. C., will lie without the permission of the Advocate-General as provided by S. 6, Act 14 of 1920, in spite of a decree declaring the right of ownership of the claimant alleged to be trustee. If in spite of such a decree any one takes it upon himself to institute a frivolous suit under S. 92, Civil P. C., he may do so and take the consequences. As poin-

ted out by me already the effect of a person failing to institute the suit is no more than to relieve a person or persons interested in the trust of the necessity of obtaining the permission of the Advocate-General for instituting a suit under S. 92, Civil P. C. and to subject the alleged trustee to the harrassment of having his accounts inspected, though he is in fact not a trustee. After he has obtained a decree of a competent Court declaring his right of ownership any subsequent application under S. 3, Act 14 of 1920, will have to be dismissed on production of a copy of such a decree at the initial stage provided for by S. 5 (i) of that Act. It should be borne in mind that the Act does not empower the District Judge to pass any order directing the alleged trustee to do something of a recurring nature. He can order the examination of his accounts for three years. Such an order has to be obtained on every subsequent occasion and the District Judge may or may not pass it according as the circumstances proved before him jnstify it or not.

Any argument based on analogy drawn from the provisions of Ss. 199 and 202, N. W. P. Tenancy Act of 1901, is unsound It should not be overlooked that those sections refer to questions of proprietary right arising in suits for ejectment against an alleged tenant. Power has been conferred upon the revenue Court to determine questions of proprietary title on failure of a party to institute within three months a suit in a civil Court for determination of such question. The decree passed in such a suit operates as res judicata. The essential distinction between a decree passed by a revenue Court under Ss. 199 and 202, if conditions giving it the jurisdiction to decide questions of proprietary title existed, is a decree passed by a Court of competent jurisdiction, whereas the order of the District Judge under S. 5, Act 14 of 1920 is only an order passed in summary proceedings, which order has not the force of a decree and has the effect of merely withdrawing certain restrictions imposed on the persons desirous of instituting suits under S. 92, Civil P. C. For the reasons detailed in the foregoing para. I entertain no doubt that the suit out of which the present appeal has arisen is maintainable and was rightly tried out on the merits.

As regards the existence of a trust of a religious or charitabfe character, I have no hasitation in accepting the finding arrived at by the Court below. (Here the judgment discusses evidence on merits and concludes). Considering all the circumstances of the case as they appear from oral and documentary evidence. I am of opinion that the finding of the learned Subordinate Judge that the property in dispute is not held by the plaintiff-appellant in private ownership, and that it is property belonging to Math Nasirput of which the the plaintiff-appellant is the Mahant is correct. In view of my finding stated above, I dismiss this appeal with costs.

Mukerji, J.—There are two points in this appeal. The first point is one of law, and is whether the suit is at all maintainable? Ths appellant, who was the plaintiff in the Court below, was called upon, at the instance of the defendants in the suit, to furnish an account of certain properties which were described by the then applicants, as wakf property to which Act 14 of 1920 applied namely, property endowed for public purposes of a charitable or religious nature. The plaintiff appeared in answer to the notice issued by the learned Judge and pleaded that the property in his hands was not at all wakf. The learned District Judge allowed an adjournment. The plaintiff did not give an undertaking to institute a suit within three months, as he could do, under sub-S. 3, S. 5, Act 14 of 1920. The application was heard and tried on its merits, on such evidence as the learned District Judge had before him. He held that the property was wakf and belonged to a Math and the present plaintiff was bound to render accounts. This was on 31st August 1925: see p. 81 of the record. Thereupon, on 29th September 1925, the plaintiff instituted the suit out of which this appeal has arisen on the allegation that the property was the personal property of his spiritual ancestors through whom he inherited and of himself and that in any case, there was no trust created for public purposes of charitable or religious nature governed by Act 14 of 1920.

The defence was that the suit was not maintainable and that the property appertained to a Math and was of a character to which Act 14 of 1920 applied.

The learned Subordinate Judge, on the point of law, held that the suit was maintainable. On the question of fact he held that the property was Math property held by the defendant as trust property for public religious and charitable purposes. The learned Subordinate Judge did not use the word "public" in the concluding portion of his judgment, but that is, I understand, what he meant. The first question is whether the suit is maintainable, for if the suit is not maintainable, the appeal must fail, whatever may be the finding on the issue of fact. If we examine the entire Act 14 of 1920, we shall easily find the whole scheme and object of the Act. The Act starts by saying that it is expedient to provide facilities for obtaining of information regarding trusts created for public purposes of a charitable or religious nature and enable trustees to obtain directions of the Court. Then it says that any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature, may apply by petition to District Judge for several purposes.

Among these purposes is one to call upon the trustee to submit accounts to be examined and audited. S. 5 then says that the Court, on receipt of an application may take some preliminary evidence to satisfy itself on certain points, mainly directed towards finding out whether the application is a proper one or not. The Court, if it is satisfied as to the bona fides of the application, would issue a notice to the other side. The opposite party then might come and either admit allegations and agree to submit the accounts, or deny the existence of a trust, or admitting the trust, may deny that it is for public purposes of a charitable or religious nature. The opposite party may, if he likes, either submit to an enquiry by the Court or may offer to institute a suit for a declaration, in support of his case. If he offers to institute a suit, the Court is bound to stay its hand and ultimately dispose of the application in accordance with the result of the suit. If, however, no offer is made to institute a suit, or the offer made is not carried out by the institution of a suit within three months, the Court is bound to determine the question before it. As a result of the Court's enquiry, the Court will either dismiss the application or pass such order as it thinks fit. If the Court decides against the opposite party and calls on him to submit an account and if he fails to submit an account, the consequence that would follow would be that the opposite party would

> "be deemed to have committed a breach of trust affording ground for a suit under S. 92, Civil P. C., 1908."

The section then further provides that for the institution of such a suit, previous consent of the Advocate-General would not be necessary. We find, therefore, that the result of an adverse order by the District Judge is that the opposite party is, by law, to be deemed to have committed a breach of trust. This charge against the opposite party necessarily involves two findings, namely the property in respect of which an order for account is passed is trust property of the nature to which Act 14 of 1920 applies and that the opposite party, by failing to submit accounts, has committed a breach of trust so as to justify the maintenance against him of a suit under S. 92, Civil P. C.

Now, if no offer is made to institute a suit under S. 5, sub-S. 3, or if an offer having been made is not complied with, and if as the consequence of an order for furnishing account being disputed, the consequences will follow, what would be the result, if, in a subsequent suit, instituted by the opposite party to the application before the District Judge, succeeds in his suit? The result would be that there would be two conflicting positions. On the one hand, a justifiable ground has come into existence for the maintenance of a suit against the opposite party and it will be taken as settled that he has committed a breach of trust. On the other hand, there is the declaration given, in the subsequent suit, that the opposite party (the plaintiff in the subsequent suit) is not liable to render an account at all and, therefore, no suit can be maintained against him under S. 92, Civil P. C.

This is a position which is hardly imaginable. On the other hand, the scheme of the Act offers an ample chance for a regular suit being instituted for the determination of the question whether property is or is not an endowed property for a public purpose of a charitable or religious nature. The District Judge

is required to satisfy himself on the points before he issues notice. Then the opposite party is given a chance to have the matter litigated through the proper Courts. In the circumstances that have happened in this case, the plaintiff-appellant has not availed himself of his opportunity of instituting a suit and now that an order has been made against him, he brings a suit. As I have already pointed out, what would be the position of the plaintiff-appellant if his suit succeeds? How will he be able to wipe out the consequences which have followed under S. 6, Act 14 of 1920? If the decree in his favour cannot wipe out the consequences provided by S. 6, Act 14 of 1920, the subsequent decree in his favoour is useless. I cannot conceive tnat a party is to have two chances at a regular litigation in the Courts, one under S. 5, sub-S. 3, Act 14 of 1920, and another, at any time thereafter, as and when he chooses. If one can institute a suit at any time he likes, what is the good of giving three month's time as provided by sub-S. 3, S. 5 of the Act?

Sections 199 and 202, N. W. P. Tenancy Act of 1901, contained a similar provision as to the institution of a suit. It was held that if no suit was instituted within the time allowed, a suit, instituted after the three months' time allowed, was to be treated as time barred. The ordinary period of limitation was held to be suspended : see *Banwari Lal* v. *Mt. Gopi* (1) also *Ganga Chumar* v. *Bindesari Rai* (2). Without deciding, definitely, the question of limitation, I am decidedly of opinion that the maintenance of a suit so as to nullify the effect of S. 6, Act 14 of 1920 is not permissible.

On the merits, I agree with my learned brother that the plaintiff has failed to prove the case set up by him. In the result, I agree in dismissing the appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1907] 30 All. 44=4 A. L. J. 713=(1907) A. W. N. 282.
(2) A. I. R. 1925 All. 615=47 All. 904.

A. I. R. 1929 Allahabad 511

BOYS AND BENNET, JJ.

Pitambar Das—Plaintiff—Appellant.

v.

Punna and *another* — Defendants — Respondents

Second Appeal No. 2332 of 1927, Decided on 5th April 1929, against decree of Addl. Dist.-Judge, Aligarh, D/- 23rd August 1927.

Evidence Act, S. 115—Person, in whose favour three mortgages on same property were executed, assigning second of them to another — Assignee suing making assignor pro forma defendant—Assignor not disclosing third mortgage by written statement—He cannot sue auction-purchaser on his third mortgage.

A person, in whose favour three successive mortgages on the same property were executed, assigned the second mortgage to another person ; and, when the assignee sued on the assigned mortgage, he made the assignor pro forma defendant, but the latter did not disclose his third mortgage by his written statement.

Held ; that although the assignor was made only a pro forma defendant, it was his duty to disclose the third mortgage ; and as he failed to do so, he would be precluded from suing the auction-purchaser in assigner's suit on his third mortgage. [P 512 C 1]

S. N. Seth—for Appellant.

A. M. Khwaja for *T. A. K. Sherwani* —for Respondents

Judgment.—These two appeals Nos. 2332 and 2203 of 1927, are brought by the same appellant Pitambar Das against the orders of the Additional District Judge of Aligarh, dismissing his appeals. The facts are rather brief and are similar in the two cases. The facts in appeal No. 2332 are as follows : Chhedda, the father of minor defendant 1, executed three simple mortgage-deeds in favour of the plaintiff as follows :—(1) 26th December 1911, (2) 25th August 1914 (3) 14th April 1919. All these deeds were on the same property. Subsequent to the third deed the plaintiff on 28th July 1924 assigned his rights as mortgagee under the second deed to one Daulat Ram. After this Daulat Ram brought a suit to enforce the second mortgage-deed, and he made the present plaintiff Pitambar Das a party to that suit. In para. 5 of the plaint it is true that he says that Pitambar Das is only made a pro forma defendant and no relief is asked for against him. Accordingly Pitambar did not disclose by a written statement the

existence of the third deed. A decree was obtained and in execution of that decree the property was purchased by defendant 2 Munshi Ahmad Husain. The plaintiff has now come forward to sue on his mortgage deeds Nos. 1 and 3. The question which we have to decide is whether the plaintiff is now precluded from bringing this suit for sale to enforce his mortgage No. 3. Both the lower Courts have held that he is so precluded. It was argued that because the plaintiff had been made a pro forma defendant in the suit by Daulat Ram with the express proviso that no relief was desired against him, therefore it was not necessary for the plaintiff to disclose this third mortgage, but the plaintiff must have been very well aware that a decree in that suit would be followed by an auction sale, and that if he did not disclose his third mortgage, then the auction-purchaser would not be aware of it. Accordingly in his present suit against the auction-purchaser, defendant 2, we consider that the plaintiff cannot succeed. It was his duty to have pleaded this third mortgage in that former suit. We may note that the Transfer of Property Act also lays the duty on a vendor to disclose all matters affecting the title to the property to his vendee, and it was therefore the duty of the plaintiff in his sale deed of 28th July 1924 to Daulat to mention this third mortgage, because the question would be of importance when Daulat sued for sale on the second mortgage. We agree with the finding of the lower appellate Court. and we dismiss these appeals with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 512

DALAL, J.

Khooti and *others*—Defendants—Applicants.

v.

Kishori Lal and *another*—Plaintiffs—Opposite Parties.

Civil Revn. No. 241 of 1928, Decided on 1st March 1929, against order of Dist. Judge, Agra, D/- 11th June 1928.

Agra Tenancy Act (3 of 1926), Ss. 243 and 270—Suit for rent under S. 132—Defence under S. 270 that rent was paid in good faith to third person—No appeal lies to District Judge under S. 243.

No appeal under S. 243 lies to the District Judge in the case of a suit instituted under S. 132 for recovery of rent, the defence to which was under S. 270 that rent was paid in good faith to a third person for no question of title can be raised in a defence under S. 270.

[P 512 C 2]

N. P. Asthana and *S. P. Sinha*—for Applicants.

S. K Dar and *G. N. Kunzru* for *B. N. Sahai*—for Opposite Parties.

Judgment.—The plaintiff, Kishore Lal sued certains tenants in the Court of an Assistant Collector of the Second Class for recovery of arrears of rent under S. 132, Tenancy Act. The defence was under S. 270 on the pleading that rent was paid in good faith to a third person Tikam Singh. As directed in that section, Tikam Singh was made a party to the suit, and the question was taken up for decision whether the tenant had paid rent in good faith to Tikam Singh. The trial Court held that he had, and dismissed the plaintiff's suit as laid down in Cl. (2), S. 270. Kishore Lal plaintiff went up in appeal to the Collector, who held that the payment of rent, if any made, to Tikam Singh by the defendant was against past custom and clearly in bad faith. The appeal was, therefore, decreed, and the tenants filed a second appeal under S. 243 in the Court of the District Judge on the allegation that a question of proprietary title had been decided. In my opinion, the learned Judge was correct in refusing jurisdiction. No question of proprietary title arose as the defendants did not claim to be proprietors themselves. Their defence was the one provided for in S. 270, according to which, no question of proprietary title can be raised in the suit for rent, but has to be raised separately in a separate suit between the plaintiff and the intervener independently of the tenants. This application for revision is dismissed with costs.

S.N./R.K. *Revision dismissed.*

A. I. R. 1929 Allahabad 513

SULAIMAN AND SEN, JJ.

Kundal Lal and *others*—Appellants.

v.

Raj Behari Lal and *others*—Respondents.

First Appeal No. 444 of 1925, Decided on 26th February 1929, against decree of Fourth Addl. Sub-Judge, Aligarh, D/- 17th July 1925.

(a) Hindu Law—Partition — One member separating — It is for those who assert jointness to prove that they continued joint or reunited—*X* separating from father and minor brother — Minor brother's share, though ascertained, yet not actually separated—Father managing minor's share also —Minor's mother already dead but minor having stepmother —Separation in minor's interest—After *X*'s separation, father and minor held to have not continued to be joint.

Where one member of a joint Hindu family separates the presumption of jointness is, in the first instance put an end to, and the burden of proving that the remaining members continued to be joint or that they reunited would be on them who assert such jointness. And although where one of the remaining members is a minor it is difficult to prove reunion; still it can be shown that in spite of separation of one member others continued to be joint. [P 515 C 1]

X separated from his father and minor brother but in the partition that took place although the share of the minor was ascertained it was not actually separated from the father's share. Further the father all along was managing not only his share but that of his minor son also. But since the mother of the minor was dead and the father had married again there was fear that subsequent births would reduce the minor's share and so it was in the interest of the minor that there should be separation.

Held: that the circumstances showed that the father and the minor son did not continue to be joint but there was complete separation: 30 *Cal.* 725 (*P. C.*); *A. I. R.* 1925 *P. C.* 93; *A. I. R.* 1925 *P. C.*, 49, *Rel. on.* [P 515 C 1, 2; P 516 C 1]

(b) Hindu Law—Partition.

Where one member separates from the rest, continuance of jointness between the remaining members is not the same as their reunion. [P 515 C 2]

Iqbal Ahmad, *Peary Lal Banerji* and *Sailanath Mukerji*—for Appellants.

K. N. Katju, *Shiva Prasad Sinha*, *Vishun Nath*, and *K. N. Malaviya*—for Respondents.

Sulaiman, J.—First Appeal No. 444 of 1925 and First Appeal No. 196 of 1926 are connected, and are cross appeals by defendants and plaintiffs respectively arising out of the same suit for recovery of possession of the plaintiffs' share of the property and for the avoidance of a deed of relinquishment, dated 19th February 1924, executed by the plaintiffs' father. The plaintiffs are the sons of Ram Lal who was one of the sons of Nand Kishore. In 1901 Nand Kishore had two sons, Chaturbhoj and Ram Lal forming members of his joint family and he had a third wife Mt. Chandan Kuar, who was not the mother of either of the sons. Chaturbhoj instituted a suit for the partition of the family property in 1901 against his father and brother and at a subsequent stage, his stepmother, Mt. Chandan Kuar was also impleaded. The share of Chaturbhoj thus became one-fourth of the entire property. At that time Ram Lal was a minor and was impleaded under the guardianship of his father Nand Kishore. The judgment in the case, printed at p. 35, shows that the case was principally contested by Nand Kishore, and was ultimately decreed. A preliminary decree was passed for the partition of the family property and by a subsequent order, dated 28th May 1903 (p. 43) four lots of moveable properties were prepared out of which lot No. 3 was allotted to Chaturbhoj, lot No. 1 went to Mt. Chandan Kuar, lot No. 2 went to Ram Lal and lot No. 4 to Nand Kishore. The decree which was finally prepared on 28th May 1903 (p. 44), however, only mentioned lot No. 3, which had been allotted to the plaintiff Chaturbhoj, although the operative portion of the order passed by the Judge under which the partition made by the commissioner was confirmed had mentioned all the four lots separately. The zamindari property was left undivided and a declaration of the shares of the coparceners only was given. Chaturbhoj's one-fourth share was admittedly separated off. We also find that Mt. Chandan Kuar got her one-fourth share separated through the revenue Court.

A record of the partition proceedings is to be found at p. 71 which shows that there was an imperfect partition of a mahal under which patti No. 1 was allotted to Mt. Chandan Kuar separately, patti No. 2 to Chaturbhoj and patti No. 3 remained joint with Nand Kishore and Ram Lal. Ram Lal attained majority sometime in 1911. In 1924 he, jointly with his wife acting

as the guardian of their minor sons, executed the deed of relinquishment referred to above which the plaintiffs now wish to impugn. Under this deed, he admitted that accounts had been settled between him and Nand Kishore and recited the manner in which they had agreed to adjust their accounts.

The plaintiffs came to Court on the allegation that Ram Lal was insane and the deed of relinquishment obtained by him was obtained under undue influence and was in no way binding on the plaintiffs. They claim that the family has been separate since the partition was made at the instance of Chaturbhoj, and that the share of Ram Lal and his sons has been one-fourth all along. They further claimed that Nand Kishore, who had continued to manage the property, was liable to render accounts and lastly they contended that no such account had been rendered and the deed of relinquishment purporting to close the account was not binding on them. They claimed an actual possession of the one-fourth share together with some property alleged to have been purchased with the money in the hands of Nand Kishore and also claimed mesne profits. The suit was contested mainly by the sons of Chandan Kuar, who had been born subsequent to the partition brought about by the suit of Chaturbhoj. They pleaded that. although Chaturbhoj separated, Nand Kishore and Ram Lal continued to be joint and the family was joint, when these defendants were born with the result that they all shared in that half of the property, which remained in the possesion of Nand Kishore. They further pleaded that the property which has been subsequently acquired has been acquired not out of the money belonging to Ram Lal but out of the joint family fund, in which all the parties are interested. They of course pleaded that the relinquishment by Ram Lal was binding on him and it was no longer open to his sons to reopen the accounts.

The learned Subordinate Judge has come to the conclusion that the family became separate after the suit of Chaturbhoj and that, therefore, Ram Lal and his sons were entitled to a one-fourth share which could not be diminished by the subsequent births of his younger brothers. He has further held that the plaintiffs have failed to establish that the deed of relinquishment was executed at the time when Ram Lal was of unsound mind and failed to prove the exercise of any undue influence. He has found that the deed of relinquishment is accordingly binding on the plaintiffs and the accounts must be deemed to have been fully adjusted. He has, however, omitted to give the plaintiffs a decree for mesne profits since the execution of the deed of relinquishment, although it is admitted that the possession of the zamindari property has continued with Nand Kishore and the defendants, and the name of Ram Lal has not been separately recorded in the revenue papers. It will be convenient first to dispose of the question of fact whether the deed of relinquishment was obtained under undue influence or at a time when Ram Lal was of an unsound mind. This point is raised in F. A. No. 196 of 1926. The learned Subordinate Judge who heard the oral evidence produced by the plaintiffs was not impressed by it and after examining the statements of these witnesses has come to the conclusion that the evidence fails to establish that Ram Lal was of unsound mind. Ram Lal attained majority in 1911 and the settlement between him and Nand Kishore was not made till 1924 and there is no reason to suppose that any undue influence was exercised on Ram Lal. Having heard the learned advocate for the plaintiffs I am of opinion that this finding must be accepted.

The next question is whether the separation of Chaturbhoj brought about a disruption of the joint status of the whole family. These questions of law which arise are concluded by the pronouncements of their Lordships of the Privy Council in several leading cases. It was clearly laid down in *Balabux* v. *Rukhmabai* (1) that when one coparcener separates from the others there remains no presumption that the latter remain united. Where it is necessary in order to ascertain the share of the outgoing member to fix the shares of others, his separation must be said to be the virtual separation of all. In such a case an agreement amongst the remaining coparceners to remain united or to reunite must be proved like any other fact. Their Lordships at p. 735 further

(1) [1903] 30 Cal. 725=30 I. A. 130=7 C. W. N. 642=8 Sar. 470 (P. C.).

expressed a doubt as to an agreement for reunion being validly made by or on behalf of a minor member of the family. That when there has been a separation among the members a reunion must be proved has been further laid down by their Lordships in the case of *Jag Prasad* v. *Mt. Singar* (2). The law has been lately clarified by the recent pronouncement in *Palani Ammal* v. *Muthuvenkatachala Moniagar* (3). Their Lordships have made it clear that the mere fact of the ascertainment of shares does not by itself necessarily lead to an inference that the family had separated, inasmuch as there may be other reasons for such ascertainment. This is in no way centrary to the rule of law laid down in *Balabux's* case (1) that no presumption that they remained united remains. It is also clear that one member of a joint family may separate from the other members, while the other members may continue to remain joint. In *Palani Ammal's* case (3) their Lordships have laid down that without proving any special agreement amongst the remaining members, the fact that the remaining members continued to be joint may be inferred from the way in which their family affairs were carried on after the separation of the outgoing coparcener. Their Lordships have further remarked that if a joint Hindu family separates the members may agree to reunite, but such a reunion is of a very rare occurrence and must be strictly proved as any other disputed fact.

In view of these observations of their Lordships of the Privy Council, it follows, in my opinion, that the effect of the separation of Chaturbhoj was in the first instance to put an end to the presumption of jointness but it need not necessarily have had the effect of a complete disruption of the joint family. The burden of proving that the remaining members continued to be joint or that they reunited would be on the plaintiffs who assert such jointness. As Ram Lal was a minor member of the family at the time, I am doubtful as to whether a case of reunion, had it been set up on behalf of the plaintiffs, could have succeeded. But it does not follow that the plaintiffs are not entitled to show that in spite of the separation of Chaturbhoj, Nand Kishor and Ram Lal continued to be joint and there was no separation so far as the status of these two members was concerned. In view of the observations of their Lordships, the continuance of jointness is not the same thing as a reunion.

The learned advocate for the defendants urges that inasmuch as Ram Lal was a minor at the time and his guardian was Nand Kishore, there can be no intention on the part of Ram Lal or Nand Kishore to bring about separation between them. He further points out that in the final decree which was drawn up by the Court, the share of Ram Lal was not actually separated and has relied on the admitted fact that there was no actual partition of their shares in the revenue Court and that all along Nand Kishore managed his own share and that of Ram Lal. No doubt these are circumstances which to some extent weigh on the side of the defendants. On the other hand, we have the clear fact that it was in the interest of Ram Lal that there should be a separation. The mothers of Chaturbhoj and Ram Lal were dead and Mt. Chandan Kuar, the third wife, had been newly married. The subsequent births of other brothers would have the effect of reducing the shares of Chaturbhoj and Ram Lal and it is not surprising that Chaturbhoj intervened and got his share separated off. It was equally for the benefit of Ram Lal that his share should remain intact and be not affected by the subsequent births in the family. It is also an admitted fact that Mt. Chandan Kuar, the mother of the present appellants, did proceed further in the matter and got her one-fourth share actually separated. Although the ascertainment of Mt. Chandan Kuar's share was necessary in order to determine the share which had to be allotted to Chaturbhoj, it seems to me that after Chaturbhoj had gone out with his share, in case the remaining members intended to remain joint, their shares would have been thrown into the hotchpot. The circumstance that Mt. Chandan Kuar, the mother of the present defendants, insisted on her share being separated shows that there was a general partition among the members of the family under which she was allotted a definite and specific share. The fact that the management of the shares of Nand Kishore and Ram Lal

(2) A. I. R. 1925 P. C. 93.
(3) A. I. R. 1925 P. C. 49=48 Mad. 254=52 I. A. 83 (P. C.).

continued to be joint is obviously explained by the circumstance that Ram Lal was then a minor and his mother was dead. It therefore seems to me that there is nothing in the conduct of the members of the family subsequent to the partition which would show that Nand Kishore and Ram Lal continued to remain joint. Of course, there is no special agreement pleaded or proved. On the other hand, the circumstances indicate that there was a complete separation.

Last of all, there is the deed of relinquishment executed by Ram Lal and his wife which I have held to have been executed voluntarily at a time when Ram Lal was possessed of a sound disposing mind. This document contains clear recitals to the effect that the shares of Ram Lal and Nand Kishore had been separate though both were under the management of Nand Kishore. The exeeutants have gone on to state that it had become necessary that accounts should be settled with Nand Kishore and that the whole income and mesne profits should be received and separate possession of the entire shares of moveable and immovable properties taken. They stated that the settlement of the account of the mesne profits from 1331F had accordingly been made and the amounts due from Nand Kishore had been realized after understanding the accounts and that all articles such as utensils, gold and silver ornaments, cash etc. in the possession of Nand Kishore had been received back and that not a single farthing on account of the executant's share remained due by Nand Kishore. The deed further recited that Nand Kishore had sold the share of Ram Lal along with his own share in certain villages in tahsils Atrauli and Iglas and with the sale consideration purchased in his own name some property in village Tholai and Mahmoodpur Janan and had got his name entered in public papers against the whole; and that the settlement with regard to this transaction was that Nand Kishore was solely rssponsible for the payment of the amount on the mortgage-deed, dated 16th December 1922, under which money was raised for the purchase and that Nand Kishore and Ram Lal were to divide the properties purchased half and half in lieu of Ram Lal's share which had been sold. This settlement of account between the parties not only shows that there had been a complete separation of the status and that Nand Kishore and Ram Lal had been separate ever since the partition of 1901, but further that the accounts between them were completely settled and adjusted and after the execution of this document no further sum remained due to Ram Lal.

The learned advocate for the plaintiffs has contended before us that the minor plaintiffs are in no way bound by the settlement of account by Ram Lal in case that settlement was not just and proper. Ram Lal was the head of the joint family consisting of himself and his two minor sons. Hs represented this family to the outside world and was fully competent to enter into contracts with the outside world for purposes of settlements of account. Nand Kishore should be deemed to be a stranger to the family. A settlement of account between Ram Lal as representing his family and Nand Kishore, the person who rendered account, was in the interest of the family and is binding on the family. I do not think how the plaintiffs can now say that they are not bound by it or that Ram Lal had no authority to settle the accounts of behalf of the family.

It cannot, however, be disputed that even after the deed of relinquishment Nand Kishore and the defendants appellants have remained in possession of the shares of Ram Lal and the plaintiffs. Under an interlocutory order passed by this High Court certain monthly allowances were directed to be paid by the defendants to the plaintiffs. With the exception of the amounts so paid, the plaintiffs have not had the enjoyment of the one-fourth share. I would accordingly dismiss with costs F. A. No. 444 of 1925 and would allow F. A. No. 196 of 1926 in part and modify the decree of the Court below by giving the plaintiffs a further decree for mesne profits from 19th February 1924 till the date of the delivery of possession. Future interest at 6 per cent. per annum on the amount of the mesne profits from the date of the delivery of possession till payment will be allowed. As the plaintiffs have failed substantially I would direct that the plaintiffs should pay the costs of this appeal to the defendants and should bear their own costs. The case would accordingly be sent down to the Court below

for the passing of a final decree after the mesne profits have been ascertained.

Sen, J.—The facts which have given rise to the present appeal have been set out in the judgment of my learned brother and need not be recapitulated. The mark and bent of the plaintiffs have been to get behind the partition in Chaturbhoj's suit and the deed of relinquishment dated 19th February 1924.

In 1901, Chaturbhoj instituted a suit for partition against his father Nand Kishore and his minor brother Ram Lal. The suit resulted in a preliminary decree, followed in the usual course by a final decree for partition and the shares of the various members of the family, including that of the stepmother Mt. Chandan Kuar were separately allotted. The plaintiffs, who are the sons of Ram Lal, come into Court on the allegation that there was no separation between Nand Kishore and the other members of the family barring Chaturbhoj and that they must be considered to be the members of a joint Hindu family.

The ideal Mitakshara family is a thing of the past. Its vestiges are to be found in obscure out of the way corners in rural areas outside the disrupting influences of the modern conditions of life. Where these influences are present, presumption in favour of the jointness of the family has consequently grown weak. Presumption in favour of its continuances has grown feebler. The influences which have brought about the change may form an interesting chapter of social dynamics but cannot be exhaustively enumerated and it is not necessary to enumerate them for the purposes of this case. Where on a partition, the shares of the various members of a Mitakshara family have been ascertained, the separation of the outgoing member is a virtual separation of all and there can be no presumption of cohesion as against disintegration. In the present case no reunion has either been pleaded or proved. There is nothing, of course, to prevent the affinity of the other members of the family intending to remain and remaining joint. Complications may arise from the minority of individual members. There is nothing, however, to prevent a minor being taken inside the family fold through affection. To hold otherwise would be to introduce the sterilising influence of a deadlock which is not only opposed to the interest of the minor but would be in conflict with tradition and experience attending family lives amongst the Hindus belonging to this province.

The evidence in this case has been considered in detail and elaborately analysed by my learned brother. I am in full accord with his conclusions. I find on the evidence (1) that Ram Lal was separate from Chaturbhoj; (2) that the separation of Chaturbhoj was the virtual separation of Ram Lal; (3) that the properties which were subsequently acquired in the name of Nand Kishore were so done with funds belonging in common to Ram Lal and Chaturbhoj and belonged to them in equal moieties; (4) that Ram Lal was not a person of unsound mind, (5) that the deed of relinquishment dated 19th February 1924 was executed by Ram Lal voluntarily and was not procured by any undue influenee being brought to bear upon him, and (6) that the plaintiffs are entitled to mesne profits of the property in suit from 19th February 1924.

The deed of relinquishment dated 19th February 1924 must be considered to have been executed by Ram Lal as the manager of the joint family consisting of himself and his sons who figure as plaintiffs in the present action. There being nothing to show that the transaction in question was tainted by fraud or collusion or that the rights of the minor members of the family were not sufficiently protected, the document is not open to any challenge or impeachment. The plaintiffs have failed to prove any invalidating circumstance. Under the circumstances, the deed in question must be upheld. Ram Lal in his capacity as manager of a joint family, having acknowledged that Nand Kishore had rendered accounts, the plaintiffs as sons of Ram Lal were not entitled to rip the matter open by means of the present suit. I, therefore, am of opinion that F. A. No. 444 of 1925 should be dismissed and F. A. No. 196 of 1926 should be allowed in part on the lines proposed by my learned colleague.

S.N./R.K. *Order accordingly.*

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A. I. R. 1929 Allahabad 518

DALAL, J.

Abdul Rahim Khan—Plaintiff—Appellant.

v.

Ramzan—Defendant—Respondent.

Second Appeal No. 1403 of 1927, Decided on 1st March 1929, against decree of Dist. Judge, Benares, D/- 1st June 1927.

Mahomedan Law—Waqf—Mutawalli de facto—He has right to collect money of the trust (rent of shops).

A de facto Mutawalli of a mahomedan religious trust is entitled to act on behalf of the trust and sue for recovery of the rent of the shops belonging to the trust without being put to proof of his antecedents and the origin of his authority to manage the trust. When it is desired by the tenant to displace a de facto manager, his only remedy lies in taking action under S. 92, Civil P. C.: *A. I. R.* 1924 *All.* 59 ; *A. I. R.* 1926 *Mad.* 1066 ; *A. I. R.* 1927 *Mad.* 69, *Ref.* [P 518 C 2]

A. M. Khwaja—for Appellant.

Mushtaq Ahmad—for Respondent.

Judgment.—The defendant was sued on behalf of a mosque for the recovery of the rent of the site of a shop. The defendant's shop is situated on land belonging to the mosque, and the defendant's liability to pay rent is admitted. The question in dispute is as to whether the plaintiff who puts himself forward as the manager of the mosque property is entitled to sue and recover the money. The plaintiff is the secretary of a society known as the " Anjuman Intizamia Masjid " in Benares, and it appears that the association looks after the management of several mosques in that city. It is in evidence that this association has in the past recovered rent for the sites of shops from parjautdars and has carried on with the money the management of the mosque. In 1922 the society got itself registered. On behalf of the defence it was suggested that there was a rival body which managed the mosque and that the plaintiff was not entitled to recover the parjaut. The relevant observations of the lower appellate Court which has dismissed the suit of the plaintiff after reversing the decree of the trial Court are :

" In the present case the plaintiff has admitted that he cannot say how the Anjuman has got the title to manage the mosque in dispute. All that can be claimed is that the Anjuman has been managing the mosque since 1912 for some years. Since that time, however, and after the period of registration". (in 1922) :

" the parjautdars appear to have taken matters into their own hands and have set up a countermanagement. I am of opinion that in the present case when the plaintiff comes to enforce a right he must prove his title up to the hilt."

This does not appear to be the correct view of looking at the rights of a person or a body suing on behalf of a Muhammadan religious trust. It has been held by this Court in *Muiz-ud-din* v. *Mohammad Ikhlaq* (1) that a de facto mutwalli of a trust is entitled to remain in possession of the trust property and to recover the profits of the trust. This pronouncement was followed by the Madras High Court in a Single Judge decision in the case of *Mahomed Ibrahim* v. *Sundaram Chetti* (2). In another Madras case of 1926 *Moideen Bibi* v. *Rathanevelu Mudali* (3) a Bench of two Judges accepted the dictum of the Allahabad High Court that de facto mutwallis of mosques were well known to the law. In 1913 a Bench of the same High Court laid down that a de facto trustee of a mosque had a right not only to reimburse himself of all expenses properly incurred by him just like a de jure trustee, but further that he was entitled to remain in possession of the trust property until he was reimbursed in respect of all proper charges incurred by him: *Kaliba* v. *Soran Bivi* (4). There is thus a large volume of authority in favour of a de facto mutwalli being entitled to act on behalf of a trust without being put to proof of his antecedents and the origin of his authority to manage the trust.

The question, therefore, is whether the plaintiff is or is not a de facto trustee. In my opinion he is. He started management in 1912, and the association on behalf of the parjautdars is more recent. The plaintiff's association is a registered body while the other association is not. When it is desired by the defendant and other parjautdars to displace a de facto manager their only remedy lies in taking action under S. 92, Civil P. C., and the lower appellate Court was not correct in the view that the responsibility lay on the plaintiff Anjuman to take proceedings

(1) A. I. R. 1924 All. 59.
(2) A. I. R. 1926 Mad. 1066.
(3) A. I. R. 1927 Mad. 69.
(4) [1915] 38 Mad. 260=28 I. C. 290=28 M. L. J. 347.

under S. 92. The amount in dispute is small, so there is no necessity to pass any order to insure the use of the money for the purposes of the mosque.

I set aside the decree of the lower appellate Court and restore the decree of the trial Court with costs of all the Courts.

K.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 519

BOYS AND BENNET, JJ.

Babu Ram Singh and *others*—Defendants—Appellants.

v.

Subhan Mochi and *another*—Plaintiffs—Respondents.

Second Appeal No. 500 of 1926, Decided on 4th April 1929, against decree of Dist. Judge, Ghazipur, D/- 31-8-1925.

(a) Deed—Construction— Settlement deed held to have intended to bind parties permanently for future.

Certain Mahomedans proceeded to take out the "duldul" procession, but as it was likely to result in serious trouble the authorities collected the leaders of the various communities and effected a settlement which provided : "As often Hindus and Mahomedans and Aryasamajists carry out new sorts of processions inside the qasba which hurt the feelings of some party, so we agree that we will not carry out any new procession without applying beforehand to the District Magistrate and obtaining his sanction thereto. There is no necessity of taking sanction for ancient processions."

Held : that the agreement was not merely intended to settle the immediate trouble, but was intended to settle permanently the trouble that had been arising. [P 520 C 1]

(b) Civil P. C., S. 100—Finding whether agreement is intended to settle immediate trouble or is binding for future is not one of fact.

The finding as to whether an agreement was intended to settle the immediate trouble or it had binding effect for the future involves the interpretation of the legal effect of the agreement and can in no sense be a finding of fact. [P 520 C 2]

(c) Deed — Construction — Authorities effecting settlement between various parties likely to cause serious trouble—For determining whether leaders entered that settlement in representative character—Attitude of those whom they were supposed to represent must be considered.

Where the authorities effect a settlement between the various parties the disputes among which are likely to cause serious trouble, in order to determine the question whether the agreement was entered into by the leaders in a representative character, the attitude of those whom the leaders were supposed to represent must be considered. [P 520 C 2]

P. L. Banerji—for Appellants.

Mushtaq Ahmad and *K. N. Malaviya*—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit by two Mahomedan plaintiffs asking for two reliefs, the material portions of which are as follows :

"(a) It may be declared by the Court that the plaintiffs are authorized to take out the "duldul" procession on the fourth of Muharram of every year without any obstruction or interference.

(b) A perpetual injunction may be issued to the Hindus . . . . . and the Secretary of State for India restraining them from offering any obstruction in future to the "duldul" procession . . . . . As the stoppage of the "duldul" procession is due to the interference and orders of the Government servants and officers, it is neeessary to implead the Secretary of State for India . . . . . "

The facts are broadly stated in the judgment of both the two lower Courts and no objection has been taken on either side before us that the facts have not been correctly stated. The case comes from the district of Ghazipur, and trouble between the Hindus and Mahomedans is said to have started as long ago at any rate as 1911, but does not appear to have come to a head in the particular locality concerned till 1920. In 1920, as the trial Court has found, a finding concurred in by the lower appellate Court, the Mahomedans for the first time proceeded to take out the "duldul" procession. Petitions indicated that this was likely to result in serious trouble, and it is clear that the authorities collected the leaders of the various parties and effected a settlement. An agreement was entered into on 7th October 1920, a translation of the material portion of which is to be found on p. 29 of the paper book. Counsel on either side before us have expressly stated that they had no fault to find with that translation. It is vital to this case, and we reproduce it from the judgment of the lower appellate Court. It reads :

"As often Hindus and Mahomedans and Aryasamajists carry out new sorts of processions inside the qasba which hurt the feelings of some party, so we agree that we will not carry out a new procession without applying beforehand to the District Magistrate and obtaining his sanction thereto. There is no

necessity of taking sanction for ancient processions."

This agreement was signed by ten Mahomedans and some 20 Hindus, the latter including, as we are told, those who signed it on behalf of the Hindus generally and those who signed it particularly on behalf of the Aryasamaj. In subsequent years, 1921, 1922 and 1923, there was some friction; but counsel for the plaintiffs has not been able to show us that there is any evidence that the "duldul" procession was actually taken out either with or without the District Magistrate's sanction in 1921, 1922 or 1923. The present suit asking for the reliefs which we have set out at the commencement of this judgment was filed on 10th day of May 1924.

The trial Court gave the plaintiffs a decree to the effect that they

"have a right to take out "duldul" procession with its appropriate observances on the 4th of Muharram of every year on the public streets of Rasra town without interference or obstruction by anybody provided...."

After the word "provided" follow a number of restrictions and conditions governing the right to take out the procession. These restrictions and conditions were apparently intended, as the lower appellate Court in upholding the decree suggests, to make "full provisions for the executive to interfere when necessary." Defendants, certain Hindus, have appealed on the ground that the lower Courts were wrong in interpreting the agreement, which we have set out above, of 7th October 1920, as an agreement which was only intended to have a temporary effect and to patch up a peace for the occasion only between the parties. We have no hesitation in accepting the plea of the appellants that the agreement was intended to be and was an agreement making permanent provision for securing peace between the parties so far as it might be possible. The whole language of the agreement is plainly inconsistent with any idea that it was the result of an endeavour merely to smooth over the trouble that was theatening on the particular occasion. In the first place the "duldul" procession had already been taken out on 17th September 1920, i. e., nearly three weeks prior to the signing of the agreement. Next, we have the initial phrase:

"As often Hindus and Mahomedans and Aryasamajists carry out new sorts of processions."

Again, "so we agree that we will not carry out any new procession." Again, "there is no necessity of taking sanction for ancient processions." The last phrase obviously referred to the future indefinitely. And finally we have the fact that in this particular agreement there is the reference to processions carried out and to be carried out by the Aryasamajists. It is in our view impossible to interpret this agreement as anything, but an endeavour to settle permanently for the future the trouble which had been arising. On behalf of the respondents three points have been taken. It has been urged that there is a finding of fact that the agreement was only intended to settle the immediate trouble and not intended to have any binding effect for the future. We do not agree that the interpretation of the legal effect of this agreement is in any sense a finding of fact. Nor can we agree that this finding was not challenged in appeal to the lower appellate Court. It is expressly challenged in ground 3 of the memorandum.

The next point taken is that even if the agreement is binding on plaintiff 2, who has been found definitely to have signed it, it is not binding on plaintiff 1, who did not so sign. It has to be contended that the signatories of the agreement did not sign in a representative capacity, and that even if they purported to do so, others who did not sign are not bound by those signatures. That there is no force in this contention we are satisfied from a consideration of the circumstances. It is manifest that the parties did summon the leaders of the various communities and that they were summoned as representatives of their various communities. From the point of view of the authorities any other intention would have been absolutely futile. This of course is not sufficient in itself. The attitude of those whom the leaders were supposed to represent must also be considered. We find it quite impossible to believe in the circumstances of the case that the other Mahomedans of Rasra were not fully aware of the meeting to which their leaders had been summoned, and their subsequent conduct in the ensuing years

shows that during those years, at any rate, they accepted the representative capacity of the leaders who had signed the agreement. It is manifest that for at least three years no single Mahomedan made any endeavour to repudiate the authority of those leaders. We notice, moreover, that in this very suit the plaintiffs themselves have recognized this principle of representation, for the suit is brought against ten Hindus as representative of the Hindu community for an injunction to be issued against the Hindus generally. That it is right and proper to infer the representative character of the signatories to the agreement from the surrounding circumstances is amply supported by a reference to S. 187, Contract Act.

Thirdly, it is contended that even if the agreement is binding the relief asked for by the plaintiffs is not inconsistent with that agreement. The plea is manifestly untenable. The agreement provides for the sanction of the District Magistrate being required before any new procession is taken out. We have set out earlier the reliefs and they in the most unmistakable terms ask for a declaration of the right of the Mahomedans to take out the "duldul" procession, though both Courts have found it to be a new procession, without any obstruction or interference, and they expressly ask that the Secretary of State may be restrained from offering any obstruction in future to the "duldul" procession, and refer to the fact that the stoppage of that procession is due to the interference and orders of the Government servants and officers. To grant the plaintiffs a relief on terms that they might take out any new procession such as the "duldul" procession, subject to the control and sanction of the District Magistrate, would be to declare that they had a right which nobody has ever in fact challenged. It is to us manifest that a wise and reasonable agreement was arrived at between the parties on 7th October 1920, and it is most regrettable that anybody should have advised one of the parties to resile from that agreement subsequently. We think, therefore, that the plaintiffs' suit should have beeen dismissed. The appeal is allowed with costs and the suit of the plaintiffs is dismissed with costs.

S.N./R.K. *Appeal allowed.*

* A. I. R. 1929 Allahabad 521

SULAIMAN AND KENDALL, JJ.

Madan Mohan Singh—Defendant—Appellant.

v.

Narain Singh — Plaintiff — Respondent.

First Appeal No. 82 of 1926, Decided on 13th February 1929, against decree of Addl. Sub-Judge., Budaun, D/- 17th November 1925.

(a) Civil P. C., S. 11—Decree passed in terms of award without objection cannot afterwards be treated as nullity because arbitrators had wrongly decided mixed question of fact and law—Civil P. C., Sch. 2, R. 15 (c).

Where no objection is taken to an award under Sch. 2, and a decree is passed in accordance with its terms, the decree is binding on the parties thereto and cannot be subsequently treated as nullity because the arbitrators had wrongly decided a mixed question of fact and law which had arisen before them : 36 *All.* 69 ; 29 *Cal.* 167, *Rel. on.* [P 524 C 2]

*** (b) Civil P. C., S. 11—Stray remark, not incorporated in operative portion of award, cannot supersede previous decree.**

A stray remark made by the arbitrators, which is not incorporated in the operative portion of the award, does not amount to a fresh adjudication which would supersede a previous decree. [P 525 C 1]

N. C. Vaish, K. N. Katju and *P. M. L. Varma*—for Appellant.

Iqbal Ahmad, Harnandan Prasad and *Narain Prasad Asthana* —for Respondent.

Judgment.—This is a defendant's appeal arising out of a suit for recovery of possession of immovable property by avoidance of a decree passed in terms of an award in 1922. The grounds on which the decree is sought to be avoided are set forth in para. 16 of the plaint, the first four being to the effect that the award itself was contrary to an earlier waqfnama and was invalid in law, and the last one that the decree was fraudulently obtained. The plaintiff and the defendant are both grandsons of Sukha Singh from his sons Bija Singh and Bhajja Singh respectively. It was the plaintiff's case that Sukha Singh had made a valid waqf in 1887 under which the management of the entire dedicated property would come to the plaintiff and the defendant was wrongfully in possession of half of that property. The defendant denied that Sukha Singh had any

Advocate High Court
Jammu & Kashmir

power to make a valid waqf and pleaded that the arbitration award and the decree were binding on the plaintiff and that no fraud had ever been practised.

The learned Subordinate Judge has come to the conclusion that the plaintiff has failed to establish any fraud or misrepresentation which would entitle him to avoid the decree of 1922. But his finding is that the waqf of 1887 was really valid, and as it was a public waqf the arbitrators had no power to direct that the two branches should manage portions of the dedicated property separately. In his opinion the award was ultra vires and the decree passed upon it was a nullity. The learned Subordinate Judge has not gone on to hold that the effect of a subsequent litigation of 1925 which also resulted in an award was to create any bar of res judicata against the defendant. He has, however, relied on this subsequent pronouncement as being worthy of greater reliance on the question of fact whether there had been a valid dedication in 1887.

The facts are that on 11th July 1887 a registered tamliknama was executed by the grandfather of the parties, viz. Sukha Singh, under which shares in several villages were dedicated and set apart for the expenses of a temple in Sabalpur. Mutation of names as trustee was duly effected. After the death of Sukha, his eldest son Bija's name was entered and when Bija died, the name of his younger brother Bhajja was entered. At this time the present plaintiff was a baby in arms, being a few days old. In 1922 Bhajja applied for a partition of the property covered by the tamliknama in the revenue Court and objection was raised by Narain Singh, the present plaintiff. The revenue Court referred the objector to the civil Court. Accordingly Narain Singh instituted a suit in the civil Court against Bhajja Singh on 1st May 1922 (p. 59). He claimed a declaration that the plaintiff was a mutwalli of the endowed property and asked for possession, if necessary. Before the time for the filing of the written statement arrived, the parties agreed to refer their dispute to certain arbitrators, and an application dated 15th May 1922 was presented before the Court. The matter was referred to the arbitrators named, and the Court directed that the defendant do file his written statement before the arbitrators. Bhajja Singh filed an elaborate written statement on 10th June 1922 before the arbitrators. In this he challenged the validity of the tamliknama and denied the creation of any valid endowment or the right of the plaintiff to take possesssion of the entire estate as manager. It is not necessary to refer to the other numerous pleas taken by him. On 19th June 1922 the arbitrators framed no less than seven issues, the first one of which was whether the property in question formed part of the joint ancestral property of the family of Thakur Sukha Singh and his sons, and whether Thakur Sukha Singh had a right to make a waqf of it or not. The last issue was whether Madan Mohan Singh (Bhajja's son) should necessarily be made a party to the suit or not.

On the 24th June 1922 the arbitrators delivered their award and the same along with an application filed by the parties was incorporated in the decree of the Court. In the award after setting forth the issues which had been framed the arbitrators proceeded to decide them seriatim. Under issue 1 they recorded the finding that it was proved that the property in dispute was a part of the ancestral and joint family property of Sukha Singh and his sons, and under the circumstances the transfer made by one member without the consent of the other members of the joint family was invalid according to law. They then proceeded to state that at that time the parties to the suit were agreed to fulfil the wishes of their ancestor so far as it might be possible, and with that object they with mutual consent prepared the necessary statement of the incomes and expenditures and rendered themselves separately liable for carrying out the object for which the tamliknama was executed. They then proceeded to state that it seemed proper to them also that the parties to the suit should act up to the conditions relating to the worship of the deities installed in the temple. In their finding they referred to the statement which had been prepared by the parties and which was appended to the award. In their finding on issue 7 they came to the conclusion that it did not seem necessary to make Madan Mohan Singh a party to the suit inasmuch as his guardian Thakur Bhajja

Singh was a party and could very well protect his rights. They then passed a decree for possession over 4 biswas and odd in favour of the plaintiff as manager and mutwalli and as regards the rest as proprietor.

In the list appended to the award it was stated that the parties had given their consent to do their best to fulfil the wishes of their ancestor and to abide by the proper instructions which the arbitrators might issue in respect thereof and to act up to the same in future. Separate lists of expenses which were to be made by Thakur Bhajja Singh and his sons and representatives and those which were to be made by Thakur Narain Singh, his sons and representatives were shown, and in the final note it was further stated that in order to fulfil this object it had been decided by the arbitrators with the consent of the parties that the management of the 20 biswas zamindari should be entrusted to both the parties in equal shares, each party having the duty cast upon it to feed Brahmans and perform other functions. The application of 24th June 1922, filed by the parties in which two clerical mistakes occurring in the award had been pointed out was also incorporated in this decree. In this application there was a prayer that a decree for possession of four biswas and odd should be passed in favour of the plaintiff as manager and mutwalli, and the remaining property in dispute should remain in the possession of Thakur Bhajja Singh as manager and mutwalli thereof according to the conditions laid down and the award made by the arbitrators.

The finding of the Court below that no fraud or misrepresentation has been established has not been challenged before us. The plaintiff is accordingly not entitled to avoid this decree on any such ground. The Court below instead of first proceeding to decide whether this decree operates as a bar of res judicata has thought fit to consider the question of the validity of the waqf made by Sukha Singh in the first instance. There was no direct evidence before the Court to show that the property dedicated by Sukha Singh was his self-acquired property. The learned Judge, however, thought that 'the arbitrators in a way had shirked to tackle with the issue and decided that the property was a part of the joint ancestral property. The learned Judge thought that they meant to say that although it was acquired by Sukha Singh it was thrown in with the joint family property and became a part and parcel of it. It is not easy to understand on what ground this inference is drawn. The arbitrators in their judgment had distinctly stated that after having enquired about the facts relating to the case and thought over the evidence produced by the parties they found it proved etc. The learned Judge had before him the pronouncement of those arbitrators and an expression of opinion in a subsequent litigation of 1925 to which we shall refer later, and thought that the latter being more recent was worthy of greater reliance. He admitted that the oral evidence on the point on either side was unconvincing, and particularly that the plaintiff and two of his witnesses who had sworn that the property was self-acquired were giving hearsay evidence and could have no direct knowledge of the matter. Relying, however, on a passage in the latter award he recorded a finding that the property was the self-acquired property of Sukha Singh. He then followed it up with the finding that the waqf created by him was valid and binding on the parties. Having this finding in view, he proceeded to consider the award of 1922. He conceded that the grounds of the invalidity of the said award ought to have been raised by way of objection after the award was filed in Court and before the decree was passed, and he expressed a doubt whether the plaintiff can raise that point now. He, however, held that the endowment was of a public character and there was accordingly no bar against the plaintiff from raising the question. He has referred to a few cases in his judgment, but none of the cases referred to by the learned Subordinate Judge is directly in point, and goes to the length of laying down that a trustee is not personally bound by a decree passed against him.

In our opinion the fallacy underlying the reasoning adopted by the Court below lies in the supposition that because according to the view taken by the Court below the waqf of 1887 was really valid, the arbitrators acted without jurisdiction in going contrary to its provisions. As observed by their Lordships of the Privy

Council in the case of *Ghulam Khan* v. *Muhummad Husain* (1), the arbitrators have power to decide the question of jurisdiction and they can do so. They may err in law, for arbitrators are judges of law as well as judges of fact, and their error in law does not vitiate their award. An award having been made and not having been corrected or modified, and no application having been made to set it aside or such an application having been made but refused, the Court had no option but to pronounce a decree in accordance with it. We have pointed out that on the pleadings before the arbitrators the question whether the waqf of 1887 had been validly made or not was a matter in issue. They recorded a clear finding that it could not have been validly made. It is wholly irrelevant now to consider whether their finding was right or wrong. We cannot sit in judgment over their expression of opinion. Having found that the waqf of 1887 was invalid, they certainly did not act without jurisdiction if they proceeded to incorporate the agreement of the parties in their award and directed how they should separately manage portions of the property in order to carry out the wishes of their ancestor.

Reading their finding on p. 85 and the way in which the parties had agreed to separately manage different portions of the properties and fulfil the objects mentioned in the waqf and tamliknama of 1887, we are convinced that the effect of the award was to hold that no valid waqf had been in reality created in 1887, but that the parties agreed that they should create a new waqf subject to the conditions agreed upon which were all embodied in the award. It is noteworthy that in the application which was filed before the Court, no objection was taken to the division of the management, nor was any objection taken to the decree for possession of part of the property in favour of the plaintiff as manager and the retention by the defendant of the other part of the property in his capacity as manager and mutwalli thereof according to the conditions laid down in the award. We therefore fail to see in what way it can be said that the arbitrators were acting without jurisdiction and that their award was ultra vires. In our opinion the invalidity of the award ought to have been challenged before the Subordinate Judge under Sch. 2, Civil P. C. It is clear from the provisions of R. 15, sub-Cl. 'c' that the award could have been set aside if it was in any way "invalid" : *Lutawan* v. *Lachya* (2). No such objection having been raised and the decree having been passed, we are of opinion that the decree is binding on the parties thereto, and it cannot now be treated as a nullity because the arbitrators had wrongly decided a mixed question of fact and law which had arisen before them.

The learned advocate for the respondent has taken a new ground in support of the decree which has not been mentioned by the learned Subordinate Judge. His contention is that the effect of the subsequent litigation of 1925 was to create a new bar of res judicata against the defendant. On 1st August 1923, Bhajja Singh filed a suit for partition. In para. 3 of his plaint he clearly stated that the ancestor of the parties had made a waqf of a portion of the zamindari property which was the subject-matter of dispute in the suit of 1922, and the matter terminated in an award, and that at that time there was no dispute in respect thereof. The lists appended to the plaint as printed in pp. 127 and 128 show that the dedicated property was excluded from the plaint. In the written statement that was filed by Narain Singh, all the allegations contained in the plaint were not admitted but the last para. 12 shows that the defendant did not want to raise any controversy with regard to the plaintiff's allegations relating to this waqf property. He stated that the contesting defendant was taking other proceedings in respect thereof. The award which is printed on p. 141 does not show that the plaint was at all in controversy between the parties. It goes on to say that certain villages which are named are sought to be partitioned and then states :

"the remaining property, viz., some villages were personally acquired by Thakur Sukha Singh, the ancestor of the parties, and he had full power to transfer them in every way. He had dedicated the said villages to Sri Thakurji and Mahadeoji installed in the temple in the village Sabalpur. The parties should think it their duty to serve Sri Thakurji and Mahadeoji and they should get the temple repaired as soon as possible and this will be a source of benefit to the soul of their ancestor."

(1) [1902] 29 Cal. 167=29 I. A. 51=6 C.W.N. 226=8 Sar. 154 (P.C.).

(2) [1914] 36 All. 69=21 I.C. 989=12 A.L.J. 57.

The learned advocate for the respondent contends before us that this amounts to a fresh finding in favour of the validity of the waqf and therefore supersedes the previous decree. We are unable to accept this argument. The property was not in dispute in the suit, and the parties had not called upon the arbitrators to adjudicate upon their respective claims in respect of such property. The reference to the dedication which by the way neither names the villages specifically, nor mentions the date of the deed, was by way of expressing a pious wish that the parties should think it their duty to serve their family deities and repair the temple. Furthermore, if this passage were to be taken strictly literally, it reaffirmed the right of both the parties to serve their deities and repair the temple, whereas it is the plaintiff's case now that he alone has the exclusive right to do so. In our opinion this stray remark which was not incorporated in the operative portion of the award does not amount to a fresh adjudication which would supersede the previous decree.

The last point urged before us is that in view of the fact that Bhajja Singh is dead, his son Madan Mohan cannot take advantage of the arbitration award of 1922. We think that there is no force in this contention. The arbitrators did remark that Madan Mohan was represented by his guardian and father Bhajja Singh, who was there to protect his right. Madan Mohan is not trying to go behind the decree. Bhajja Singh, his father, certainly represented him. It seems to us that the present plaintiff Narain Singh who was himself a party to the previous decree cannot avoid it by saying that Madan Mohan might have repudiated the decree although he is prepared now to accept it. As regards the binding nature of the decree on the sons and representatives of the parties to the suit there are clear recitals in the award and the lists prepared by the parties which were incorporated in it. We are accordingly of opinion that the learned Judge was wrong in holding that the plaintiff can treat the previous decree of 1922 as a nullity and recover possession of the property which was given to Madan Mohan's father Bhajja Singh in 1922. We accordingly allow this appeal and setting aside the decree of the Court below dismiss the plaintiff's suit with costs.

S.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 525

MUKERJI AND NIAMATULLAH, JJ.

Rohan Lal—Applicant—Appellant.

v.

Collector of Etah— Opposite Party—Respondent.

First Appeal No. 141 of 1926, Decided on 20th February 1929, against decree of Addl. Dist. Judge, Aligarh, D/- 23rd December 1925.

(a) Land Acquisition Act, S. 23, Sub-S. (1) —Market value of land determines compensation.

In determining the amount of compensation the Court should take into consideration the market value of land at the date of the publication of the notification, that value being the chief index of amount of compensation irrespective of any consideration of how the land is held : 40 *All.* 367, *Diss. from.* ; 42 *Mad.* 644, *Rel. on.* [P 526 C 2]

(b) Land Acquisition Act, S. 21— Division of compensation between landlord and the occupancy tenant is 10 to 6 annas in a rupee —Only landlord and not tenant objecting— Landlord is entitled to only proportionate share in increase.

As to the basis of apportionment of compensation between a landlord and an occupancy tenant the fair estimate is that in a rupee the landlord should have 10 annas share and the occupancy tenant 6 annas share. After award, if the landlord had objected to it and the tenant had not, then the landlord will be entitled to his porportionate share of the compensation and not the whole.

[P 526 C 1 ; P 527 C 2]

K N. Katju, Panna Lal and *Misri Lal Chaturvedi*—for Appellant.

U. S. Bajpai and *Iqbal Ahmad*—for Respondent.

Judgment.—This appeal arises out of proceedings taken for acquisition of land in the district of Etah. The area acquired is small and the learned District Judge has found that the total market value of the land is Rs. 1,600. The zamindar of the land, which was in the possession of occupancy tenants, when it was acquired was the only contesting party before the District Judge. The tenants were given a small amount of money as compensation and they did not choose to contest the Collector's award.

The learned District Judge, having found that Rs. 1,600 was the market value of the acquired plot proceeded to

find out what would be the fair share for the zamindar's interest. He found that the tenant paid a rent of Rs. 8-13 per annum to the landlord and the landlord paid Rs. 3 as the land revenue. The learned Judge, accordingly, found that Rs. 5-13 a year or roughly Rs. 6 was the zamindar's income from the property. The patwari stated before the learned Judge that a sub-tenant of the occupancy tenants was likely to pay a rent of between Rs. 20 and Rs. 25. The learned Judge then expressed the opinion that having regard to the situation of the plot and the possibility of growing tobacco on it, the tenant was likely to make Rs. 40 a year out of the land. Thus the learned Judge thought that the tenant could make 7 times the profit which the zamindar could make out of the land. Proceeding on this basis, the Judge thought that the zamindar's income from the property was 1/8th of the total income and that, therefore, he should assess the value of the zamindar's interest at 1/8th of the total value. He accordingly directed that a sum of Rs. 200 be paid to the appellant before us, the zamindar.

Although one of the grounds of appeal before us states that the market value of the land is not less than Rs. 2,400, the learned counsel has accepted Rs. 1,600 as the right market value for the purposes of his appeal. His contention is that the learned Judge has awarded to his client a grossly inadequate amount as compensation. We have to see if this contention is substantially right.

As regards the contention of the learned counsel that the occupancy tenants not having chosen to contest the award, the zamindar should get the entire market value of the land minus the amount paid to the occupancy tenants, it is sufficient to say that this contention is not sound. The fact that the occupancy tenants have accepted the compensation awarded to them amounts to this that there is no contest as between the Collector and the occupancy tenants. If by the award the Government happens to be the gainer, that gain is entirely the Government's and the zamindar has no right to share in that gain. If the compensation awarded to the tenants had been too large, the zamindar would not have been precluded from saying that whatever the Collector might choose to give to the tenants, he the zamindar, was entitled to a fair compensation for himself. On principle, therefore, the appellant cannot get anything more than what fairly should be awarded to him. This view would find support from the language of S. 21, Land Acquisition Act which runs as follows ;

"The scope of the enquiry in every such proceeding (before the District Judge) shall be restricted to a consideration of the interests of the persons affected by the objection."

Coming now to the compensation to be given to the appellant, the learned District Judge has relied on the case of *L. W. Orde* v. *Secretary of State* (1), In that case, two learned Judges of this Court held that where land is occupied by an occupancy tenant the owner is not entitled to anything more than the capitalised value of the rent income from the plot. We have great difficulty in accepting the view of the learned Judges of this Court. The right principle to be adopted in awarding compensation and in apportioning the same seems to be this.

Under S. 23, sub-S. (1), Land Acquisition Act, in determining the amount of compensation the Court should take into consideration the market value of the land at the date of the publication of the notification. This would mean that the value of the land should be found out irrespective of the question how it is held. The land may be held by a permanent lessee with the result that neither the landlord nor the lessee alone represents the whole estate. In such circumstances, the landlord or the lessee alone may not possess the absolute right to dispose of the entire body of interest in the land. But that is no reason why the compensation to be awarded for the same land should be different in different circumstances. If a land is worth, say Rs. 2,000 in open market its value would remain Rs. 2,000 whether the landlord holds it in his own possession without encumbrances or whether he has let it out permanently to some people. What therefore has to be done is first to find out what is the market value of the land itself, irrespective of any consideration as to how it is held. The next step would be to apportion the value among the several parties holding distinct and separate interests in the land. If, for

(1) [1918] 40 All. 367=44 I. C. 923=16 A. L. J. 301.

example, there be 4 co-owners and no tenant, the value would be divided equally among the 4 co-owners. If there be, say a landlord and a tenant, the value will have to be apportioned between the two according to their respective interests. This opinion of ours finds support in the case of *Raja of Pittapuram* v. *Revenue Divisional Officer, Cocanada* (2).

The next question is how is the compensation to be divided between the landlord and the occupancy tenant? In our opinion, the learned Judge in arriving at the figure Rs. 40 as the profit of the tenant, has omitted to consider the fact that the tenant's income includes the value of his own labour and the value of some capital, in the way of purchasing seed, employing labour and paying for irrigation costs. A tenant who tills his own soil gets the crop not only as the value of his right to hold the land but also as the value of his labour and capital spent. Usually the labour is not only his own labour but also the labour of his whole family and also possibly hired labour. Further, in assessing the proportionate value of occupancy rights, several matters have to be borne in mind. They are these facts, viz.:

(1) that an occupancy tenant's rent is liable to enhancement although within statutory limits;

(2) that the tenant is unable to transfer his rights;

(3) that his right even to sublet is very much limited;

(4) that in the case of rent falling into arrears, from whatever reason, he is liable to be ejected;

(5) that in the case of the tenant dying without one of the statutory heirs, the tenancy would lapse to the landlord. We might add that the number of statutory heirs is small and the chances of the occupancy rights lapsing are not at all remote. Having regard to all the circumstances, although a tenant may, for the time being, make out of the land more than the landlord can make out of it, the actual gain of the tenant is less than that of the landlord. The landlord may easily borrow money on the security of the property and at any time may sell the property outright. The minerals under the land belong to the landlord and not to the occupancy tenant, whose rights are confined to the tilling of the upper soil. If any mineral is discovered under the soil, it would be the landlord who would be entitled to it and not the occupancy tenant. In our opinion, therefore, there is a substantial disparity between the rights of the landlord and the rights of an occupancy tenant, in these provinces.

But when all is said, it remains still difficult to give a money value to the respective rights of the zamindar and the occupancy tenant. But howsoever we may decide, we have to assign somewhat arbitrary value to the two rights. Having given the case our best consideration, we think that it is a fair estimate of the respective rights to say that, in a rupee, the landlord's share ought to be ten annas and the occupany tenant's right six annas.

We hold that the appellant is entitled to Rs. 1,000 as the proper share of the compensation money found by the learned Judge. We allow the appeal, modify the decree of the Court below and direct that a sum of Rs. 1,000 be given to the appellant as the compensation payable to him. The appellant will have one-half of his costs in this Court and the Court below and the respondent will pay his own costs throughout.

P.R./R.K. *Decree modified.*

(2) [1919] 42 Mad. 644=51 I. C. 656=36 M. L. J. 455.

A. I. R. 1929 Allahabad 527

BENNET, J.

Sita Ram—Defendant—Appellant.

v.

Har Sahai—Plaintiff—Respondent.

Second Appeal No. 312 of 1929, Decided on 9th April 1929, against decree of Sub-Judge, Etawah, D/- 21st Nov. 1928.

Civil P. C., S. 144—Nothing in S. 144 can affect decree in another suit in respect of same property between the same parties.

H brought a suit against *S* for possession of houses Nos. 1, 2, 3 and 4 and a nibhera. a decree for possession of houses Nos. 3 and 4 and nibhera was granted to *H*. In second appeal it was decided that *H* was entitled only to house No. 4 and nibhera. In another suit, brought by *S* against *H* for partition, houses Nos. 1, 2 and 3 were given to *H*. Ignoring this decree, *S* applied for restitution of possession of houses Nos. 1, 2, 3 under S. 144 on the strength of the decree in the second appeal and urged that as both decrees became final and operated as res

judicata, the latter decree must prevail over the former.

Held : that no question of res judicata arose and that the matter was governed by S. 144 under which the applicant is to be placed in a position which he would have occupied but for such decree or such part thereof as has been varied or reversed. It does not lay down that where a decree has been varied or reversed the parties are to be placed in the same position in which they were before the suit was brought nor does it direct that other proceedings such as suits are to be ignored. As under the decree in the partition suit, possession of houses Nos. 1, 2 and 3 was awarded to *H*, *S* could not claim restitution in respect of the said houses merely on the ground that the decree in the suit had been varied in the second appeal : *A. I. R.* 1927 *All.* 717, *Dist.* [P 528 C 2]

Haribans Sahai—for Appellant.

Judgment.—This is a second appeal by one Sita Ram, whose application for restitution to possession of certain houses Nos. 1, 2 and 3 has been refused by the two lower civil Courts. The facts are simple and were not in dispute. Har Sahai the respondent, brought a suit No. 561 of 1921 in the Court of the Munsif against Sita Ram appellant for possession of houses Nos. 1, 2 and 3, another house No. 4 and a nibehra. Originally the suit was decreed ex parte then restored and decree for possession of houses Nos. 3 and 4 and a nibehra was granted to Har Sahai. Ultimately after an appeal and a second appeal it was decided that Har Sahai was entitled only to house No. 4 and the nibehra. Sita Ram has, therefore, applied under S' 144 Civil P. C., for restitution of possession of houses Nos. 1, 2 and 3. In the ordinary course it is clear that he would be entitled to restitution of these three houses under this section. But it is admitted that the appellant Sita Ram filed a partition suit, No. 18 of 1921, in the Court of the Subordinate Judge against the respondent. In the decree of this suit houses 1, 2 and 3 were given to Har Sahai respondent. It is admitted that this decree has become final. The only question before the Court is what is the effect of the decree in the partition suit No. 18 of 1921 on the present application. The lower Courts have gone out of their way to consider this matter from the point of view of res judicata, and the learned counsel for the appellant has made reference to a ruling *Amar Singh* v. *Govind Ram* (1) to the effect that where two decrees operate as res judicata the latter decree must prevail over the former because it shuts out consideration of the former. These matters, however, do not arise in the present case, nor do I consider that any question of res judicata arises. It is sufficient to refer to the language of S. 144 itself. That section states:

"where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed."

Now the section lays down that where the decree has been varied or reversed, the applicant is to be placed in a position which he would have occupied but for such decree or part thereof as has been varied or reversed. In the present case, therefore, Sita Ram is to be placed in the same position which he would have occupied if the suit No. 561 of 1921 had never been brought. If that suit had never been brought, the partition suit No. 18 of 1921 would still have transferred possession of houses 1, 2 and 3 to Har Sahai. Nothing under S. 144 can affect the decree in partition suit No. 18 of 1921, because a decree in that suit has not been varied or reversed. Sita Ram therefore is not entitled to keep possession of these houses 1, 2 and 3. He is only entitled to be placed in the same position which he would have occupied if there had been no suit No. 561 of 1921, and that position is that he would have no possession of these houses because of suit No. 18 of 1921. The mistake into which the learned counsel and the lower Courts have fallen is to omit to read S. 144 and they have assumed that it lays down something to the effect that where a decree has been varied or reversed the parties are to be placed in the same position in which they were before the suit was brought. There is no such provision in S. 144, and it does not date back to the time when the suit was brought, nor does it direct that other proceedings such as suits are to be ingored, Accordingly I find that there is no merit whatever in the present appeal and I dismiss it under O. 41, R. 11.

K.N./R.K. *Appeal dismissed.*

(1) A, I. R. 1927 All. 717=49 All. 606.

* A. I. R. 1929 Allahabad 529

SULAIMAN AND SEN, JJ.

Aftab Ali Khan and *others*—Plaintiffs—Appellants.

v.

Akbar Ali Khan and *others*—Defendants—Respondents.

First Appeal No. 346 of 1927, Decided on 4th March 1929, against decree of First Sub-Judge, Saharanpur, D/- 22nd April 1927.

*** Limitation Act, Art. 120 — Suit for declaration of title by owner, against whom adverse entry is made in khewat more than six years ago, is not necessarily barred because any fresh invasion of owner's right may give a new cause of action.**

A mere entry of names in the khewat does not debar the person, against whom the entry is made, for all time to come from suing for a declaration, if once six years are allowed to expire. Any fresh act which can amount to a fresh invasion of the owner's right or a fresh attempt to cast a cloud on his title would create a new cause of action in his favour, and his suit for declaration cannot be dismissed on the mere ground that the cause of action first accrued more than six years ago when an adverse entry was made against him. (1898) *A. W. N.* 215; 10 *A. L. J.* 413; 11 *A. L. J.* 877; 36 *All.* 492 and 17 *A. L. J.* 588, *Rel. on*; 31 *All* 9, *Dist.* [P 530 C 2]

(b) Limitation Act, Art. 120—Scope.

Article 120 applies to all declaratory suits : 20 *All.* 35, *Foll.* [P 531 C 1]

Mushtaq Ahmad—for Appellants.

A. M. Khwaja and *Mahmudullah*—for Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit for a declaration that the plaintiffs are the owners entitled to four out of ten sihams in certain village properties and house property. The facts mentioned in the plaint were that the property originally belonged to Mt. Hussain Bibi who is shown in the pedigree at p. 8, that on her death the heirs to her estate were her daughters and certain collaterals who are the ancestors of the present plaintiffs. In her lifetime she had mortgaged this property with possession to certain mortgagees whose descendants are not impleaded as such. Paras. 8 and 9 of the plaint stated that on account of the wrong entries in the khewat, only the names of defendants 1 to 4 (who are descendants of Mt. Sakina), stand recorded as mortgagors against the property mortgaged and the names of the plaintiffs are not recorded; and that although the entries are null and void and ineffectual as against the rights of the plaintiffs yet the defendants were asked to rectify them because their existence was contrary to fact and not proper, but they did not pay any heed. In para. 10 of the plaint it was alleged that the cause of action accrued in April 1926 when the defendants refused for the last time. In para. 4 it was stated that the ancestors of defendants 1 to 4 had died about six years ago. Reading these paragraphs together it is clear that the plaintiffs' case was that the names of defendants 1 to 4 were wrongly entered in the revenue papers as the mortgagors about six years ago, and although the entries were not binding on the plaintiffs, the defendants were asked to rectify them but they did not pay any heed and refused to do so. The plaintiffs wanted a declaration of their right against the defendants.

In the written statements which were filed it was stated that after Mt. Husaini Begam the name of her daughter only was recorded about fifty years ago and that of no one else was ever recorded. The defendants' case was that Mt. Husaini had gifted the property to her daughter. It was further pleaded that the claim was barred by limitation and also pleaded that the suit had been brought without any cause of action and ought to be dismissed on that very ground. It was also stated that a declaratory suit had been filed without any necessity. There were a number of other pleas which it is not necessary to mention.

The learned Subordinate Judge framed no less than eight issues but ultimately dismissed the suit on the sole ground that the suit for declaration was barred by limitation. The basis of the ground is that the name of Mt. Sakina Bibi was entered in the revenue papers about 1878 and the cause of action in favour of the plaintiffs' ancestors arose at that time and that there has been no fresh cause of action since then and a subsequent refusal on the defendants' part cannot create a new cause of action. The learned Subordinate Judge has placed reliance on the case of *Akbar Khan* v. *Turaban* (1) and has considered that that case is not distinguishable. The suit has accordingly been dismissed on the ground of limitation only.

(1) [1909] 31 All. 9=5 A. L. J. 637=1 I. C. 557=(1908) A. W. N. 252.

We may point out at the very outset that there is nothing on the record to indicate that when the name of Mt. Sakina Bibi alone was entered in the revenue papers in 1878 there was any contest between rival claimants or any definite adjudication of their rights by the revenue Court. On the other hand, a certified copy of the report of the Naib Tahsildar indicates that the mutation of names took place on his report. Thus it was an uncontested case in which Mt. Sakina Bibi's name was entered. Another important feature which we may point out is that Mt. Sakina Bibi died long ago and the names of her heirs have been substituted from time to time. It was alleged in the plaint and not disputed in the written statements that the names of the defendants 1 to 4 were entered in the revenue papers on the death of Fazal Ali Khan which took place about six years ago. It is, however, not clear whether this happened within six years or just beyond six years.

In our opinion the learned Judge has misapplied the ruling in *Akbar Khan's* case. That was a very special case which had certain peculiar features and accordingly that case has been distinguished in numerous subsequent cases. There in 1895 the defendant's name had been entered in the revenue paper in respect of the property in dispute after contest and after the title of the plaintiff had been specifically denied. Nothing more happened except a refusal in 1903 on the part of the defendant to get the entry corrected. The learned Judges accordingly held that the cause of action accrued when there was a definite denial by the defendant in 1895 and his subsequent refusal to get the the entry corrected which entry he had himself procured, was a mere continuance of the original cause of action and not a fresh denial of title. The learned Judges took care to point out that there may be cases where a fresh invasion of the plaintiff's right would give him a fresh cause of action. But they held that in the peculiar circumstances of that case there was no such fresh invasion of the the right. Of course, a mere refusal to get the entries corrected is not necessarily a clear denial of title. It does not amount to omitting to do a thing which a man is bound to do, nor even doing a thing which he is not entitled to do.

That a mere entry of names does not debar the person against whom the entry is made for all time to come from suing for a declaration, if once six years are allowed to expire, is quite clear on the authorities. Any new invasion of rights which amounts to a fresh denial of title undoubtedly confers on the owner in possession a fresh right to sue. In the case of *Ilahi Bakhsh* v. *Harnam Singh* (2) a fresh application to the Municipal Board was considered sufficient to give a fresh cause of action. In the case of *Sheopher Singh* v. *Deonarain Singh* (3) a fresh suit for profits after the mutation of names was held to confer a fresh cause of action. In the case of *Rahmatulah* v. *Shamsuddin* (4) fresh partition proceedings in the revenue Court were held to constitute a fresh cause of action in favour of the plaintiffs against whom adverse entries had been made at the previous revision of settlement. In the case of *Allah Jilao* v. *Umrao Husain* (5) a fresh order for assessment of rent was held to give the plaintiffs a fresh cause of action in spite of the previous refusal to have the village papers corrected. In the case of *Kali Prasad* v. *Harbans Misir* (6) a private transfer subsequent lo the entry of names was treated as creating a fresh cause of action in favour of the plaintiffs. It will thus be seen that any fresh act on the part of the defendants which can amount to a fresh invasion of the plaintiffs' right or a fresh attempt to cast a cloud on his title would create a new cause of action in his favour, and his suit for declaration cannot be dismissed on the mere ground that the cause of action first accrued more than six years ago when an adverse entry was made against him. Indeed it may be argued whether an entry in an uncontested case, standing by itself necessarily creates a cause of action for a suit by one cosharer against another cosharer.

In the present case the learned Subordinate Judge has overlooked the fact that

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(2) [1898] A. W. N. 215.
(3) [1912] 10 A. L. J. 413=17 I. C. 675.
(4) [1913] 11 A. L. J. 877=21 I. C. 609.
(5) [1914] 36 All. 492=24 I. C. 535=12 A. L. J. 810.
(6) [1919] 17 A. L. J. 538=50 I. C. 767.

the plaintiffs did not in the plaint allege the entry of Mt. Sakina Bibi's name to be the initial basis of the cause of action in their favour. The rule in *Akbar Khan's* case cannot undoubtedly be extended to fresh mutations of names which may take place in favour of heirs in subsequent years. We may further point out that one of the properties in dispute is a house in the city of Saharanpur and the ruling in *Akbar Khan's* case can by no means apply to it. The plaintiffs in the present case alleged their cause of action to have arisen from the wrong entries of the names of the contesting defendants 1 to 4 and not their ancestor Mt. Sakina Bibi. It is not clear from the record whether this occurred within six years of the suit, and the present action, therefore, cannot be thrown out simply on the ground of limitation. We may note that we cannot accept the argument of the learned advocate for the appellants, that no rule of limitation applies to a declaratory suit where the defendants are interested in denying the plaintiffs' right within the meaning of S. 42, Specific Relief Act. This point in our opinion has been set at rest by the Full Bench decision in *Francis Legge* v. *Ram Baran Singh* (7). Art. 120 undoubtedly applies to all declaratory suits.

We are, however, of opinion that this is not a fit case in which a declaratory decree should be granted to the plaintiffs. Our reasons are as follows : An alleged wrong entry was first made in favour of Mt. Sakina Bibi about 1878. For nearly 40 years the plaintiffs and their ancestors have remained idle and not sought any relief. We may note that it is admitted in para. 2 of the plaint that the actual possession is with the mortgagee who is not impleaded in the suit as such. Any decree that is passed in favour of the plaintiffs would not bind the heirs of the mortgagee who would still be entitled to challenge the plaintiffs' right. Thus the decree cannot be necessarily effective. Sixty years are about to expire and the plaintiffs would have to bring a suit for redemption very soon. In that suit for redemption the whole question of title can be gone into in a manner which would bind all the parties who are interested in the property. Furthermore, we find that one of the defendants Ahmad Ali Khan was out of British India when the suit was filed or was pending. The summons was sent to him by post to Arabia and he received it after the date fixed for the appearance and stated that he should be allowed time to come back to India. By the time he could arrive the suit was actually dismissed. If, therefore, we were now to allow the plaintiffs to amend their plaint, as asked for by the counsel, we would have to give an opportunity to the various defendants to file supplementary written statements and the case would have to go back to the Court of first instance with directions to admit fresh evidence if tendered. This can more conveniently be done in a fresh suit in which the mortgagee also is impleaded. Having regard to these circumstances we are of opinion that this is not a fit case in which we should exercise our discretion under S. 42, Specific Relief Act, and grant the plaintiffs the declaration asked for, even assuming that they are entitled to such a declaration.

The parties are not agreed as to the extent of the properties mortgaged and the properties are still in the possession of the mortgagee. We express no opinion on this matter which will have to be fought out hereafter. Nor do we consider it necessary to go into the question of title, gift or adverse possession. We accordingly dismiss this appeal. In view of the fact that we have confirmed the decree of the Court below on a different ground we direct that the plaintiffs should bear their own costs and pay the costs of the defendants in the Court below. The parties should bear their own costs of this appeal.

S.N./R.K. *Appeal dismissed.*

(7) [1897] 20 All. 35=(1897) A. W. N. 193 (F.B.).

A. I. R. 1929 Allahabad 531

SULAIMAN AND KENDALL, JJ.

Rameshar Prasad Lal—Plaintiff—Appellant.

v.

Ghisiawan Prasad and *others*—Defendants—Respondents.

First Appeal No. 407 of 1926, Decided on 7th March 1929, against decree of Addl. Sub-Judge, Basti, D/- 30-4-1926.

(a) Agra Pre-emption Act, S. 5 (a)—Entry in wajib-ul-arz meaning "at transfer of one cosharer's property other cosharers have right of pre-emption according to rights and usages of religion"—Although word "religion" is ambiguous, yet entry could be interpreted as laying down rule of pre-emption according to Mahomedan Law and so could not be taken out of S. 5 (a).

There was an entry in the wajib-ul-arz which meant that "at the time of transfer of the property of any cosharer, other cosharers have a right of pre-emption according to the rights and usage of religion:"

Held: that although the word "religion" was ambiguous yet the entry could be interpreted as laying down a rule of pre-emption according to the Mahomedan law and was not possible to be taken out of the language of S. 5 (a), and must, therefore, be held to be conclusive evidence of the right of pre-emption. [P 533 C 1]

(b) Evidence Act, S. 115—Cosharer intending to sell his share—Other cosharer refusing to purchase for want of money, but not showing intention to reserve his right to pre-empt—Vendee induced to purchase—Cosharer's refusal to purchase amounted to absolute refusal and he was estopped from claiming pre-emption, although no notice was given as required by Agra Pre-emption Act, S. 14.

Sections 14 and 15 are not exhaustive; what they mean is that if a notice as prescribed in S. 14 has been given, a mere failure to reply would extinguish the right. But it does not follow that if no such notice has been given, there can never be a case in which there may be a similar estoppel. [P 534 C 1, 2]

A cosharer intended to sell his share. Other cosharer refused to purchase the share, on the ground that he had no money to make the purchase, but without showing his intention to reserve his right to pre-empt subsequently, and thereby induced the vendee to purchase the share on the belief that this other cosharer had waived his right to pre-empt. In a suit for pre-emption by the other cosharer:

Held: that there was absolute refusal to purchase the share and he would now be estopped from going behind his refusal and claiming a right to pre-empt although no notice was given under S. 14, Agra Pre-emption Act: 6 *All.* 463; 27 *All.* 670; and 5 *A. L. J.* 331, *not Appro.*; 39 *All.* 127; 15 *A. L. J.* 315; 40 *All.* 690, *Dist.*: *A. I. R.* 1926 *All.* 467, *Rel. on.* [P 534 C 2]

N. P. Asthana—for Appellant.

K. N. Katju and *Harnandan Prasad*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for pre-emption. The property in dispute was sold under a sale-deed dated 18th March 1924 for Rs. 30,000. The plaintiff claimed that under S. 5, Agra Pre-emption Act, which governs this transaction he had a right of pre-emption. The main defence to the suit was a denial of any right of pre-emption in that village, and also a plea that the plaintiff was estopped from pre-empting the property on account of a previous refusal. The learned Subordinate Judge has found both the points against the plaintiff and has dismissed the suit.

We are not prepared to accept the view of the Court below that there is no right of pre emption in this village. In the wajib-ul-arz of 1292-F, (1885) under the heading "custom of pre-emption" we have an entry which has been translated by the official translator as follows:

"At the time of transfer of the property of any cosharer other cosharers have a right of pre-emption according to the rule and custom."

This translation omits one word which has been read by the learned Subordinate Judge as "mazhab" meaning religion. The entry would then read "according to the rights and usage of religion." The learned advocate for the appellant says that the word is "dehi," i. e., village, and says that the rights and usage of the village are referred to. We have not the original before us, but only a certified copy. If the word is "village" then the learned advocate for the respondents concedes that the case would come directly under S. 5 of the Act. Assuming that the word is religion there is undoubtedly a record of a right of pre-emption accruing on a transfer according to the rights and usage of religion.

Section 5 provides that if the village records a custom, contract or declaration recognizing, conferring or declaring a right of pre-emption expressly or by necessary implication, whatever its extent and in whatever form it may be expressed, or imposing on a cosharer desiring to transfer his interest in land an obligation to offer it to other cosharers or forbidding cosharers to transfer their interest in land to persons other than cosharers, the right shall be deemed to exist and under sub-Cl. (2) such a record is conclusive evidence of the existence of such right. The section is thus mandatory. The object of the section is not to find out the particulars or the incidents of the rule of pre-emption, but merely to lay down the test whether a rule of pre-emption should be

held to be applicable to the village or not. Once a rule of pre-emption prevails, that rule must be the one embodied in S. 12. It is, therefore, wholly immaterial for the purpose of the applicability of S. 5 to enquire into the constitution of the village or the class of cosharers which existed at the time when the wajib-ul-arz was prepared. If the wajib-ul-arz does record a declaration recognizing a right of pre-emption, however limited in its scope, the entry is conclusive. Of course if the entry in a wajib-ul-arz expressly declares that no right of pre-emption exists or by necessary implication it negatives the existence of such a right it would be difficult to say that there is a right. On the other hand, however vague the rule may be and in whatever imperfect form it may be recorded, if it amounts to a declaration recognizing the right of pre-emption, it would fulfil the conditions required by S. 5. In the present case if the right had been confined to the rights and usage of any particular religion according to which such right could not exist, e. g., the Hindu religion or the Christian religion, there would have been a contradiction in terms and we might have been compelled to hold that the entry by necessary implication negatived the existence of such a right. But the rule is not limited in that way. In these provinces the rule of pre-emption according to the Mahomedan law is quite common. The Mahomedan religion is at least one religion according to which a right of pre-emption can be exercised. The entry therefore is not absolutely a contradiction in terms, and although it is ambiguous it is capable of a meaning, viz: to lay down a rule of pre-emption according to the Mahomedan law. We therefore think that it is impossible to take this case out of the language in sub-Cl. (a), S. 5, and we must hold that this village does record a declaration recognising a right of pre-emption. That being so it is a conclusive proof of the existence of a right of pre-emption according to the rule laid down in S. 12 of the Act. The defendant vendee is admittedly a stranger and the plaintiff would therefore have a right of pre-emption if there were no bar of estoppel.

We, however, agree with the Court below that in this particular case the plaintiff is estopped from pre-empting this property. The refusal of the plaintiff is based principally on the statement of Mr. Stern, who was examined on commission. The answers to the interrogatories served on him are to be found on pp. 8 to 17 of the supplementary book. He has no longer any interest left in this property, and the learned Judge has believed his statement in spite of the plaintiff's denial. We therefore accept the statement of Mr. Stern as regards the circumstances preceding the sale. According to him there was a contract of sale of the village in various shares with different purchasers. Some of these made the purchases but others got further indulgence from time to time. The plaintiff Rameshar Prasad was one of these and had purchased a one-anna share. Another prospective purchaser was Kishen Prasad Singh who wanted to take three annas six pies. Kishen Prasad Singh had been given time which had been extended by four days more. On the fourth day, i. e. the 4th March 1924, Kishen Prasad along with Rameshar Prasad (plaintiff) went to Mr. Stern and asked for further time, but Mr. Stern refused to give any more time. Then he asked Rameshar Prasad to purchase that three and a half annas or any portion of it at the same price which was settled with Kishen Prasad but Kishen Prasad answered that with great difficulty he managed to borrow money for purchasing one anna share and that it was impossible for him to raise any further sum to purchase another share. It was after this refusal that Mr. Stern negotiated with Ghisiawan Pandey and Mahadeo Pandey the vendees and accepted their earnest money on 6th March 1924. The sale actually took place on 18th March. We accept this statement as substantially embodying what actually happened.

The learned advocate for the plaintiff contends that there can be no absolute refusal so as to operate as an estoppel unless there first has been a definite contract settled with a definite vendee for a definite price of the sale of a definite property and that no amount of refusal before such a complete contract can deprive the pre-emptor of his right of pre-emption. He strongly relies on a number of earlier cases of this Court which no doubt lay down the rule in those broad

terms. We may refer to the cases of *Subhagi* v. *Muhammad Ishaq* (1), *Kanhai Lal* v. *Kalka Prasad* (2), *Munawar Husain* v. *Khadim Ali* (3) and other cases referred to therein with great respect, we would say that the rule was laid down too broadly in these cases. There can be an estoppel under S. 115, Evidence Act, if the refusal of the plaintiff has prejudiced the pre-emptor or the vendee and has induced them to act upon such representation and to compromise their position. We do not see why there should not be a personal estoppel against the plaintiff on account of his own previous conduct and unambiguous declaration.

The learned advocate for the respondents has invited our attention to subsequent rulings of this Court where it has been laid down that in cases where the custom requires an offer to be made to the cosharers in the first instance such a custom is complied with as soon as the offer has been made even though no definite contract with a prospective purchaser has yet been made. We may refer to the cases of *Naunihal Singh* v. *Ram Ratan* (4), *Nathi Lal* v. *Dhani Ram* (5) and *Shamsher Singh* v. *Peare Datt* (6). But these cases turned on the particular language of the wajib-ul-arz which recorded the custom. Of course, if a custom merely requires that an offer should be made to the cosharers before a share is sold, the prospective vendor fulfils the condition by making the offer and obtaining refusal. Under such a custom it is no part of his duty to go back once more to the cosharers after he has entered into a contract to restrain them.

The present case is governed by the Agra Pre-emption Act. Ss. 14 and 15 lay down a rule under which notice can be given to cosharers and cases where the right of pre-emption may be extinguished. S. 14, sub-Cl. (2) clearly provides that the notice should describe the property to be sold and the name of the vendee and the price settled. But in our opinion these two sections are not exhaustive and do not lay down the only rule of estoppel with can operate in pre-emption cases. That the section is not exhaustive has been held in the case of *Ranjit Singh* v. *Bhagwati Singh* (7). With that view we agree. If a notice as prescribed in S. 14 has been given, a mere failure to reply would extinguish the right ; but it does not follow that if no such notice has been given, there can never be a case in which there may be a similar estoppel.

In our opinion every case must be considered on its own facts. A mere refusal to purchase need not in every case amount to a waiver of the right of the pre-emption. A cosharer may not be prepared to take the sale direct, but may well be prepared to pre-empt the property in case it is sold to a stranger. On the other hand a waiver of the right of pre-emption can also be inferred from a clear, unambiguous and absolute refusal to purchase the property in any event. It seems to us that if a cosharer wishes to preserve his right of pre-emption in case of a sale he should not merely refuse to purchase the property on the ground that he had no means to purchase it, but he should make it clear that he is reserving his right of pre-emption. He cannot be allowed to use unambiguous language indicating an absolute refusal and yet make a mental reservation in his favour to the prejudice of the vendor.

In the present case we are satisfied that the statement made by the plaintiff Rameshar Prasad to Mt. Stern under the special circumstances of this case and having regard to what had happened previously, amounted to an absolute refusal on his part to take the property on the ground that it was impossible for him to raise the money. This flat refusal induced Mr. Stern to enter into negotiations with the vendees, who acting upon such representation believed that Rameshar Prasad had waived his right of pre-emption and that there was no longer any fear of such a suit. In our opinion the plaintiff is now estopped from going behind his refusal and claiming a right to pre-empt the property. We accordingly uphold the decree of the Court below and dismiss this appeal with costs.

S.N./R.K. *Decree upheld.*

(1) [1884] 6 All. 463=(1884) A.W.N. 174.
(2) [1905] 27 All. 670=2 A.L.J. 390=(1905) A.W.N. 149.
(3) [1908] 5 A.L.J. 331=(1908) A.W.N. 93.
(4) [1916] 39 All. 127=37 I.C. 511=14 A.L.J. 1138.
(5) [1917] 15 A.L.J. 315=39 I.C. 637.
(6) [1918] 40 All. 690=46 I.C. 761=16 A.L.J. 683.
(7) A.I.R. 1926 All. 467=48 All. 491.

A. I. R. 1929 Allahabad 535

BANERJI AND SEN, JJ.

Bikram Singh and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal .No. 1015 of 1928, Decided on 7th February 1929, against order of Sess. Judge. Budaun, D/- 19th November 1928.

Penal Code, S. 304—Dispute between accused and another—Deceased, friend and partisan of other party, intervening—Accused, thinking him to have come to help his opponent, giving him only one blow with his kasi—Blow causing death—Offence was punishable under S. 304.

A sudden dispute arose between the accused and another person. The deceased, who was a friend and partisan of the other party, came upon the scene and the accused thinking that he came to help his opponent, gave only one blow to him with a kasi with which he was scraping grass. The blow resulted in the death of the deceased.

Held: that as the culpable homicide was caused without premeditation aud only one single blow was given, the offence was punishable only under S. 304. [P 535 C 2]

C. Ross Alston and *Ram Nama Prasad*—for Appellants.

M. Waliullah—for the Crown.

Judgment.—The two appellants Bikram Singh and Nanhey Singh have been convicted, the first under S. 302 read with S. 114, I. P. C., and the second under S. 302, I. P. C., and sentenced to transportation for life.

That Narain the deceased was injured by one blow from the instrument called kasi (Ex. 1) there can be no doubt, for the medical evidence makes it clear that the three injuries caused on Narain were very likely caused by one blow. The witnesses called on behalf of the prosecution have not been able to controvert the suggestion of the defence that only one blow was given to Narain. Having considered the whole of the evidence in the case, we have no doubt that the findings of the learned Session Judge that a fight took place between Ram Prasad and Mulaim Singh on the one side and Bikram Singh and Nanhey Singh on the other, was a correct finding.

Narain who was admittedly a friend and a partisan of Mulaim Singh came up, and it may well be that the accused mistook Narain as having come up to support the side of Ram Prasad and Mulaim Singh. Nanhey Singh gave one blow with the kasi which was in his hand, and as proved by the witnesses for the prosecution was used by him for scraping grass.

The evidence in the case clearly indicates that the culpable homicide was committed without any premeditation in a sudden fight, and in the heat of passion upon a sudden quarrel that had taken place on account of the water from Ram Prasad's field escaping into Bikarm's.

Although the learned Assistant Government Advocate suggests that a man who attacks another with the instrument like Ex. 1, must be deemed to have acted in a cruel and unusual manner, we are unable to accept that suggestion. It appears that only one blow was struck by the assailant, with whatever instrument happened to be in his hand, and which in this case was the kasi Ex. 1 and the fact that the assailant did not give more than one blow show in our opinion that the accused did not take any undue advantage or act in a cruel and unusual manner.

We must state that it is not suggested, on the contrary, it is admitted that there was no enmity between Narain and the accused, nor did the accused have any motive in attacking Narain. We accept the finding of the learned Sessions Judge that the attack was not a premeditated attack. In view of the above circumstances we are of opinion that the offence which the appellants committed was an offence punishable under S. 304, I. P. C. We alter the conviction of the appellants to one under S. 304, and sentence Bikram Singh to eight years' rigorous imprisonment and Nanhey Singh to three years' rigorous imprisonment. We pass a lesser sentence on Nanhey Singh by reason of the fact that he is a young man of eighteen and must have been acting under the influence of Bikram Singh, otherwise the appeal is dismissed.

S.N./R.K. *Conviction altered.*

A. I. R. 1929 Allahabad 536

SULAIMAN AND SEN, JJ.

Mirza Mal Bhagwan Das—Plaintiffs—Appellants.

v.

Rameshar and *others* — Defendants—Respondents.

First Appeal No. 180 of 1926, Decided on 12th March 1929, against decree of Sub-Judge, Jaunpur, D/- 4th Jan. 1926.

(a) Hindu Law—Joint family—Where one member enters into partnership with strangers, there is no presumption that he does so in representative character so as to make other members liable as partners—If they are sought to be made liable, it can be done by evidence of consensus or by evidence to prove agency through which contract of partnership was brought into existence—Contract Act, S. 239.

An agreement, express or implied, is essential for the creation of partnership under the Contract Act and so there can be no presumption in law that a member of a joint Hindu family entering into a partnership with certain persons who are strangers to the family, is doing so in a representative or vicarious capacity so as to hold that the other members of the family become ipso facto liable as partners in that partnership. If a liability is sought to be fastened upon the other members of the family it can only be done either by evidence of consensus or by evidence to prove an agency through which the contract of partnership was brought into existence: 12 *A. L. J.* 79 ; *A. I. R.* 1922 *P.C.* 215 ; 39 *I. C.* 498 ; 40 *I. C.* 463 ; *A. I. R.* 1929 *P.C.* 1, *Dist.* ; 6 *M. L. W.* 417 ; 20 *M. L. T.* 565 ; *A. I. R.* 1924 *All.* 414 ; *A. I. R.* 1926 *All.* 337 ; *A. I. R.* 1929 *All.* 148 ; 25 *All.* 378 ; *A. I. R.* 1921 *All.* 306 ; 41 *Mad.* 454 ; 27 *Bom.* 157 ; 3 *B. L. R.* 144 ; 40 *Cal.* 523, *Rel. on.* [P 540 C 2]

(b) Contract Act, S. 239—Scope.

An agreement to share the loss is not a necessary ingredient of partnership under the Act. [P 504 C 1]

Mushtaq Ahmad—for Appellants.

N. P. Singh—for Respondents.

Sen, J.—This is a plaintiffs' appeal in a suit for recovery of Rs. 8,078-13-6 for the price of various articles, such as molasses, sugar, raw sugar, sesamum seed, grain, etc, supplied to the defendants together with commission and interest. The plaintiffs carry on the business of commission agency at Shahganj in the district of Jaunpur under the style of Mirza Mal Bhagwan Das. The suit was directed against nine defendants, seven of whom were sued as principals and the other two were sued as sureties.

The plaintiffs alleged that defendants 1 to 4 were members of a joint family and were originally residents of Salimabad in the Kishangarh State in the district of Ajmer, that defendants 1 to 4 were related to the other defendants, that defendants 1 to 4 in partnership with defendants 5, 6 and 7 started a firm known as Kishori Lal Bhagwati Prasad at Kishengarh for carrying on trade, that defendant 1 Roormal was the managing member of the said partnership concern, that on the recommendation of defendants 8 and 9, who carried on business in Nasirabad Cantonment, under the name of Bhaniram Chhote Lal and under a letter dated Asarh Badi 9 Sambat 1978, corresponding to 29th June 1921, and on their standing sureties thereunder, the plaintiffs supplied various articles to defendants 1 to 7, that retrogressive interest at 12 annas per cent. and commission at 8 annas per cent. were settled between the parties and that upon an account Rs. 6,586-4-3 principal and Rupees 1452-9-3 as interest were due to the plaintiffs from the defendants.

Roormal and Ram Kishen who were defendants 1 and 2 admitted the plaintiffs' claim but contended that they had purchased various goods from the plaintiffs on their own responsibility. They denied that defendants 3, 5, 6 and 7 were partners in the firm styled Kishori Lal Bhagwati Prasad. They also denied that defendants 8 and 9 ever stood sureties for them or the other defendants and they finally pleaded that Rameshar, defendant 3, who was the own brother of Roormal defendant 1 and son of Balkishen, defendant 2, had been taken in adoption by one Ladu Ram and had nothing to do with the joint family of defendants 1, 2 and 4. Defendants 5, 6 and 7 contended that they never carried on any business in partnership with defendants 1 to 4 nor were they partners in the firm styled Kishori Lal Bhagwati Prasad. They carried on business at Beawar in iron and not in sugar, grain etc.

Defendants 8 and 9 pleaded that they did not stand sureties for the other defendants in respect of any amount due to the plaintiffs nor did the plaintiffs give any goods on credit to the defendants on the recommendation of these defendants. The Court below held that the firm styled Kishori Lal Bhagwati Prasad consisted of only four partners, namely, Roormal, defendant 1, Ram Kishen, defendant 2, Bhagwati Prasad,

son of Roormal, defendant 4, and Kishori Lal, defendant 6, who was outside the family of Ram Kishan, that Rameshar defendant 3 had been adopted by Ladu Ram and did not belong to the family of Ram Kishan and was not concerned with the partnership firm, that Moti Lal, defendant 5, and Bhagwati Prasad defendant 7 were not the members of that firm and that defendants 8 and 9 had not stood sureties for the other defendants. Upon these findings, the Court below passed a decree against defendants 1, 2, 4 and 6. These defendants have submitted to the decree and have preferred no appeal.

The plaintiffs in their appeal to this Court claim a decree against Rameshar, defendant 3, Moti Lal, defendant 5 and Bhagwat Prasad defendant 7, on the allegation that they are also members of the partnership firm styled Kishori Lal Bhagwati Prasad. They challengethe finding of the lower Court that Rameshar had been adopted by Ladu Ram and that defendants 8 and were not the sureties for the other defendants. (Here the judgment discusses evidence and finding (1) family that Rameshar was adopted in another was not justified by evidence (2) ; that it was not proved that defendants 5 to 7 were members of the partnership firm, it proceeds). It is contended by the plaintiffs-appellants that Rameshar being a member of the joint family with Ram Kishan, Roormal and Bhagwati Prasad and Moti Lal and Bhagwat Prasad being members of another joint family with Kishori Lal, it must be presumed that Rameshar, Moti Lal and Bhagwat Prasad were also the members of the partnership firm, known by the name of Kishori Lal Bhagwati Prasad. A large number of authorities have been cited in support of this proposition. In *Parbati Dasi* v. *Baikuntha Nath De* (1), the question now raised was not the question in issue. All that was decided in this case was that where property was purchased in the name of a junior member of a joint Hindu family, the criterion was to consider the source from which the purchase money was paid and in the absence of evidence to prove that the junior member had any separate funds, the presumption was clear and decisive that the property was acquired by the joint family and was not the self-acquisition of the junior member. In *Bandhu Ram* v. *Chintaman Singh* (2), the same rule of law was reiterated in different words and a bond held in the name of the managing member of a joint Mitakshara Hindu family was presumed to be the joint property of the family in the absence of evidence to the contrary. Their Lordships observed in this case that where the evidence on both sides was somewhat meagre, the presumption in favour of joint ownership was not displaced. *Jagan Lal* v. *Mathura Prasad* (3) is a decision of the late Court of Judicial Commisioners of Oudh and rests upon the same rule. The ordinary presumption of the Hindu law is that property acquired, whether in the name of one member of the family or another, while the family is joint will be deemed to have been acquired from the joint funds, where a joint nucleus was shown to exist, unless it was shown to have been acquired by any member from separate earnings of his own. In *Punnu* v. *Mt. Kousa* (4) a Bench of this Court enunciated the rule in this form :

"We think that if the family was found to be joint and if it was proved that there was joint family property belonging to the family, then the onus of showing that the money advanced on these mortgages was a self-acquired property of Govind would lie upon the defendant his daughter."

This view has not been departed from in *Annamalai Chetty* v. *Subramanian Chetty* (5).

The contracting capacity of the joint family as a whole or of an individual member of the joint family for himself is not disputed. The joint family as a jural unit may enter into an agreement of partnership with a person or persons outside the family either through its managing member or by the consensus of the members constituting the joint family. Likewise a member of the joint family may enter into such a contract in his individual capacity. The nature and incidents of the partnership in each of these cases have to be determined by a consideration of the evidence produced in each case. *In Moti Ram* v. *Mohammad Abdul Jalil* (6), it was held that where a partnership consisted of numerous individuals, some of whom were en-

(1) [1914] 12 A. L. J. 79 = 22 I. C. 51=16 Bom. L. R. 101 (P.C.).

(2) A. I. R. 1922 P. C. 215.
(3) [1917] 39 I. C. 498.
(4) [1918] 40 I. C. 463.
(5) A. I. R. 1929 P.C. 1.
(6) A. I. R. 1924 All. 414=46 All. 509.

tered in the partnership deed as holding certain shares on their own behalf and in trust for certain minor members of their family, the partnership would be accountable to such individuals alone and the minor members should not for the purposes of S. 4, Companies Act, be regarded as separate partners. *In Mewa Ram* v, *Ram Gopal* (7) it was decided that where a person representing a joint Hindu family or a firm lends his name to a partnership contract, he must be deemed to be one person within S. 4, Act 7 of 1913. Sulaiman J, observed:

"If each of the executants entered into his partnership in his own individual capacity, he admittedly counts as one. On the other hand, if he entered into partnership in his representative capacity on behalf of his family, then his joint family must be considered to be a unit and must be deemed to be one person within S.4. Companies Act."

It follows from this that the matter has got to be determined in each case with reference to the evidence produced therein and that no presumption necessarily arises either as a matter of law or of logic that the other members of the family should be deemed te be partners in the firm by reason of an individual member of the family entering into a contract of partnership with strangers. The same view is endorsed by Mukerji, J, but in different words

"Where a person lends his name to a partnership contract, he is a "person" consituting the total number of partners. Behind his back there may be a joint Hindu family or he may be representing a firm consisting of himself and several other members. In either case, so far as the other partners are affected, the party joining in the contract is the only person with whom they are concerned. The share owned by the individual member may have to be, in the case of a partition in the family or dissolution of partnership, divided among certain parties. But that fact cannot affect the other members in the partnership in question. In this view the party joining constitutes only one person and not more than one person."

This observation leaves count of the fact that it may be permissible for an individual member of a joint family to enter into a partnership with persons who are strangers to the family on his own personal account and not as a member of the family at all. The matter was considered by this Court in a very recent case in *Gauri Shankar* v. *Keshab Deo* (8), and it was held that a joint family can enter into a partnership and that where a joint family carries on a trading concern there is no dissolution of partnership amongst the various members of the concern by reason of the death of its managing member.

In the case of a joint family-ancestral-trade the various members are not only coparceners but also copartners of the trading firm. A member of the family becomes a copartner by operation of law and the partnership can suffer no dissolution from the death of an individual member. The law on the subject has been thus stated by Mayne (Hindu Law and Usage, 9th edition, 398):

"Where a managing member of a joint Hindu family enters into a partnership with a stranger, the other members of the family do not ipso facto become partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Contract Act. In such a case, the family as a unit does not become a partner but only such of its members as. in fact, enter into a contractual relation with the stranger; the partnership will be governed by the Act."

The distinction between an ancestral Hindu family firm and a partnership between certain members of a joint family and strangers to that family, has been recognized and acted upon in a number of cases. In *Anant Ram* v. *Channu Lal* (9), this distinction was emphasized upon in the following terms:

"Now in dealing with this contention it is most essential to bear in mind that the firm Channu Lal, Lal Man was not an ancestral Hindu firm belonging to the members of a joint Hindu family and, as such, subject to the peculiar rules by which such a firm is governed. The relationships between the persons who established this firm was not that created by the personal law and arising out of the status of the members of a Hindu joint family but that it takes its rise from a contract between partners as defined in S. 239, Contract Act. The firm was an ordinary commercial trading firm, consisting of several persons who had agreed to combine their property and skill in the business of purchasing and selling cloth at a profit, dividing the profits among themselves in certain proportions. Whatever may be the rules which govern an encestral joint Hindu family partnership they cannot, in our opinion, affect a firm such as that which we have before us in this case."

In *Kharidar Kapra Co. Ltd.* v. *Daya Kishan* (10), a Bench of this Court endorses the view laid down by the Madras High Court in the Full Bench case of *Gangaya* v. *Venkataramiah* (11). In the

(7) A. I. R. 1926 All. 337=48 All. 395.
(8) A. I. R. 1929 All. 148.
(9) [1903] 25 All. 378=(1903) A. W. N. 76.
(10) A. I. R. 1921 All. 306=43 All. 116.
(11) [1917] 41 Mad. 454=34 M. L. J. 271=6 M. L. W. 708=43 I. C. 9=(1917) M.W.N. 805.

latter case the following rule has been enunciated:

"It is well settled that a contract of partnership between a member of joint family and a stranger does not make every member of the joint family which the managing member represents a partner so as to clothe him with all the rights and obligations of a partner as defined in S. 239, Contract Act."

In *Vadi Lal Lallubhai* v. *Shah Kushal* (12), it was held that:

"Although a person carrying on business is a coparcener in a joint family, it does not necessarily follow that all his coparceners are his partners in that business, entitled with him to its rights and responsible with him for his liabilities. The fact of partnership must be proved by evidence showing that the persons alleged to be partners have agreed to combine their property, labour or skill in the business and to share the profits and losses thereof.

The following passage from the judgment may be usefully reproduced:

"In our opinion, it is too broad a proposition of law to lay down that because a person carrying on business is a coparcener in a joint family, therefore all his coparceners are his partners in that business entitled with him to its rights and responsible with him for its liabilities:

"We are left to presume therefrom the mere fact that the plaintiff is joint with his father and his brother, but just as there is no presumption that a loan contracted by a manager of a Hindu family is for a family purpose . . . . . so there can be no presumption that business carried on by a cosharer is a family business."

The same rule was enunciated in an earlier case by Sir Lawrence Jenkins, C. J., *Baldeo Das* v. *Manekchand* (13). The point argued in this case was that the members of a joint family whose assets comprised a business are ipso facto liable for debts that may be incurred by any member of the family in any business carried on by him. His Lordship observed that this would be a most dangerous doctrine to accept:

"Possibly under the rule of Hindu law, which regulates the relations between the members of a joint family, the rest of the members may under certain circumstances claim the benefits arising from a business carried on by one of their numbers but until the business is in some way adopted as an asset of the joint family, it would be contrary to principle to fasten on the other members any liability for the debts of that business. Therefore, it must, in my opinion, be shown by the creditor who advances such a claim that the business carried on by an individual member has, by some such method as I have indicated, become the business of the family or is carried on for its benefit."

It is respectfully submitted that the above contains the true statement of the law and ought to be adopted. In *V. P. L. R. M. Palaniappa Chetty* v. *Official Assignee of Madras* (14), Abdul Rahim Officiating, C. J., is reported to have made the following observations:

"It is said that "there is a general presumption of Hindu law that a business carried on by the head of a Hindu family although started by himself for the first time, is, without anything more being shown, the joint business of the family." I do not think that there is any such absolute presumption. In order that a presumption may arise it must be shown that the other members participating in the conduct of the business or its profits or by a long course of acquiescence treated it as a business in which all the coparceners were interested."

Phillips, J., did not not share his views. He says:

"No doubt the provisions of the Indian Contract Act must be read together with the provisions of the Hindu law, for the coparcenary of a joint Hindu family is of such a nature that it must modify to a certain extent some of the provisions of the Indian Contract Act in regard to partnership but this is no ground for contending that such provisions are not to be applied, as far as are consistent with Hindu law to the partnership constituted by a joint family business."

He was of opinion that given a joint family with the nucleus of ancestral property the presumption of Hindu law was that the property acquired by the manager of the family was joint family property. This proposition cannot be controverted. But it is respectfully submitted that the proposition in question cannot be extended to partnerships between a member of the joint family and a stranger. Nor can a presumption be invoked in favour of the creation of such a partnership apart from the provisions of S. 239, Contract Act. The ruling enunciated in *Malaiperumal Chetti* v. *Arunachalla Chettiar* (15), was with reference to the presumption which should ordinarily be raised in the case of a trading caste or family and it would be most dangerous to extend the rule to the case like the present. An individual member embarking in a business on his own personal account cannot be permitted to involve the entire family credit and all the joint family properties to the prejudice of the family as a whole inclu-

(12) [1903] 27 Bom. 157=4 Bom. L. R. 968.
(13) [1901] 3 Bom. L. R. 144.
(14) [1917] 20 M. L. T. 565=36 I. C. 787=(1917) M. W. N. 150.
(15) [1917] 6 M. L. W. 417=41 I. C. 224.

ding the minor members. The rule of evidence laid down in *Grey* v. *Walker Coward & Co.* (16), does not militate against the view that the character and constitution of the partnership in dispute have to be proved in each case upon a consideration of such evidence as may be forthcoming and cannot be decided merely upon a presumption of law one way or the other. There can be no doubt that in the case of trading families there is a presumption of jointness not only of their property but even as regards the business which they carry on.

It was observed by Lord Lindley (The Law of Partnership, 9th edition 25) that where the legislature has provided a statutory definition of partnership, that definition, taken in connexion with other sections, must be the ultimate test applicable to the determination of the question whether in the particular case a partnership does or does not exist. Regard has to be paid in particular to the contract and intention of the parties as appearing from the whole facts of the case: *Cox* v. *Hickman* (17).

Section 239, Contract Act, defines partnership as the relation which subsists between persons who have agreed to combine their property, labour and skill in some business and to share the profits thereof between them. Partnership therefore is a relation resulting from the contract and that an agreement, express or implied, is the source of the said relation. The definition in the Indian Contract Act may be compared with the definition given by Watson. According to him it is a voluntary contract between two or more persons for joining together their money, goods, labour and skill or either of them or all of them upon an agreement that the gain or loss shall be divided proportionately between them and having for its object the advancement and protection of a fair and open trade. An agreement to share the loss is not a necessary ingredient of partnership under the Indian Contract Act. An agreement is essential for the creation of partnership under the Indian Contract Act.

No evidence is forthcoming in this case that defendants 3, 5 and 7 entered into such an agreement with the other persons against whom the decree has been passed by the Court below. The agreement to constitute a partnership may be express or may be implied. A presumption in favour of such an agreement may be raised from the conduct of the parties, from their mutual dealings and from the surrounding circumstances but there is no presumption in law that a member of a family entering into a partnership with certain persons who are strangers to the family is doing so in a representative or vicarious capacity. If a liability is sought to be fastened upon the other members of the family it can be done either by evidence of consensus or by evidence to prove an agency through which the contract of partnership was brought into existence. These have not been proved in this case. The finding of the Court below that defendants 3, 5 and 7 are not the partners in the firm of Kishori Lal Bhagwati Prasad is correct and ought not to be displaced.

It is next contended that defendants 8 and 9 are the sureties of the remaining and are liable for the plaintiff's claim. The plaintiffs in para. 5 of the plaint relied upon a letter dated Asarh Badi 9 Sambat 1978 corresponding to 29th June 1921. In the course of the argument the learned counsel for the appellant who has dealt with this case very skilfully and in all its aspects-brought to our notice another document which has been marked as Ex. 3. A contract of guarantee has been defined in the Indian Contract Act as a contract to perform the promise or to discharge the liability of a third person in case of a default. We have been taken through these two documents in extenso and we do not find anything there to indicate that defendants 8 and 9 gave an undertaking to the plaintiffs either to perform the promise or to discharge the liability of the remaining defendants. I therefore repel this contention. In view of the above findings I would, therefore, dismiss this appeal.

Sulaiman, J.—I entirely concur in the conclusions of my learned brother including the view that there is no presumption in this case that the other members of the family of Kishori Lal are partners in the firm. No doubt it is well settled that where a property stands in the name of a junior member of a joint Hindu family the presumption

(16) [1913] 40 Cal. 523=18 I. C. 753.
(17) [1860] 8 H.L.C. 268=3 L.T. 185=8 W.R. 754=30 L.J. C.P. 125=7 Jur. (n.s.) 105=9 C.B. N.S. 47.

where the nucleus is proved, is that it was acquired out of the joint family funds and belongs to the joint family, but that presumption cannot be extended to cases of partnership. The acquisition of property stands on quite a different footing from the membership of a partnership, which involves not only an acquisition of an interest is a partnership concern but an assumption of liability also. My learned brother has referred to the case of *Vadi Lal Lallubhai* v. *Shah Kushal* (12), where it was clearly laid down that there was no presumption that a business carried on by a coparcener is a family business. In *Gangayya* v. *Venkata Ramiah* (11) it was conceded that as between the members of an undivided family and the co-parcener who enters into a contract of partnership for the benefit of the family they will be entitled to call upon him to account for the profits earned by him from the partnership and to share in such profits, but this will not place them in any position of direct contractual relationship with the other partners of the firm, even though the entire assets of the joint family might be available to the creditors of the family in certain circumstances.

Similarly in the case of *Baldeo Das* v. *Manek Chand* (13) (at 145), Jenkins, C.J., remarked that under certain circumstances the rest of the members of the family may claim the benefit arising from the business carried on by one of their number, but until this is done, or until the business is in some way adopted as an asset of the joint family, it would be contrary to principle to fasten on the other members any liability for the debts of that business, and therefore, the creditor who advances such a claim must show that the business carried on by an individual member has by some such method become the business of the family or is carried on for its benefit. It follows therefore that the question is one of fact and not of presumption, and there is no initial presumption in favour of the defendants that the entire family of Kishori Lal was a partner of this firm merely because Kishori Lal is now found to have been a partner, particularly when Kishori Lal was a junior member and not the karta or the head of the family.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 541

BANERJI AND KING, JJ.

Girdhari and *others*—Plaintiffs—Appellants.

v.

Jodha and *others*—Defendants—Respondents.

Second Appeal No. 308 of 1926, Decided on 25th January 1929, against decree of Sub-Judge, Farrukhabad, D/- 16th December 1925.

Adverse possession — Decree-holder purchasing property at auction sale judgment-debtor remaining in possession—After purchase judgment-debtor agreeing to pay purchaser certain amount in satisfaction of decree in three years—Judgment-debtor's possession for those three years is not adverse.

The decree-holder purchased at an auction sale judgment-debtor's property, but the judgment-debtor remained in actual possession. After auction purchase judgment-debtor entered into an agreement by which decree-holder agreed to accept certain sum of money in three years in full satisfaction of the decree and then release the property to the judgment-debtor.

Held: that the possession by the judgment-debtor for those three years was on behalf of and not adverse to the decree-holder.

[P 542 C 1]

Benod Behari Lal—for Appellants.

P. L. Banerji—for Respondents.

Judgment.—This is a plaintiffs' appeal in a suit for a declaration that a grove was the property of the plaintiffs and if the plaintiffs were found by the Court not to be in possession for possession in the alternative.

The facts which led up to the present suit are that one Jagan Nath, who held a mortgage of the grove in question from the predecessors-in-interest of the defendants, purchased it at an auction sale on 23rd January 1911. On 15th May 1911 formal possession was delivered to Jagan Nath. It appears that the names of the defendants continued in the revenue records till 1922 when they were removed and that of Jagan Nath substituted. Jagan Nath sold the grove in suit to the plaintiffs on 23rd January 1924. The defence to the action was that Jagan Nath was never in actual physical possession of the grove and that the defendants had, after the auction sale, entered into an agreement, by which Jagan Nath had agreed to accept the sum of Rs. 600 in three years in full satisfaction of the decree and then release the property to

the defendants. The defendants did not obtain a deed of reconveyance as they were afraid that their other creditors might attach the property in execution of their decree. Various issues were raised in the Court of first instance and finding that the plaintiffs' claim was not barred by limitation the Court of first instance decreed the plaintiffs' suit. In appeal the learned Subordinate Judge, finding that Jagan Nath not having been in actual possession of the grove, held that it must be taken that Jagan Nath was out of possession and as more than 12 years had elapsed from the date of the decree the plaintiffs' claim was barred by limitation. He therefore dismissed the plaintiffs' suit.

The plaintiffs have come up in second appeal and it is urged by the learned advocate for the appellants that the case of the defendants, as put forward, was that the defendants did admit the title of Jagan Nath until, at any rate, the year 1914. There was thus no assertion of any adverse title, at any rate, up to the year 1914, and the possession of the defendants up to 1914 must be accepted as the possession of the plaintiffs as the defendants were holding that property on behalf of the plaintiffs until the payment of the sum of Rs. 600. The Courts below have not accepted the contention of the defendants that any sum of Rs. 600 was, as a matter of fact, paid. We are of opinion that the contention of the learned advocate for the appellants is correct and that the possession of the defendants must be deemed to be possession on behalf of Jagan Nath. Twelve years not having elapsed since then, the plaintiffs who are the transferees from Jagan Nath are entitled to possession of the property as against the defendants. We allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance.

S.N/.R.K. *Decree set aside.*

A. I. R. 1929 Allahabad 542

MUKERJI AND YOUNG, JJ.

Hoshiar Singh—Plaintiff—Applicant.

v.

Udai Ram Singh and *others* — Defendants—Opposite Parties.

Civil Revn. No. 271 of 1927, Decided on 24th April 1929, against order of Sm. C. Court Judge., Meerut, D/- 29th July 1927.

Partnership—Two partners exceuting pro-note to third agreeing to pay certain sum to him on taking partnership accounts—Pro-note will not bind other partners. Contract Act, S. 251.

Where two of the partners of a firm execute a promissory note in favour of a third agreeing to pay him a certain sum of money as being due to him on taking partnership accounts, the remaining partners of the firm will not be bound by the promissory note. [P 542 C 2]

H. C. Mukerji—for Applicant.

N. C. Vaish—for Opposite Parties.

Judgment.—This is an application to revise a judgment passed by a Judge, Small Cause Court. The facts are briefly these. The plaintiff was one of several partners in a firm. Two of the members of the firm executed a promissory note in plaintiff's favour agreeing to pay him a certain sum of money as being the amount due to the plaintiff on taking partnership accounts. The plaintiff sued not only the executants of the promissory note but the other partners. The question before the Court below was whether the promissory note given by two of the five partners bound the other two defendant partners. The Court below has answered the question in the negative, and we are of opinion that the Court below was right.

The learned counsel for the plaintiff applicant had taken his stand on Ss. 249, 251 and 263, Contract Act. They do not lay down that one of the partners, as between themselves, can bind another partner where the dealing is not with a third party. The authority which a partner holds on behalf of other partners to deal with third persons is the subject matter of the legislation. in those sections. Illustrations given to S. 251 made this claar. The application has no merits and is dismissed with costs.

S.N./R.K *Application dismissed.*

A. I. R. 1929 Allahabad 543

DALAL, J.

Sahdeo Ram and *another*—Defendants—Appellants.

v.

Salig Ram—Plaintiff—Respondent.

Second Appeal No. 1256 of 1928, Decided on 13th April 1929, against decree of Sub-Judge, Ghazipur, D/- 9-5-1928.

Civil P. C., O. 15, R. 4—Adjournment granted conditionally on production of evidence—Condition not fulfilled—O. 15, R. 4 applies and decree is appealable even if suit is wrongly dismissed for default under O. 17, R. 2.

Where in a suit fixed for final disposal the Court passes a conditional order of adjournment for production of evidence but the condition is not fulfilled by the party concerned, the Court cannot dismiss the suit for want of prosecution. If it so dismisses it, its order amounts to a decree and is appealable and on appeal the appellate Court can remand the case for proper disposal. The party, however, will not be entitled to produce any further evidence and the decree will be passed on the evidence as it existed at the time of granting the conditional order. [P 543 C 2]

K. Verma and *Ambika Prasad*—for Appellants.

A. P. Pandey—for Respondent.

Judgment.—It is clear to me that an appeal did lie to the lower appellate Court and a second appeal here. Revision No. 240 of 1928 to this Court is, therefore, dismissed. As regards the second appeal, the view taken by the lower appellate Court is correct, but, in my opinion, that Court ought to have circumscribed the remand to the trial Court. 17th January 1928 was the date fixed for the hearing in the trial Court in a case in which the summons had been issued for the final diposal of the suit. The plaintiff was present and applied for adjournment, whereupon the Court passed a conditional order of adjournment on the plaintiff depositing Rs. 20 as costs to be paid to the opposite party. Costs were not paid up to 30th January 1928, whereupon the Court dismissed the suit for want of presecution. The Court had no jurisdiction to do so. Under O. 17, R. 2, Civil P. C., such action could be taken only where on any date on which the hearing of the suit is adjourned the parties, or any of them fail to appear. The proper rule applicable to this case is R. 4, O. 15. Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies the Court may at once pronounce judgment, or may, if it thinks fit after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issue. The Court did not think fit to adjourn the suit except upon a condition, and upon the condition not being fulfilled, the Court could have refused to grant the application for adjournment filed on 17th January 1928. On refusing that application the Court was bound to adopt the second course of pronouncing judgment at once. The Court had no jurisdiction to dismiss the suit for want of prosecution. It is obvious that adjournment depended upon the payment of damages, and not the decision of the suit. On failure to pay damages the prayer for adjournment failed, but the suit remained where it was, and the second alternative of R. 4, O. 15 had to be followed by the trial Court. Such a pronouncement of judgment will amount to a decree appealable to the District Judge.

The remand was properly made by the lower appellate Court because the trial Court had not brought its mind to bear on the subject of the decision of the case. At the same time the plaintiff is not entitled to produce further evidence. He failed to produce on 17th January 1928 without sufficient cause in the opinion of the trial Court and failed to take advantage of the indulgence of the Court by paying damages. Under the circumstances the position should be restored to that which existed on 17th January 1928, and the trial Court should be directed to pronounce judgment on the evidence which existed on 17th January 1928.

In the result I modify the decree of the lower appellate Court and direct that the suit shall be tried on the merits but on the basis of the evidence which existed on 17th January 1928 and after hearing arguments of counsel. Except for this modification the appeal is dismissed. Costs here and heretofore shall abide the result, but Rs. 20 directed to be paid by the plaintiff to the defendants shall not be paid because the plaintiff has been denied the advantage to be obtained by him by such payment.

P.N./R.K. *Decree modified.*

A. I. R. 1929 Allahabad 544

BENNET, J.

Kailash Chandar Jain —Plaintiff—Appellant.

v.

Ram Lal—Defendant—Respondent.

Second Appeal No. 344 of 1929, Decided on 10th April 1929, against decree of Sub-Judge, Fatehpur, D/- 1st December 1928

(a) Agra Tenancy Act (1926), S. 110—Tenant can construct well without proving any local custom.

In S. 110 the word "except" governs all the words which follow it to the end of the section and so, a well, as it does not come after the word "except" and is not the same as a tank, can be constructed by a tenant without proving any local eustom entitling him to do so. [P 544 C 2]

(b) Agra Tenancy Act (1926), S. 3 (11) —Tenant constructing well close to, but without, his holding—No special damage to landlord—Landlord has no cause of action— (*Obiter*).

A tenant can dig a well on parti land close to his occupancy holding, though without it, for the benefit of the holding, and no cause of action arises in favour of the landlord unless he suffers special damage by the construction of the well. [P 544 C 2]

Binod Behari Lal—for Appellant.

Judgment.—This is a second appeal by the plaintiffs whose suit has been dismissed by both the lower Courts. The facts are simple and not in dispute. The plaintiff is the sole zamindar of the village and the defendant is an occupancy tenant. The defendant has recently constructed a well close to his occupancy tenancy on some "parti" land. The mukhtar-am of the plaintiff admits that the distance of the well from the occupancy holding is only 20 paces. The plaintiff has not shown that he has been caused any special damage by the construction of this well. The only argument put before me on appeal, out of the various grounds of appeal, was that it was necessary for the lower Courts to find that there was a local custom entitling the defendant to make the well in question, and that as a matter of fact it was not necessary for the defendant to make the well because sufficient water could be obtained for irrigation of his holding from a jhil. S. 110, Act 3 of 1926 states:

"An ex-proprietary or occupancy tenant may make any improvement except that he may not plant trees, make a tank, or erect buildings of a permanent character unless there is a local custom entitling him to do so or he has obtained the written consent of his landholder."

It appears to me that the word "except" governs all the words which follow it to the end of the section. Therefore any improvement which does not come after the word "except" may be made by an occupancy tenant. "Improvement" is defined in S. 3 (11) and in sub-S. (a). "Improvement" includes wells. It was argued that a well is the same as a tank. The learned counsel who put forward this argument was unable to support it by any definition in any dictionary or by any ruling or by any reference to the Act itself. On the contrary, the Act enumerates in S. 3 (11) (a) both wells and tanks. If these two words were synonymous the Act would not have specified them separately. Further if the provisos in S. 110 had been intended to apply to wells as well as to tanks, the two words would have been mentioned in S. 110 just as they have been mentioned in S. 3 (11) (a). I consider, therefore, that there is no force whatever in the argument, and that it is unnecessary to prove that there is any local custom entitling an occupancy tenant to make a well. No other ground of appeal was argued before me, but I may state that I agree with the findings of the lower appellate Court generally, and I consider that as S. 3 (11) permits an improvement to be made for the benefit of the holding without being on the holding, there is no difficulty arising in the present case from the fact that the well has been made on parti land close to the occupancy holding. It is only in case the plaintiff could have shown that he suffered any special damage by the construction of the well that any cause of action could arise to him. He has failed to do so in the present case. I dismiss this appeal under O. 41, R. 11.

S.N./R.K. *Appeal dismissed.*

* A. I. R. 1929 Allahabad 545

BANERJI AND KING, JJ.

Debi Dayal and *others*—Applicants.

v.

Ambika Prasad and *others*—Opposite Parties.

Original Suit No. 2 of 1929. Decided on 27th February 1929, for review of judgment in First Apppeal No. 395 of 1918.

(a) Limitation Act, Art. 173—Scope.

Under Art. 173, 90 days time is allowed to the petitioners for review from the date of their knowledge but the contention that where the knowledge is after that period, there is no period prescribed by the Limitation Act, or Art. 181, Sch. 2, Lim. Act at most applies is wrong. [P 547 C 1]

*** (b) Civil P. C., O. 47, R. 1—Newly discovered evidence must be believable and if believed must be conclusive.**

Where the ground for review is the alleged discovery of new evidence, the evidence discovered must at least be such as is presumably te be believed, and if believed would be conelusive : 45 *Cal.* 60; *Brown* v. *Dean*, (1910) *A. C.* 373, *Foll.* [P 545 C 2]

(c) Evidence —Where there is difficult investigation of fact, contemporary documentary evidence, if trustworthy should be preferred to any amount of oral evidence.

Where there is a difficult investigation of a fsct the history relating to which is somewhat obscure, contemporaneous documentary evidence, if it is trustworthy should be preferred to any amount of oral evidence, which does not always create the same amount of confidence. [P 546 C 2]

Tej Bahadur Sapru, *U. S. Bajpai* and *Surendra Nath Verma*—for Applicants.

K. N. Katju, *K. N. Laghate* and *Binod Behari Lal*—for Opposite Parties.

Judgment.—We have come to the conclusion that we ought to issue notice in this case. The matter is of an exceptional character, and not free from difficulty ; and we think it, therefore, desirable for the benefit of the parties to state broadly our grounds fot issuing notice.

The application is made to this Bench, one of the Judges constituting which was a member of the Bench which decided the first appeal, the judgment in which it is now sought to review. The application is made on behalf of the plaintiffs to review a judgment of this Court, dismissing the first appeal so long ago as 17th June 1921. The main issue in both the Courts, which resulted in concurrent findings, was whether one Bhawani Prasad an ancestor of the defendants had survived a female ancestor, Sitala Kunwar, who admittedly died in 1906.

The ground upon which the application is made is the recent discovery, that is to say five years after the decision, of an alleged deed of gift, made by the father of the said Bhawani Prasad, which it is claimed conclusively shows that the said Bhawani Prasad not only predeceased Sitala Kunwar, but predeceased his own father, who died in 1896, and must have died about 1888.

Now the principles upon which a new trial is allowed or a review is granted, on the ground of discovery of new and important evidence, are stated in a comparatively recent judgment of the Calcutta High Court *Nandu Lal Malik* v. *Panchanan Mukerjee* (1) where there is a reference to some English cases on the subject and a pronouncement of the Lord Chancellor in *Brown* v. *Dean* (2) to the effect that where the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive.

It is also relevant to consider whether the discovery has been made under suspicious circumstances. We express no opinion about this, beyond saying that the coincidence which led to the discovery in this case is on the face of it, a curious one. It is traced to information supplied to the present applicants by one Kali Charan, whom they met by accident. Kali Charan has filed an affidavit, corroborating the fact that he communicated the information to them. That of course is essential to the applicants' case but he has gone further or attempted to disclose how he came to be possessed of the knowledge which he communicated. As notice is to go, it is not necessary to insist on a further affidavit, provided that Kali Charan is present at the hearing, prepared to give evidence before us, and to submit himself to cross-examination on this part of the case.

On the other issue which we have to consider, namely whether the new evidence, in this case, a deed of gift, is to be believed, we can say nothing. That

(1) [1918] 45 Cal. 60=26 C. L. J. 187=42 I. C. 484=21 C. W. N. 1076.
(2) [1910] A. C. 473=79 L. J. K. B. 690=54 S. J. 442=102 L. T. 661.

will be a matter which will no doubt be contested before us, but inasmuch as the successful defendants at the trial relied upon documentary evidence, which if true, was conclusive, and the present applicants now rely upon a deed of gift, which if genuine, would be practically conclusive, Sir Tej Bahadur is quite right when he says that the issue now raised is as to which side has attempted to support their case by deliberate forgery.

The further branch of this issue, namely whether the new evidence, if believed, would be conclusive, is the ground of this application, which at present impresses us the most. A perusal of the High Court's judgment and the Subordinate Judge's judgment shows that the case was on any showing a curious one. The High Court's judgment dwells upon the features of the case, which went to assist the plaintiffs, namely that the absence of certain entries and the absence of certain conduct, both of which would have been expected in the ordinary course of events from Bhawani Prasad, if he had been alive, had to be explained' and were in fact explained by the successful defendant by saying that although he had not actually embraced a religious life, he had taken to a contemplative or ascetic life, and as a consequence refused to take any part in the management of his affairs, leaving that to his wife and son. That was acknowledged to be a strange story. On the other hand the story set up by the plaintiffs was considered to be a strange story and the final decision of this Court declined to decide which was the more unlikely of the two witnesses. This is another striking feature of the decision because the defendants relied very strongly on a positive piece of evidence purporting to be a certified copy of the entry of the death of Bhawani Prasad in the municipal register. The original, owing to the process of weeding and to palpable delay, if not negligence, on the part of the defendants in obtaining the original, is not now available. This High Court commented on the delay which had occurred even in procuring the copy, and declined as appears from its judgment, to act on this affirmative documentary evidence. It was therefore driven to fall back upon what it believed to be facts rather than inferences testified to by oral evidence alone, namely two persons who swore that they had been present when Sitala Kunwar died in 1906 and saw Bhawani Prasad there. It is as a rule a sound principle where there is a difficult investigation of a fact, the history relating to which is somewhat obscure, to prefer contemporaneous documentary evidence, if it is trustworthy to any amount of oral evidence, which does not always create the same amount of confidence. If a document is conclusive it can only be got rid of by showing that it is not genuine. If on the other hand its genuineness is established it as a rule outweighs such evidence as this Court finally accepted as conclusive in this case. We therefore think that there is a strong prima facie case for saying that this new evidence, which is now tendered, and is said to have been discovered recently, if it be in fact genuine, will turn out to be conclusive on the issue which was raised. The respondents must be supplied with copies of all the affidavits which have been filed in this matter, together with the grounds of the application and this order.

We think generally that every body in this case, who has made an affidavit, should be present at the hearing, ready to submit himself to cross examination, if required, and we therefore direct that a special date be fixed for the hearing, and we leave it to the counsel for the applicants when notices have been duly served to apply to us to fix a date.

(After a date was fixed, the case came up before their Lordships and the following judgment was delivired.

Judgment.—This is an application for review of a judgment of this Court of 17th June 1921, upon the ground that the plaintiffs-appellants have made a recent discovery of a deed of gift dated 22nd April 1893. The first objection taken by the learned advocate for the respondent is that this application is barred by time as under Art. 173, Sch. 2, Lim. Act the period prescribed for filing the application had expired long before the date of the application. The affidavit filed on behalf of the petitioners states that they obtained a copy of the deed of gift on 10th June 1926. The petitioners should have presented an application at once, that there was no formal application for extension of time and no reason had been given for the delay in

filing this application after 10th June 1926. The application was presented on 18th October 1926 and the Court was closed for the long vacation from 30th July 1926, to 17th October 1926. Sir Tej Bahadur Sapru who appears in support of this application has submitted that 90 days time is allowed to the petitioners from the date of their knowledge, and where the knowledge is after that period, no period is prescribed by the Limitation Act, and at most Art. 181, Sch. 2, Lim. Act, applies. He therefore submitted that if in the opinion of the Court his contention cannot be accepted he orally prayed for extension of time.

We have come to the conclusion that the contention of Sir Tej Bahadur Sapru cannot be accepted and that to accept the interpretation put by Sir Tej Bahadur Sapru on Art. 173 we would have to read into that article the words

"that the facts upon which the review is sought comes to the knowledge of the petitioner."

This we cannot do. We, however, under the peculiar circumstances of this case consider that although Raj Bahadur says in his statement before us that it was possible that he could present the application on 30th June 1926, we are of opinion that in view of the facts of this case and the time which had elapsed since the date of the judgment of this Court and the statement of the plaintiff that he had to consult counsel and decide about taking steps, there was no unreasonable delay in filing the application and we extend the time as prayed for by Sir Tej Bahadur Sapru.

We would now take the merits of this application. The principle upon which an application for review can be sought has been stated in the order of this Court dated 16th December 1926, passed by Sir Cecil Walsh and one of us when notice of this application was issued to the opposite party. The facts briefly stated are that the plaintiffs as reversioners to one Nand Lal who died in the year 1863 sued for possession of the estate upon the death of Nand Lal's daughter Mt. Sitla Kuer who admittedly died on 16th December 1906. The case for the plaintiffs was that they were the next reversioners at the date of death of Mt. Sitla Kuer and the defendant's case was that Bhawani Prasad, son of Gur Sahai, who was the next reversioner had excluded the plaintiffs from succeeding to the estate of Nand Lal. Gur Sahai died in the year 1896 and the question at issue between the parties was whether on 16th December 1906, Bhawani Prasad was alive. The trial Court found that Bhawani Prasad was alive on 16th December 1906 and that finding was accepted in appeal by a Bench of this Court presided over by Walsh and Stuart, JJ. on 17th June 1921. The applicants stated that they received the information about the deed of gift of 22nd April 1893, from one Kali Charan. Kali Charan has been examined in this Court and we are satisfied that the petitioners learnt about this deed from Kali Charan, and we have no doubt upon an examination of the affidavits filed by Devi Dayal and Raj Bahadur, and the statement made in Court before us, that they did not know of the deed of gift and discovered it in the way that they have stated in their affidavits.

The next question for determination is whether we can hold that the petitioners had constructive notice of the deed of gift. From the facts stated in para. 36 of the affidavit of Devi Dayal which has not been challenged in the cross-examination of Devi Dayal, it appears that it was not possible for the plaintiffs to know of the deed of gift at the time when the deed was executed. The property which was the subject of the deed of gift was in the possession of Gur Sahai the donee and on the date when the plaintiffs instituted their suit, the property was in the possession of Gur Sahai's natural heirs, there was no occasion for the plaintiffs to search the registration office for finding out how the person then in possession of the property came to be in possession of the property. We therefore cannot accept the contention of the learned advocate for the opposite party that the plaintiffs should have and ought to have examined the registration office and if they had they would have come to know of it.

As has been stated in the order of 16th December 1926, the principle upon which a review is granted is the discovery of such new and important evidence which if believed would be conclusive. We have therefore to see whether there is any reason to suspect the genuineness of the deed. Kali Charan, son of Bhawani Prasad, filed an affidavit on 2nd November

1928, and a number of statements are made in that affidavit, but as regards the deed in question he did not really challenge the genuineness of the deed and only suggested that the deed of gift remained a dead letter. In para. 10 of the affidavit Kali Charan stated that upon the death of Gur Sahai the names of Ram Narain and Mt. Rekhab Kuer (his mother) and Kali Charan were entered in the revenue records.

We had before us the original registers from the registration office to see if the certified copy produced by the petitioners was correct or not, and upon an examination of the registers and the statements of the officials of the registration department we have come to the conclusion that Gur Sahai did execute the deed of gift as is evidenced by the certified copy filed by the petitioners.

It has been contended by Dr. Katju appearing on behalf of one of the opposite parties that the deed of gift was not admissible in evidence under S. 32, Cl. (5), Evidence Act. The learned advocates for the respective parties referred to the relevant sections of the Evidence Act and several reports of cases in support of their cases. We think, however, that it is not necessary for us to decide at this stage finally whether the document was admissible in evidence or not. All that we need say at this stage is that in our opinion prima facie the document is admissible in evidence.

In the deed of gift Gur Sahai states that his son Bhawani Prasad was dead and if Bhawani Prasad had died before the date of the execution of the deed, he could not possibly have been alive on the date when Mt. Sitla Kuer died and it seems to us that prima facie this deed is conclusive regarding the point at issue between the parties in this case. On examination of all the circumstances the affidavits of Kali Charan, Devi Dayal and Raj Bahadur and the oral evidence they gave before us we are satisfied that there was nothing suspicious regarding the circumstances under which the petitioners came to know of the deed of gift and that the petitioners did not know of the deed of gift until the year 1926, and that the deed of gift is genuine and is prima facie conclusive regarding the point at issue between the parties. We therefore grant the application for review of the judgment of this Court in F. A. 395 of 1918. Costs will abide the result.

S.N./R.K. *Review granted.*

A. I. R. 1929 Allahabad 548

DALAL, J.

Brahmdeo and *others*—Defendants—Appellants.

v.

Dubri Rai and *others*—Plaintiffs—Respondents.

Second Appeal No. 1424 of 1927, Decided on 3rd April 1929, against the decree of the Sub-Judge Ghazipur, D/- 31st May 1927.

Agra Tenancy Act (1926), S. 198—*D* suing for sub-tenant's ejectment—Latter pleading that he was tenant of *P*—Revenue Court making *P* party and deciding that he was *D's* sub-tenant—*P's* suit to declare his title will not be barred by revenue Court's decision because mistake in making *P* party to suit cannot invest it with jurisdiction to try proprietorship between parties.

D sued in revenue Court for ejectment of a sub-tenant. The sub-tenant alleged that he was tenant of *P* and so he was brought on record. The revenue Court holding that he was the tenant of *D* decreed ejectment and *D* consequently got possession. *P* then sued in the civil Court for declaration of his title.

Held: that the revenue Court had no jurisdiction to bring *P* on record, the mistake of that Court in making *P* party cannot invest it with jurisdiction to try the question of proprietorship between the parties. And so the decision of the revenue Court does not bar *P's* Civil Suit: *A. I. R.* 1927 *All.* 70 (*F.B.*), *Dist.* [P 549 C 1]

N. Upadhiya—for Appellants.

M. L. Agarwala—for Respondents.

Judgment.—The plaintiffs sued in the civil Court for the ejectment of the defendants on the ground that the plaintiffs were cosharers and *sir*-holders and entitled to possession of the land and the defendants had wrongfully ejected the plaintiffs sub-tenants and taken illegal possession. There was a sub-tenant Mt. Babuna. The defendant sued for her ejectment in the revenue Court. Her defence was that as she was the sub-tenant of the plaintiffs and paid rent to them the plaintiffs were brought on the record as defendants. The revenue Court, however, held that Mt. Babuna was the sub-tenant of the defendants and granted to the defendants a decree for the ejectment of Mt. Babuna. In pursuance of that decree the defendants were in pos-

session at the date of the institution of the present civil suit. It is argued here that the present civil suit is in effect an attempt to reverse the decision of the revenue Court in a matter within its exclusive jurisdiction. The Full Bench ruling of *Balwant Singh* v. *Sarabjit* (1) is quoted. The matter, however, is provided for by statute. Under S. 198, Tenancy Act, it was not within the jurisdiction of the revenue Court to make the plaintiffs parties to the revenue suit. It is enacted there that when, in any suit against a tenant under this Act, the defendant pleads that the relation of landholder and tenant does not exist between the plaintiff and himself on the ground that he actually and in good faith pays the rent of his holding to some third person, the question of such payment of the rent to such third person shall be inquired into, and if the question is decided in favour of the defendant, the suit shall be dismissed. Cl. (2) of that section preserves the jurisdiction of the civil Court to decide the right of any person entitled to the rent of the holding to establish his title by a suit in the civil Court. The present is just such a case. The mistake of the revenue Court in making the plaintiffs parties to the revenue suit cannot invest that Court with jurisdiction to try the question of proprietorship between the parties to the present suit. The case in the revenue Court was not under S. 199, where the defendants may have pleaded proprietary title in denial of tenancy. Mt. Babuna did not plead proprietary title in herself. From the decision of the revenue Court the plaintiffs to the present suit went in appeal to the District Judge, but the District Judge rightly held that no appeal lay and the plaintiff's proper remedy was a suit in the civil Court as laid down by Cl. (2), S. 198, Tenancy Act.

The ruling quoted by the appellant's learned counsel is not in point for a second reason also. In that case the question of tenancy which was decided by the revenue Court was again brought into issue in the civil Court. The relations between the parties had not changed from what they were in the revenue Court. In the present case the situation is altered. The sub-tenant with respect to whom the revenue Court had exclusive jurisdiction has disappeared and the defendants have taken possession as proprietors. With the disappearance of the sub-tenant the question as to whose sub-tenant she was no longer exists. The point of law raised on behalf of the defendant appellants is not tenable. The rest is a decision of fact. This appeal is dismissed with costs.

S.N./R K. *Appeal dismissed.*

(1) A. I. R. 1927 All. 70=48 All. 774 (F.B.)

A. I. R. 1929 Allahabad 549

SULAIMAN AND BANERJI, JJ.

Bhagwan Singh—Appellant.

v.

Tasadduq Husain and *others*—Respondents.

Second Appeal No. 762 of 1927, Decided on 5th April 1929, against decree of Sub-Judge, Mainpuri, D/- 4th February 1927.

(a) Evidence Act, S. 115—Scope.

There can be no estoppel contrary to a statutory enactment. [P 550 C 1]

(b) Agra Pre-emption Act (11 of 1922,) S. 4 (10)—In the case of tangible property of Rs. 100 or upwards, mere mutation of names is not sale which can be pre-empted—Transfer of Property Act, S. 54.

As the sale of a tangible property of the value of Rupees 100 and upwards can be made only by a registered instrument, the mere fact that the name of the supposed vendee has been mutated in place of the name of the supposed vendor does not constitute a sale, which can be pre-empted, in the absence of a registered instrument. [P 550 C 1]

N. P. Asthana—for Appellant.

M. A. Aziz—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for pre-emption. The property said to have been transferred is worth Rs. 2,000 but there is no registered sale-deed in existence. What happened was that in the mutation Court the vendor made an admission that the property in question had been purchased at auction years ago in the name of his father, who was a benamidar for the defendant, and prayed that the names may be mutated accordingly. The revenue Court has acted upon the admission so made. The plaintiffs treating this as a sale instituted a suit for pre-emption. Both the Courts below have decreed the claim. The finding is that the allegation that the provious auction sale was a 'benami' transaction really for the benefit of the transferee, is untrue and

that this story was devised as a cloak for concealing the present transaction. The lower appellate Court has come to the conclusion that on account of his admission the vendor is now estopped from saying that no valid transfer has taken place and that accordingly the plaintiff is entitled to treat it as a valid sale and to sue for pre-emption. It is obvious that the first mistake which the learned Judge has made is in thinking that the supposed vendor is estopped from saying that the property has been sold. The admission which he made in the lower Court was not that the property had been sold, but it was that from the very beginning it had belonged to the supposed vendee. If he is to be bound by his admission it would not be a case of sale at all and the suit would fail automatically. It is also obvious that there can be no estoppel contrary to a statutory enactment.

In order to claim pre-emption the plaintiff must show that a sale has taken place as defined in S. 4, sub-Cl. (10), i. e., within the meaning of S. 54, T. P. Act. Under this latter section the sale of a tangible property of the value of Rs. 100 and upwards can be made only by a registered instrument. It follows therefore that no valid sale has taken place merely because the name of the supposed vendee has been mutated in place of the name of the supposed vendor. In the eye of the law no legal sale has been effected and therefore no right of pre-emption has accrued.

Section 25 of the Act, which lays down the rule of limitation when a sale is effected without a registered sale-deed, obviously applies to cases where the sale has been validly effected. This can be done when the value of the property is less than Rs. 100. That section does not by any means contemplate that a right of pre emption would accrue even if the parties intended to sell the property but no registered sale-deed as required by law has been executed. We accordingly allow this appeal and setting aside the decrees of the Court below dismiss the suit. There is no doubt, however that the defendants have been adopting dubious proceedings in order to embarass the pre-emptor. They are not entitled to any costs in any Court. We therefore direct that the parties should pay their own costs throughout.

S.N./R.K. *Appeal allowed.*

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* A. I. R. 1929 Allahabad 550

BANERJI AND KING, JJ.

Har Chand and *another*—Plaintiffs—Appellants.

v.

Dewan Singh and *others*—Defendants—Respondents.

Second Appeal No. 1070 of 1927, Decided on 22nd March 1929, against the decree of the Sub-Judge, Meerut, D/- 10th March 1927.

*** Evidence Act, S. 157—Guardian's former application containing ward's date of birth is admissible.**

The verified application formerly made by a guardian, containing his ward's date of birth, is admissible under S. 157 and the guardian is entitled to refresh his memory from that document: 18 *All.* 478, *Ref.* [P 550 C 2]

K. N. Malaviya—for Appellants.

Krishna Murari Lal—for Respondents.

Judgment.—The learned advocate for the appellants has submitted that the documentary evidence in the case was not admissible in evidence and therefore the finding arrived at on the oral evidence was influenced by inadmissible documents. He claimed that the finding arrived at by the lower appellate Court contrary to that arrived at by the Court of first instance was not a finding of fact which is binding on us.

The two documents which the learned Subordinate Judge relied on are: (1) the application filed in 1910 by Munshi, brother of Dewan, the mortgagor In that application, which was a verified application, he gave the date of the birth of Dewan as 1st June 1894. The second document is a certificate of guardianship, and according to that certificate, on the date of the mortgage, the minority of Dewan continued at least a year more. The learned advocate has referred to a case reported in *Gunjra Koer* v. *Ablakh Pande* (1) to prove that the statement of age in the certificate was ne evidence of the defendant's age. He, however, cannot point to any provision of the Evidence Act which would apply to the application of the guardian made in 1910 to exclude it from evidence. That document was clearly admissible under S. 157, Evidence Act and it was open to Munshi to refresh his memory from that document. The learned Subordinate Judge has believed the evidence of Mun-

(1) [1896] 18 All. 478=(1896) A. W. N. 158.

shi, taken into consideration his application made in 1910 and has disbelieved the oral testimony of the witnesses called on behalf of the plaintiffs who are the appellants before us. The findings arrived at by the Court below are findings of fact binding on us. and this appeal is dismissed. As nobody appears on behalf of the respondents so no question as to costs arises.

S.N/.R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 551 (1)

MUKERJI AND NIAMATULLAH, JJ.

Prohit Basant Lal and *another* — Defendants—Appellants.

v.

Basanti and *others* —Plaintiff and Defendants—Respondents.

First Appeal No. 183 of 1926, Decided on 30th April 1929, against decree of Sub-Judge, Moradabad, D/- 30th January 1926.

Civil P. C., O. 34, R. 5 (2)—Plaintiff is not bound to describe, in his application, properties with respect to which he asks for final decree for sale unless he intends that particular property should be omitted from order of Court passing final decree.

A plaintiff is not bound to describe, in his application for the making of a final decree for sale of mortgaged property, the properties with respect to which he asks for a final decree for sale, unless it is his intention that any particular property should be definitely omitted from the order of the Court passing a final decree. [P 552 C 1]

Haribans Sahai—for Appellants.

K. N. Katju, M. N. Kaul and *R. K. Malaviya*—for Respondents.

Judgment.—This is a short appeal and is on behalf of two of the several defendants in the suit. The suit was based on two mortgages. A preliminary decree was made in the Court of first instance, and an appeal was lodged in this Court. The appeal was decided on 17th July 1922. Within three years of the decision of the appellate Court, on 16th July 1925 the plaintiff applied for the making of a final decree for sale. To this application certain objections were taken by some of the judgment-debtors, partly with success. By an order, dated 30th January 1926, the learned Subordinate Judge directed that a final decree in terms of the final decision of the High Court be prepared. In this Court it is urged that property, item 17 in the final decree, prepared by the Court below (see p. 54) was omitted from the application of the plaintiff, which is printed at p. 46. It is urged that, as the plaintiff herself failed to apply for the sale of this property, there should not have been a final decree ordering its sale. The learned counsel for the appellants with all fairness, has pointed out to us that, on 30th January 1926, the Court asked the plaintiff's counsel if it was his intention to omit any property from the final decree for sale. His reply was that he did not intend any omission. Thereupon, the learned Judge ordered that all the property should be sold. The learned counsel for the appellants contends that as there is nc application for the sale of this (item 17 on p. 54 of the record) made within three years of the passing of the High Court's decree there should not have been any decree for the sale of this property.

We are of opinion that there is no substance in this argument. The plaintiff was not at all bound to describe, in his application, what were the properties with respect to which he was going to ask for a final decree for sale, unless, of course, it was his intention that any particular property should be definitely omitted from the order. The appeal, therefore, fails on this point. Mr. Haribans Sahai has told us that, having considered the merits of the case, he does not think it necessary to urge the other pleas taken in the memorandum of appeal. Mr. Malaviya, on behalf of his client Mt. Asharfi Devi who is one of the respondents, tells us that his client is the only legal representative of Mt. Basanti, the original plaintiff. We find that a number of people have been brought on the record at the instance of the appellants as the legal representatives of Mt. Basanti. We do not decide who is the party who ought really to be allowed to represent the deceased. In the result, the entire appeal fails and is hereby dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 551 (2)

SULAIMAN AND SEN, JJ.

(*Ojha*) *Gurdial Singh*—Plaintiff—Appellant.

v.

Arjun Singh and *others* — Defendants —Respondents.

Second Appeal No. 956 of 1927, Decided on 12th April 1929.

Agra Pre emption Act (1922), S. 19—Pre-emption suit — Ex parte decree passed —Vendee getting suit restored and then acquiring interest in property cannot defeat suit.

A vendee against whom an exparte pre-emption decree is passed, cannot, by having the suit restored and then acquiring an interest in the property equal to that of the plaintiff, defeat the plaintiff's suit for pre-emption : *A. I. R.* 1929 *All.* 53 (*F. B.*), *Dist.* [P 552 C 1]

S. P. Sinha—for Appellant.

Saila Nath Mukerji—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for pre-emption. The sale deed was executed on 8th January 1923 and a suit for pre-emption was instituted on 7th July 1924. At first an ex parte decree was passed against the defendants vendees on 31st July 1924. Subsequently an application for setting aside the ex parte decree under O. 9, R. 13, Civil P. C., was presented because there was no personal service on the defendants. The Court was satisfied that good cause had been shown and the ex parte decree was set aside, and the suit was restored on 10th January 1925. After that on 28th April 1925 the defendants obtained a gift of a small share in the same village which placed them on the same footing as the plaintiff. The Court of first instance decreed the suit on 14th December 1925 but the appellate Court has dismissed it. The lower appellate Court has held that by virtue of this gift the defendants were entitled to defeat the plaintiff's suit altogether.

It has now been held by a Full Bench of this Court in the case of *Ram Saran Das* v. *Bhagwat Prasad* (1), that a gift taken by a vendee during the pendency of the suit which has the effect of depriving the pre-emptor of his right to be substituted in place of the vendee at the time when the decree is to be passed is a good defence to the suit under S. 19 of the Act. That section, however, has a further provision that where a decree for pre-emption has been passed in favour of a plaintiff, whether by a Court of first instance or by an appeal the right of such plaintiff shall not be affected by any transfer or loss of his interest accruring after the date of such decree.

The question before us is whether this provision would govern a case where an ex parte decree has been obtained by the plaintiff once but that decree has been set aside by the same Court. It is noteworthy that the tense used in this portion of the section is the present perfect tense, and we think that it would certainly cover the case of an ex parte decree once passed even though it has been set aside subsequently.

When an ex parte decree is passed the defendant has two courses open to him. He may either apply to the Court under O. 9, R. 13, Civil P. C., and if he shows good cause as required by that rule he may have the decree set aside. Or he may appeal from the ex parte decree and may on the same ground ask the appellate Court to set it aside.

In one case the suit will be restored to its original number and in the other it would be remanded by the appellate Court. In either case the ex parte decree would have been the same. It seems to us that in the case where the suit has been remanded on a reversal of the ex parte decree there can be no doubt that nothing which happens subsequent to the ex parte decree would prejudicially affect the right of the plaintiff. The same principle will apply to a case where a decree has been set aside by the first Court itself. There is nothing in the language of this section which would indicate that the decree passed by the Court of first instance must be a subsisting decree up to the time when the loss of the plaintiff's right occurs. We think that if once such a decree has been passed nothing which happens after that date can affect the rights of the parties. The mere fact that for some reason or another the previous decree has been set aside and the suit restored would not take the case out of the scope of S. 19, Agra Pre-emption Act.

We are therefore clearly of opinion that in the present case the vendees are not entitled to take advantage of the gift taken by them subsequent to 31st July 1924 on which date the plaintiff succeeded in obtaining "a decree for pre-emption."

We accordingly allow this appeal and setting aside the decree of the lower appellate Court, decree the plaintiff's suit for pre-emption on payment of Rs. 4,500 within two months from this date. The parties will be entitled to costs in proportion to success and failure. If the amount is not deposited within the time allowed the plaintiff's suit will stand

(1) A.I.R. 1929 All. 53 (F.B.).

dismissed wi h costs in all Courts. In either event the costs of this Court will include fees on the higher scale.

S.N./R.K. *Suit decreed.*

A. I. R. 1929 Allahabad 553 (1)

BANERJI AND KING, JJ.

Genda Mal—Judgment-debtor — Appellant.

v.

Narsingh Das — Decree-holder—Respondent

Execution Second Appeal No. 1294 of 1928, Decided on 22nd March 1929, against decree of Dist. Judge, Saharanpur, D/- 24th April 1928.

Civil P. C., S. 104 (2)—Decree-holder objecting to sale by which he purchased property, alleging that he had agreed to purchase it for Rs. 500, value of property estimated by him and accepted by Court, and so if sale be held to have taken place as recorded by amin, then great loss would result to him, and Court of first instance dismissing his objection—No second appeal lies to High Court under S. 104 (2) as order dismissing objection was under O. 21, R. 92.

Where a decree-holder objected to the sale by which he had purchased a property, his case being that he had agreed to purchase it at the estimated value put down by him and which had been accepted by the Court, namely, Rs. 500 and therefore if the sale be said to have taken place as recorded by the amin for Rs. 1,358, then great loss would result to him, and where the Court of first instance dismissed the objection, no second appeal lies to the High Court under S. 104 (2) as the order dismissing the objection was under O. 21, R. 92 and the appeal was an appeal under O. 43.

M. L. Agarwala—for Appellant.

K. Verma—for Respondent.

Judgment.—A preliminary objection has been taken to the hearing of this appeal. Certain property was advertised for sale and being non-ancestral the civil Court accepted the estimate of the value of the property made by the decree-holder at Rs. 500. Being a revenue-paying property the sale was conducted by an officer of the revenue Court. The judgment-debtor by some process unknown to law got the revenue Court to re-value the property and the Tahsildar estimated the value to be Rupees 1,887-13-0. It is said that the decree-holder purchased the property. The offer made to him was that he should buy the property at the estimated price of Rs. 1,887-13-0. It is also alleged that he accepted this offer. But curiously enough the amin entered in the report about the sale a remark to the effect that the decree-holder had purchased the property for Rs. 1,358. In due course the decree-holder objected to the sale which was said to have been held and by which he is said to have purchased the property. His case was that he had agreed to purchase the property at the estimated value put down by him and which had been accepted by the civil Court, namely, Rs. 500 and therefore if the sale be held to have taken place as recorded by the amin for Rupees 1,358 then great loss would result to the decree-holder. The learned Subordinate Judge under O. 21, R. 92, dismissed the objection and confirmed the sale.

The decree-holder went up in appeal before the District Judge who set aside the sale and directed the property to be resold. It is against this order that the present appeal has been filed and the preliminary objection is that under S. 104 (2), Civil P. C no second appeal lies against an order in appeal under O. 43 of the Code. We must accept this contention as in our opinion the order of the Court of first instance was an order passed under O. 21, R. 92, Civil P. C. and the appeal was an appeal under O. 43. Dr. Agarwala has asked us to treat this appeal as an application for revision but we cannot accept his contention. The appeal is dismissed but we make no order as to costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 553 (2)

BANERJI AND KING, JJ.

Jwala Nath—Plaintiff—Appellant.

v.

Chhanga Mal and *others*—Defendants —Respondents.

First Appeal No. 152 of 1926, Decided on 26th February 1929, against decree of Second Addl. Sub-Judge, Cawnpore, D/- 11th January 1926.

Hindu Law—Alienation—Mortgage executed by father for antecedent debt neither immoral nor illegal, being binding on son, decree passed against father in suit for sale of mortgaged property binds son though he is not party to it.

A mortgage executed by the father for antecedent debt which is neither immoral nor illegal is binding on the son, and so a decree passed against the mortgagor father for sale of mortgaged property will bind the son although he was not a party to a suit in which

the decree for sale was passed ; 17 *All.* 537, *not Foll.*; *A. I. R.* 1924 *P. C.* 50, *Rel. on.*
[P 554 C 1, 2]

M. L. Agarwala—for Appellant.
K. N. Katju—for Respondents.

Judgment. — This is a plaintiff's appeal under the following circumstances: Ram Das, defendant 3, father of the plaintiff-appellant who is a minor aged 9 years, was sued on foot of a mortgage by defendants 1 and 2, Chhanga Mal and Manga Mal. They obtained a decree for sale on the mortgage but had not impleaded Jwala Nath, the present plaintiff. The money due on the mortgage not having been paid by Ram Das an application for execution of the decree was filed by the two defendants and the property in suit was advertised for sale in execution of the decree in suit No. 281 of 1924. It is upon this action of the defendants 1 and 2, namely, applying to the Court to enforce their decree that the present plaintiff, a minor aged 9, under the guardianship of Mt. Anaro, has filed this suit for a declaration that half of the house mortgaged by Ram Das, being the plaintiff's share, is not liable to be sold in execution of the decree. The plaintiff pleaded that he not having been impleaded in the previous suit, the decree in that suit was not binding on him, that there was no legal necessity for Ram Das to incur the loan and that as a matter of fact, no money had been advanced to Ram Das. The defence of defendants 1 and 2 was that the mortgage was executed to satisfy antecedent debts, that there was legal necessity for the mortgage and, therefore, the mortgage was binding on the plaintiff. The defendants further pleaded that the property in suit was not ancestral as the plaintiff was not born at the date of the mortgage. The last two pleas were not accepted by the learned Subordinate Judge who heard the case. Repelling all the contentions of the plaintiff and holding that the mortgage executed by Ram Das was for antecedent debts which were neither for immoral nor illegal purposes the Subordinate Judge dismissed the plaintiff's suit.

The plaintiff has come up in appeal and the learned counsel for the appellant cannot seriously contend that the finding of the learned Subordinate Judge, that the mortgage executed by Ram Das was for antecedent debts and that those debts were neither for immoral nor illegal purposes, can be challanged. His contention is that the plaintiff not having been made a party to the suit of 1924 the Court was bound to give him a decree because in view of the Full Bench case of *Bhawani* v. *Kallu* (1) all that the plaintiff had to prove was that he was a member of the joint family with his father which is not questioned by any one and that he was not a party to the suit. We are unable to accept this contention. In our opinion the case of *Bhawani* v. *Kallu* (1) though not overruled by any case in which it was distinctly so stated, the case cannot be held to be binding on us in view of the decision of their Lordships of the Privy Council of *Brij Narain* v. *Mangla Prasad* (2). In that case it was proved that in the year 1912 when a decree was passed in favour of the mortgagee although the minor sons of the mortgagor were impleaded they were found by concurrent findings of the Subordinate Judge and the High Court not to have been properly represented. It was admitted before their Lordships of the Privy Council (see p. 99 *of* 46 *All*,) that the ex parte decree was not binding on the minors inasmuch as they were not properly represented, but in spite of their not having been properly represented their Lordships of the Privy Council decreed the appeal on the ground that the mortgage was executed for antecedent debts. If the case of *Bhawani* v. *Kallu* (1) was good law in the year 1928 when their Lordships of the Privy Council decided the case, the fact that the minors, who were the plaintiffs, not having been properly represented would have been sufficient to give them a decree as prayed for by them, but in our opinion the fact that the minors were not represented was not the crucial point upon which the case was decided.

The real point on which that case was decided was whether the mortgage which the father had executed was a valid and legal mortgage binding on the sons. In the present case the learned Subordinate Judge has found, and in our opinion, rightly, that the mortgage was a mortgage binding on the plaintiff.

(1) [1895] 17 All. 537=(1895) A. W. N. 212 (F.B.).
(2) A. I. R. 1924 P. C. 50=46 All. 95=51 I. A. 129 (P.C.).

We are, therefore, of opinion that there is no force in this appeal and it must be dismissed. We accordingly dismiss it with costs

P.N./R.K *Appeal dismissed.*

A. I. R. 1929 Allahabad 555

NIAMATULLAH AND BENNET, JJ.

Tola Ram—Plaintiff—Appellant.

v.

Mt. Govindi and *others*—Defendants—Respondents.

Second Appeal No. 616 of 1926, Decided on 22nd April 1929, against decree of Dist. Judge, Budaun, D/- 18th February 1926.

Civil P. C., O. 7, R. 7—Suit for possession—Court finding that suit property was held by Hindu widow and transferred by her to defendant though without necessity—Court can grant declaration, though not asked for, that transfer was void beyond widow's life.

Where a person sues for possession of certain property, but the lower Court finds that the property was held by a Hindu widow and transferred by her to the defendants but without legal necessity, the Court can under O. 7, R. 7, grant a declaration that the transfer was void beyond the lifetime of the widow, though declaratory relief was not specifically asked for : *A. I. R.* 1916 *P. C.* 117, *Dist.*

[P 555 C 2]

H. P. Sen for *Peary Lal Banerji*—for Appellant.

S. B. Jauhari and *A. P. Dube*—for Respondents.

Judgment.—This is a second appeal from a decree of the lower appellate Court dismissing the suit of the plaintiff in toto. The circumstances are that the plaintiff sued on the ground that he was entitled to possession of property as he was representative of one Narain Das deceased, who was the last male holder of the property in question. The Court of first instance found that the property was held by the widow of Sunder Lal, father of Narain Das, after the death of Narain Das, a separated Hindu and that Mt. Govindi the widow in question, had the right of a Hindu widow. Mt. Govindi had made a sale of the property in dispute to defendants 2 to 10. The plaintiff had challenged the validity of that transfer and the Court of first instance enquired into the question of legal necessity and other matters raised by the parties very fully. It found that the sale was not for legal necessity, and granted a declaration to plaintiff as reversioner that the sale was void beyond the lifetime of Mt. Govindi. The lower appellate Court only dealt with ground of appeal No. 7 and on that ground it held that the Court of first instance was not justified in passing a declaratory decree without having the plaint modified. Accordingly it dismissed the suit of the plaintiff.

It is true that the plaint does not specifically ask for a declaratory decree, although it does ask for

'any other reliefs that may, in the opinion of the Court, be beneficial to the plaintiff.

It was also open to the Court, under O. 7, R. 7, to grant general or other relief, whether it was applied for or no, The lower appellate Court has based its judgment on a ruling of their Lordships of the Privy Council reported in *Janaki Ammal* v. *Narayansami Aiyar* (1). In that case a plaintiff, claiming to be the reversionary heir, sued for an injunction and a receiver and further relief against a Hindu widow, whom he alleged to be committing waste of the property in which she had a life interest. It was laid down by the Privy Council that it would be futile to grant a declaration that the plaintiff was the next reversionary heir, because that question could only be decided on the death of the widow. The ruling, therefore, has no application whatever, to the case before us, because the declaration granted is an altogether different declaration. We consider that it was incorrect of the lower appellate Court to dismiss the suit on a mere technical ground, and that it would be a waste of time and money if the order were allowed to stand. We consider that, since the Court of first instance has gone into the question fully on various issues as to the validity or otherwise of this transfer, it is quite unnecessary to have a further suit on the same subject. Accordingly, we set aside the decree of the lower appellate Court for decision on the grounds of appeal other than ground 7, on which it has not come to any finding. The remand is made under O. 41, R. 23. The costs of the lower appellate Court and of the proceedings of this Court will abide the ultimate result.

S.N /R.K. *Case remanded.*

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(1) A. I. R. 1916 P. C. 117=39 Mad. 634=43 I. A. 207 (P.C.).

A. I. R. 1929 Allahabad 556

SULAIMAN AND BANERJI, JJ.

Saiduddin—Plaintiff—Appellant.

v.

Mohiuddin and *another*—Defendants—Respondents.

Second Appeal No. 950 of 1927, Decided on 5th April 1929, against decree of Dist. Judge, Allahabad, D/- 29th May 1926.

Mahomedan Law — Pre-emption — Person immediately on hearing of sale saying "I am pre-emptor and shall pre-empt"—This is valid first demand.

Where a person on hearing of the sale immediately said "I am pre-emptor, I possess the right of pre-emption and shall pre-empt," that is a perfectly valid first demand inasmuch as he did not merely say that he was pre-emptor which would be a mere statement of fact but he added that he would claim pre-emption.

[P 556 C 2]

S. Majid Ali—for Appellant.

K. N. Katju, Zahur Ahmad and *M. A. Aziz*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for a house situated within a notified area to which the Act does not apply, the second was zamindari property, and the third was another immovable property. It is admitted that the plaintiff had no right to pre-empt the third property. He had no doubt a right under the Act to pre-empt the zamindari property and he claimed to have the right to pre-empt the house under the Mahomedan law. If his claim for the house failed the whole suit must fail because of partial pre-emption. The learned District Judge has held that he performed the second demand under the Mahomedan law validly but that he failed to perform the first demand as required by the Mahomedan law. He has accordingly dismissed the whole suit. The plaintiff stated that when he heard of the sale he immediately said

"I am pre-emptor, I possess the right of pre-emption and shall pre-empt."

Thereafter he went to the house and took money from his box and went to the vendee and made the second demand on the same day in the afternoon. The learned Judge seems to think that there was some interval of time between the first and the second demand and therefore the fact of the second demand having been made cannot cure any defect in the making of the first demand.

We, however, think that the first demand was perfectly valid. There is no prescribed formula for making the first demand but the words used must be such as to indicate his clear intention to pre-empt. Mr Amir Ali in his book (Muhammadan Law Vol. 1 24th Edn.) has quoted the text of the Hidaya in the following words:

"Thus if a person were to say I have claimed my shufa, or I shall claim my shufa, or I do claim my shufa all these are good, for it is the meaning and not the style or mode of expression which is here considered. But if he were to say to the purchaser. "I am the shafi or pre-emptor" it would be void."

In the present case the plaintiff did not merely say that he was the pre-emptor which would be a mere statement of fact, but he added that he would claim pre-emption. In our opinion the whole tenor of his announcement was intended to convey the idea that he was making the demand there and then and would claim pre-emption. He had undoubtedly one year to sue in a Court of law.

None of the cases which have been cited before us are therefore in point for here there was a clear assertion of the claim of pre-emption. The plaintiff is accordingly entitled to a decree for pre-emption of the house and the property situated outside the notified area but not to the zamindari property situated within the notified area. He must pay the proportionate price. It is admitted on both sides that about one bigha 8 biswas of land out of five bighas sold are situated within the notified area which the plaintiff cannot pre-empt. It is also admitted that the value of the house is half of the total consideration, that is Rs. 150. It follows that the value of the property situated outside the notified area is Rs. 108. We accordingly allow this appeal and setting aside the decree of the Court below, decree the plaintiff's claim for pre-emption of the house and the property situated outside the notified area on payment of Rs. 258 within six weeks from this date. If the amount is paid within the time allowed the plaintiff will have his costs in all Courts. If the amount is not paid within time the suit will stand dismissed with costs. In all events the costs in this Court will include fees on the higher scale.

P.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 557

ASHWORTH. J.

Daropadi—Plaintiff—Appellant.

v.

Mannu Lal and *another*—Defendants—Respondents.

Second Appeal No. 1459 of 1927, Decided on 1st March 1929, against decree of Second Sub-Judge, Cawnpore, D/- 22nd April 1927.

(a) Agra Tenancy Act (3 of 1926), S. 197 (a)—Character of land granted for maintaining grove changed—Ejectment is permissible—No express or implied abandonment is necessary.

A person who is granted a specific area for the purpose of planting and maintaining a grove, loses his right of occupation when he allows the land to cease to retain the character of a grove. Abandonment, actual or implied, is not necessary : *A. I. R.* 1923 *All.* 295, *Ref.* [P 557 C 2]

(b) Civil P. C., S. 100—Question of law—Sufficiency of evidence for holding whether grove land has changed character is question of law.

A finding of fact, based on misdirection of law, can be reversed. The nature and quantum of evidence required to prove that what was once grove land has ceased to retain that character is a question of law. When a Court has misdirected itself on this point, it is impossible to maintain its finding as a finding of fact. [P 558 C 1]

(c) Agra Tenancy Act (3 of 1926), S. 3 (15)—Considerable portion containing trees sufficient to prevent land from being cultivated—Land continues to be grove.

So long as any considerable portion of a plot granted for a grove is allowed to contain a sufficient number of trees to prevent that portion from being cultivated, assuming the trees to have reached their full size, the whole plot granted will retain the character of grove but not otherwise. [P 558 C 1]

Where a certain plot, measuring three bighas was given for the purpose of maintaining a grove and only four fruit trees were in existence on that plot.

Held : that these four trees did not suffice to prove the retention of the character of grove by that holding : (1886) *A. W. N.* 138, *Dist.* [P 558 C 1]

Shambhu Nath Seth—for Appellant.

N. P. Asthana—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-appellant for possession of a certain grove on the ground that the defendant who had originally been grove-holder, had allowed it to lose its character as grove with the consequence that the right of occupation reverted to the zamindar. Both the lower Courts have dismissed the suit, holding that it was necessary to prove abandonment, and that the facts proved did not amount to abandonment. The lower appellate Court has also considered the question whether, assuming that the zamindar was entitled to resume the plot on the ground that it had been allowed to lose its character as grove land, the plot had as a fact lost that character.

In this second appeal two pleas are substantially taken, (a) that proof of abandonment was not essential, and (b) that the lower appellate Court's finding that the land had not lost the character of a grove was based upon a misconception of the law.

I hold that both the contentions are correct. It is well-established that a person, granted a specific area for the purpose of planting and maintaining a grove loses his right of occupation when he allows the land to cease to retain the character of a grove. Abandonment, actual or implied, is not necessery. I would refer to the case of *Hazari Lal* v. *Nimar* (1), where, however, both abandonment by the grove-holder and proof of cessation of retention of the character of a grove by the land were held to be proved. Again in *Harsahai* v. *Danpal Singh* (2), Mr. Justice Kanhaiya Lal appears to me to have correctly stated the law, namely that a plot granted for the purpose of a grove retains the character of grove so long as a portion of it retains that character, and in like manner fails to retain that character when no portion of it can be regarded as retaining that character. I would also refer to the *Select Decision of the Board of Revenue, No.* 14 *of* 1912, in which Mr. D. C. Baillie (subsequently Sir Duncan Baillie) held that the right of a tenant to retain possession of grove land lasts only so long a he maintains it as a grove. Lastly I would refer to the provisions of the new Agra Tenancy Act of 1926, S. 3, definition of grove land, and S. 196 and 197. That Act was not in force when this suit was brought, but that Act was intended to define the law as to grove-holders pre-existing the Act.

As regards the second question, the lower appellate Court admits in its judgment that it was a fact that for some time preceding the suit there had only been four fruit-bearing trees left on an

(1) A. I. R. 1923 All. 295=45 All. 386.
(2) [1916] 2 O. L. J. 589=32 I. C. 368.

area of three bighas. It was also a fact that the revenue officials had decided a case as regards the entry in the papers of the details of tenure etc. in respect of this land between the parties, and the Collector in that order, directing that the entry of the defendant as grove-holder should be replaced by an entry that the land was waste land, mentioned that these four fruit trees were on the boundaries of the field and had recently been planted. There can be no question that these four trees did not suffice to prove the retention of the character of grove by the holding consisting of three bighas. I have been referred to the case of *Azmatullah Khan* v. *Mangni Ram* (3). That decision only dealt with the right of a grove-holder to replant even after the grove had ceased to exist for a year. It is not relevant to this case, which has been brought by the zamindar at a time when the grove is not in existence. As a finding of fact I do not consider that the lower appellate Court's finding can be upheld.

It has been objected by the respondent's counsel that in this second appeal I am not entitled to reverse a finding of fact. It is sufficient to say that in my opinion the finding of fact by the lower appellate Court was based on a misdirection of itself in respect of the law. The nature and quantum of evidence required to prove that what was once grove land has ceased to retain that character is a question of law. When a Court has misdirected itself on this point it is impossible to maintain its finding on the particular case as a finding of fact. The lower appellate Court has in effect held that a grove-holder can allow the trees in a grove to dwindle down to what is practically nil without losing his right as grove-holder.

It appears to me that the proper view of the law, as it existed before the passing of the Tenancy Act of 1926, was rightly expressed in the new Tenancy Act. According to that Act so long as any considerable portion of a plot granted for a grove is allowed to contain a sufficient number of trees to prevent that portion from being cultivated, assuming the trees to have reached their full size, the whole plot granted will retain the character of grove but not otherwise.

(3) [1886] A. W. N. 138.

For the above reasons, I grant the appeal and decree the suit with costs throughout to the plaintiff.

K.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 558

BOYS AND BENNET, JJ.

Sheo Prasad and *another*—Plaintiffs—Appellants.

v.

Sanaullah and *another*—Defendants—Respondents.

Second Appeal No. 906 of 1928, Decided on 5th April 1929, against the decree of the Sub-Judge, Benares, D/- 26th January 1928.

Contract Act, S. 74—Term 'penalty' is not applicable where parties agree to revert to situation immediately prior to new agreement though it involves payment by one of greater sum than if he had carried out agreement.

The term penalty cannot be properly applied where all that is agreed between the parties is that they shall revert to the situation existing immediately prior to the new agreement, even though that may involve liability on the part of one of them for a sum greater than if he had carried out the agreement. [P 559 C 2]

Harnandan Prasad—for Appellants.

B. Malik—for Respondents.

Judgment.—This was a suit for sale to recover the balance of about Rs. 924 due on a mortgage. The mortgage was dated the 12th June, 1915, and was for a sum of Rs. 600 at 2 per cent p. m. simple interest. A total amount of Rs. 1368 had been realised by the mortgagee up to 1924, the last payment being an item of Rs. 500 made by the defendant mortgagor on 28th May 1924. On that date some further amount was due on the mortgage, an amount which has not been so far ascertained. An agreement was arrived at between the mortgagee and the mortgagor which is set out at the bottom of p. 8 of the paper-book. No question has been argued before us that the terms embodied on the particular slip of paper did not constitute a binding agreement. It is translated in the paper-book as follows:

"Only Rs. 300 remains to be paid out of the amount settled. You agree to pay it within 5 months, i. e., on or before Miti Katik Sudi Puranmashi Sambat 1981 (11th November 1924), If it is not paid as agreed, then we shall realise whatever has been remitted."

Both the lower Courts have held that the provision that the mortgagor might

revert to a claim for the amount which prior to the agreement he had been claiming as due on account on the mortgage was a penal provision and therefore, subject to revision by the Court. In determining whether the stipulation in this agreement amounted to the naming of a penalty or not the question should in my view be looked at broadly : "What was the situation at the time between the parties?" It would appear that both the mortgagor and the mortgagee were in agreement that there was some amount due and legally recoverable upon the mortgage. It may have been and no doubt was in dispute as to what that exact sum was but again manifestly it was a sum that both parties felt confident was more than Rs. 300, for otherwise the mortgagor would have had nothing to gain from the agreement. In order to avoid litigation on the point the mortgagor was prepared to pay Rs. 300 within five months if the mortgagee was prepared to waive the balance, and the mortgagee was prepared to waive that unascertained balance if the mortgagor paid Rs. 300 within five months. They naturally had to contemplate what was to happen if the Rs. 300 was not paid within the stipulated period. They then provided that on default in payment the agreemeent should be wiped out and the status quo restored. This appears to us a fair representation of the situation. The mortgagee said :

"If you will agree to pay me so much I will accept it; if you do not so pay I must stand upon my legal rights."

It does not appear to us that such a stipulation can be regarded as a penalty. There was no exacting from the mortgagor anything more than was due to the mortgagee at the time the agreement was entered into. There is a verbal but no essential difference between the case where the mortgagee says :

"If you pay within a certain time I will upon receipt of the payment remit the rest" and the case where he says :

"I remit the rest provided that you pay me so much within a certain time ; and provided that if you do not so pay, I will revert to the old situation."

It is merely a different manner of expressing exactly the same thing.

We do not overlook the contention of the respondent based upon the opening words of S. 74 :

"When a contract has been broken if a sum is named in the contract as the amount to be paid in case of such breach . . . the party complaining".

But the words :

"If a sum is named in the contract as the amount to be paid in case of such breach"

must be read in the light of the words which follow i. e. "any other stipulation by way of penalty." This shows that there must be something in the nature of a penalty governing the earlier proposition also. Now if we consider the illustrations in which it is declared that the stipulation amounts to a penalty, we find that in every case some further sum is to be paid by the person giving the undertaking larger than the amount that was due from him independently of the agreement. It seems to us therefore that the term "penalty" cannot be properly applied where all that is agreed between the parties is that they shall revert to the situation existing immediately prior to the new agreement, even thongh that may involve liability on the part of one of them for a sum greater than if he had carried out the agreement. We would therefore allow the appeal with costs hitherto in all Courts and remand the case to the lower appellate Court for disposal according to law.

P.N /R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 559

MUKERJI AND NIAMATULLAH, JJ.

Gajadhar & others—Applicants

v.

Chunni Lal and *others*— Plaintiffs — Opposite Parties.

Civil Revn. No. 264 of 1927, Decided on 26th April 1929, against order of Munsif, Mainpuri, D/- 4th July 1927.

Civil P. C., Sch. 2, Para. 5—Court ordering name of nominee of plaintiff to be substituted in order of reference for one of arbitrators — Defendant entitled to see whom plaintiff is going to appoint, but if he acts as if nominee is legally appointed and objects to award when it goes against him, he is estopped from questioning validity of appointment—Evidence Act, S. 115.

Where the Court orders that the name of a nominee of a plaintiff be substituted in the order of reference for one of the arbitrators to whom matters in difference are referred, the defendant is entitled to see whom the plaintiff is going to appoint and to decide whether he would agree to submit to an arbitration, to the Board of which the nominee is one of the members but if the defendant adduces evidence and acts as if the nominee is legally appointed and objects to the award

only when it has gone against him, he is estopped from questioning the validity of the appointment. [P 560 C 1, 2]

Baleshwari Prasad—for Applicants.

N. P. Asthana—for Opposite Parties.

Judgment.—This is an application to revise an order of the learned Munsif of Mainpuri dated 4th July 1927, by which he accepted an award and directed that a decree be framed in terms of it. It appears from the applicants before us, the defendants in the suit, and the plaintiff agreed to refer their differences to the arbitration of three gentlemen. The plaintiff nominated one man as his arbitrator. The defendants nominated one man as their arbitrator and the parties jointly nominated a third arbitrator, whom they called umpire. A reference was made and after a certain stage, Mr. Ram Sahai who had been nominated by the plaintiff absented himself. The plaintiff then went before the Court and stated that his arbitrator had left the locality, that there was no knowing when he was coming back and that he proposed that one Mr. Ganga Sahai should be appointed as his arbitrator. The learned Munsif ordered that the name of Mr. Ganga Sahai be substituted in the order of reference for Mr. Ram Sahai. He said that he passed this order subject to any legal objection that might be taken by the defendants. The arbitration proceeded. The defendants adduced their evidence before all the three arbitrators including Mr. Ganga Sahai and ultimately, the majority made an award in which the gentleman nominated by the defendants as their arbitrator did not join. When the matter came up before the learned Munsif objections were taken to the award by the defendants and one of the objections was that the appointment of Mr. Ganga Sahai contravened the provisions of para. 5, Sch. 2, Civil P. C. The learned Munsif held that para. 5 had no application and having dismissed the objections, passed the order already mentioned. In this Court it has been contended that the appointment of Mr. Ganga Sahai was illegal, inasmuch as the defendants had no previous notice of the appointment. As a proposition of law, we may be prepared to concede that although Mr. Ganga Sahai was a nominee of the plaintiff, the defendants were entitled to see whom the plaintiff was going to appoint and to decide, for themselves, whether they would agree to submit to an arbitration, to the Board of which Mr. Ganga Sahai was one of the members. But the conduct of the defendants in this case shows that they never took any exception to the appointment of Mr. Ganga Sahai. They adduced their evidence and acted as if that gentleman had been legally appointed and it was only after the award had gone against them, that they took exception to it. In our opinion, the defendants are estopped from questioning the validity of the appointment. In the result, the application fails and it is hereby dismissed with costs.

P.N./R.K. *Revision dismissed.*

A. I. R. 1929 Allahabad 560

BANERJI AND KING, JJ.

Dwarka Prasad and *another*—Defendants—Appellants.

v.

Ojha Dariao Singh—Plaintiff—Respondent.

First Appeal No. 88 of 1928, Decided on 12th April 1929.

Agra Tenancy Act (3 of 1926), S. 249—No appeal lies to High Court under Tenancy Act from order of remand by District Judge in appeal.

There is no provision in the Tenancy Act which allows an appeal to the High Court from an order of remand passed by a District Judge in appeal.

U. S. Bajpai and *Jwala Prasad Bhargava*—for Appellants.

M. L. Agarwala—for Respondent.

Judgment.—This is an appeal against an order of remand of a District Judge in appeal which was filed before him against a decree of an Assistant Collector. A preliminary objection has been taken by Dr. Agarwala that the Tenancy Act 3 of 1926 does not provide for an appeal against an order of remand passed by a District Judge in appeal. Under S. 240, Tenancy Act, no appeal lay from any decree or order passed by any Court under the Tenancy Act except as provided by the Act. S. 242 provides that an appeal shall lie to the District Judge from the decree of an Assistant Collector in certain suits. The present suit was one of those. We cannot find any provision in the Tenancy Act which allows an appeal to this Court from an order passed by a District Judge in appeal. We, therefore, allow the preliminary objection and dismiss the appeal with costs.

P.N../RK, *Appeal dismissed.*

* A. I. R. 1929 Allahabad 561

SULAIMAN AND KENDALL, JJ.

Brij Raj Saran Singh—Defendant—Appellant.

v.

Basant Singh and *others*—Plaintiffs Respondents.

Case No. 237 of 1925, with First Appeals Nos. 255 and 259 of 1925 and First Appeal No. 12 of 1926, Decided on 16th January 1929, against the decision of the Addl. Sub-Judge, Meerut, D/- 2nd March 1925.

*** (a) Evidence Act. S. 114—Where plaintiff's delay in bringing suit has prejudiced defendant, tendency of Court should be to make inference against plaintiff and such inference should be considered in testing evidence actually given.**

Where the long delay of the plaintiffs in bringing the suit has prejudiced the defendants and has prevented them from bringing the best evidence that would otherwise have been available to them, the tendency of the Court must invariably be to make an inference against the plaintiff unless good cause is shown and the Court should attach great importance to such presumption in testing the credibility of the evidence actually given: 14 *M. I. A.* 67; *A. I. R.* 1924 *P. C.* 137, *Foll.* [P 565 C 1]

*** (b) Evidence Act, S. 90 — Genuineness of even unregistered document can be presumed from its copy though such presumption can only be made after careful consideration of circumstances—Document purporting to be will produced in Court in 1897—On its basis public adoption made in 1903—It being admitted to be genuine in litigation in 1901, 1903 and 1910—Since death of testator in 1879 to institution of suit in 1923 no suggestion ever made that it was forgery—Original document proved to have been lost — Presumption of its genuineness can be made from its copy.**

The Court can presume the genuineness even of an unregistered document thirty years old from a copy of such document, if the original is proved to have been duly executed, and further it is also proved that the original is since lost. But such a presumption can only be made after a careful consideration of all the circumstances of the case. [P 566 C 1]

A document which purported to be the will was produced in Court in 1897, was referred to in the registered deed of gift in 1902, was made the basis of the public adoption in 1903 and was referred to in the deed of adoption. It was admitted to be genuine in litigation in 1901 and in other litigations from 1903 to 1909, and mutation of names was made in the revenue Court on the basis of the adoption in 1910. Yet since 1879 when testator died until 1923 when this suit was filed, no suggestion was made by anyone that a will had been forged or that the will produced in 1897 was a forged document. It was only when 44 speculators combined to take 192 shares of half the estate that the suit was launched.

Held: that after a careful consideration of the whole of the evidence it ought to be accepted as proved that a will was executed and that the genuineness of that will would be presumed from the copy of it: 16 *Cal.* 753 (*P. C.*), *Foll.*: 22 *All.* 294 and 5 *Cal.* 886, *Ref.* [P 567 C 1, 2]

*** (c) Hindu Law—Adoption — Hindu authorizing wife to adopt by his will—Will directing that boy in particular family should be adopted in first place—Daughter's son from that family adopted—Adoption is valid under will.**

Where a Hindu by his will gives authority to his wife and directs that a boy in a particular family should be adopted in the first place, and the wife adopts a daughter's son in the family, the adoption was according to the will because the fact that the boy adopted was a daughter's son and not a son's son does not place him outside that family. [P 568 C 1]

(d) Evidence Act, S. 13—*X* making statement in former suit that he was orphan when adopted — His adoption was not attacked in that suit on the ground of his being orphan—Still his statement was admissible in subsequent suit to prove instance of orphan's adoption.

In former suit in which the adoption of *X* was attacked, though not on the ground of his being an orphan at the time of adoption, *X* had made a statement that he was a year old when he was adopted and that his father and mother were then both dead.

Held: that this statement of *X* was admissible if produced in a subsequent suit, in which the question of the validity of an orphan's adoption was in question, to prove an instance of an orphan's adoption. [P 570 C 1]

(e) Custom (Punjab)—Jats in Ballabgarh District—Adoption.

Custom of adopting an orphan prevails amongst the Jats of Ballabhgarh District: *A. I. R.* 1922 *P. C.* 2; *on appeal A. I. R.* 1928 *P. C.* 294; *A. I. R.* 1916 *P. C.* 129, *Ref.* [P 569 C 1]

(f) Custom—If custom is proved to exist in 1912 it follows that it was ancient unless there is contrary evidence.

If the custom of the adoption of an orphan is proved to prevail in 1912, it follows that it had the ordinary attributes of a custom, that is to say, that it was ancient unless there is evidence to the contrary. [P 571 C 1]

(g) Hindu Law—Adoption—If adoption is attacked on the ground that adoptee was of different gotra, a special custom to the effect that such adoption is invalid must be proved.

If an adoption is attacked on the ground that the adoptee was of a different gotra, a special custom that such adoption is invalid in a particular locality, must be proved, because under the Hindu Law there is no restriction in regard to gotra. [P 571 C 2]

Judgment.—This appeal arises from a suit filed in the Court of the Additional Subordinate Judge of Meerut in which the first five plaintiffs, Kumar

Basant Singh and others, claimed to be the reversioners to the estate left by one Khushal Singh on his death in 1879, and as such to be entitled to possession of the estate on the death of his widow. The other plaintiffs are speculators who have purchased part of the plaintiffs' claim. Khushal Singh left a widow, Rani Raghubir Knnwar, who succeeded to the estate on her husband's death, and in 1903 she adopted Brijraj Saran Singh, the principal defendant, who is the appellant in this appeal. Other appeals have been filed by various transferees of parts of the disputed property from Rani Raghubir Kunwar or from Brijraj Saran Singh or from both. The decision in the suit depended on the validity of the adoption of Brijraj Saran Singh by Rani Raghubir Kunwar in 1903.

The plaintiffs claimed that there had been no adoption, and that even if the ceremony of adoption had been gone through it was invalid, because Rani Raghubir Kunwar being a Hindu widow had no power to adopt without the express permission of her husband. They claimed that no such permission had ever been given, and in para. 9 of the plaint they definitely set up the theory that a will had been forged by one Rao Umrao Singh, the father of Rani Raghubir Kunwar and that in this so called will alleged to have been executed by Khushal Singh it was made to appear that Rani Raghubir Kunwar had been granted permission to adopt a son. They further claimed that the adoption was invalid because Brijraj Saran Singh, who was 19 years of age at the time of his adoption, was an orphan. The defendants alleged that the will was genuine and that the adoption was valid. It has not been suggested before us that the adoption would be valid under the Hindu Law, but it has been argued that under the customary law applying to the parties an orphan can be adopted, and further that a widow can adopt a son without the permission of the husband when the husband's property is non-ancestral. The defendants also claimed that the first five plaintiffs were not entitled to sue as the reversioners to the estate of Khushal Singh. The lower Court decided all these points, except that of the factum of adoption, in favour of the plaintiffs and gave them a decree.

It is necessary at the outset to give a brief history of the events that led up to this suit. Khushal Singh the last male owner of the estate, was the adopted son of Raja Naher Singh, Raja of Ballabhgarh, a dependant of the old Delhi Emperor. Ballabhgarh was then in the district of Delhi, which was part of the North Western Provinces. During the mutiny Raja Naher Singh rebelled against the Government; he was hanged, and his estate was forfeited, and his dependants were granted allowances on condition that they left their home. Khushal Singh migrated to Kuchesar, a large estate lying in the Bulandshahr and Meerut Districts and married a daughter of the last male owner of that estate, Gulab Singh. This daughter was named Bhup Kunwar, and on her death Khushal Singh managed to obtain possession of the whole Kuchesar estate, which was a large one. Litigation followed with some of the other claimants, and in 1868 there was a compromise under which a five anna share was carved out of the whole estate and was allotted to Khushal Singh. Of the other claimants Umrao Singh whose name figures, to a certain extent in the present suit, got a six anna share, and one Partab Singh got the other five annas. Umrao's six anna share continued to be called the Kuchesar estate. Partab Singh's share was named the Mohi Uddinpur estate, and Khushal Singh's share, which is the property now in dispute, was called the Sahanpur estate. Some years before the compromise was arrived at, Bhup Kunwar had died, and very shortly after the compromise Khushal Singh married Rani Raghubir Kunwar, the daughter of Umrao Singh.

There was no issue of either marriage of Khushal Singh, and he died at the age of about 38 on 6th August 1879. It is claimed by the plaintiffs that the defendants have not proved that he left a will. A document in the form of a will alleged to have been executed by Khushal Singh at Meerut on 26th July 1879 was produced in the Court of the Settlement Officer in 1897, but that document has not been produced in evidence in this suit. The document that has been produced is a copy of the original document which was shown in the Settlement Office. The defendants

claim that this copy should be admitted as secondary evidence of the original will; and they further claim that other secondary evidence should be admitted to prove the contents of the original, and also to prove the fact that it was executed by Khushal Singh. The most important and perhaps the most difficult question in this appeal is that of whether this copy is to be admitted in evidence. If it can be admitted, then the further question arises of whether, having the copy before it, the Court can presume the original, which is said to have been executed in 1879, to be genuine; and, if this presumption ought not to be made, if whether the other secondary evidence adduced by the defendants to prove the execution and contents of the alleged will is sufficient to establish their case. Clearly then the first question to be decided is whether the copy is to be admitted in evidence, that is to say whether the defendants have proved that secondary evidence is admissible under any of the clauses of S. 65, Evidence Act. The only clause that has been referred to in argument is Cl. (c) of that section viz:

"When the original has been destroyed or lost or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time."

The defendants have tried to prove that the original will has been destroyed or lost, but the evidence on the point is so involved with that of the other question of whether a will was actually executed by Khushal Singh or not that we find it impossible to decide the one question without reviewing the evidence relating to the other. It may be stated at the outset that while the plaintiffs alleged in their plaint that a will had been forged by Umrao Singh they have never suggested at any stage that this forged will was a substitute for a genuine will executed by Khushal Singh. Their case throughout has been that Khushal Singh executed no will, and that the will produced in the settlement proceedings of 1897 had been forged shortly before that date for a specific purpose viz: to support an adoption that was then being contemplated. But it has been pressed upon us, and we think rightly pressed, that the plaintiffs' case does not depend on their proving that there was a forgery. The defendants are in possession of the disputed property, but their title depends upon an adoption that is invalid unless the will can be proved, and it is therefore for the defendants to prove the will if they are not to be dispossessed of the estate.

The alleged will is printed on pp. 801 to 803 of the printed book, and after a few preliminary remarks of no special importance it sets forth:

"(2) In case the disease from which I am at present suffering is cured and I get any issue, or I adopt a boy during my lifetime, then he shall be my successor, but in case there is no issue or adopted son, my wife, Mt. Raghubir Kunwar, shall be the owner in possession of my property.

(3) I have willed and permitted to my wife Mt. Raghubir Kunwar and now I give it in writing that in case no issue is born to me in my lifetime or in case one is born and does not survive or in case I do not adopt a son in my lifetime, she should for the sake of spiritual benefit and in order to perpetuate my name, adopt a boy, in accordance with the custom prevailing among the Jats in the first place from the family of the present rais of Kuchesar, in the second place a descendant of Rao Maharaj Singh, resident of Mohiuddinpur, and in the event of this being impossible, in the third place, any boy belonging to the brotherhood. She should bring up the boy, educate him and perform his marriage. From the time of adoption that son shall be like the begotten son of my wife and me. But when a boy of one family has been adopted a boy of another family shall not have any right to urge his claim for being adopted; nor shall a relative. Paper torn.... urge (?) Mt. Raghubir Kunwar shall be the owner in proprietary possession of my property till she makes an adoption. After the adoption she shall, as an elder and a patron, be the protector and trustee of the rights of the adopted son. She shall allow her name to stand in the public papers so long as she remains alive. Even during the minority of the adopted son she shall have the powers set forth in para. 4 of this will.

(4) At present a very large debt is due against me, the executant. If it is not paid up during my lifetime, then after my death it shall be incumbent on Mt. Raghubir Kunwar my wife to pay off the entire debt from the income of the "riayasat" (estate). In case the income does not suffice for the purpose she should sell some zamindari property to the extent of the amount of the debt and thus satisfy the debt. She shall like myself have a permanent power to transfer property for this purpose.

(5) My deceased mother-in-law, the wife of Rao Umrao Singh, in her lifetime purchased from me a five biswa zamindari share belonging to me and situate in mauza Puth, district Meerut, for a fixed price of Rs. 3,000 and made a charitable gift of the same in favour of the temple of Sri Gangaji. The income from the said property has been from the day of the purchase spent over the expenses

of the temple. Out of the said price I have already received Rs. 2,700 and Rs. 300 remain due against Rao Umrao Singh. My successor shall unhesitatingly get the mutation of names in respect of the said property effected in favour of the temple of Sri Gangaji when the remaining amount is paid up or without its payment when the aforesaid Rao Sahab desires.

(6) My mother often lives at Candauli. In addition to the pension of Rs. 100 which she receives from the Government I pay her Rs. 300 a month. She shall continue to get this for her lifetime out of the income from my property. After the death of my mother my sister Mt. Bibi Atar Dei who is a childless widow shall receive Rs. 15 a month for her lifetime. My widow or son shall not be competent to stop the same.

(7) Mt. Lachhmi Bai is in my keeping. I want to do something for her. If she keeps a good character it shall be incumbent of Mt. Raghubir Kunwar to give her (Lachhmi Bai) some property yielding a profit of Rs. 400 a month for her maintenance. Mt. Lachhmi Bai shall have power to ultimately make a gift of and give away out of that property a portion yielding a profit of not more than Rs. 50 a month to anyone (she likes). No one shall have any power to interfere in that.

(8) If, when the adopted son attains majority and takes up the work and becomes competent, my wife Mt. Raghubir Kunwar wants of her own accord to give up the management of the estate for the sake of freedom, she shall have power to make over the management of the pargana to the adopted son and free herself. In that case she shall for her lifetime take Rs. 1,000 a month or in case she so desires, retain in her possession any villages which she likes and which yield an income of Rs. 1,000 a month. She shall be at liberty to spend the income from those villages according to her own choice and without any interference on the part of the adopted son. Out of the aforesaid property she shall be at liberty to sell, mortgage, to give to any relation or to make a charitable gift of, according to her choice, property yielding a profit of Rs. 500 a month. The adopted son shall not have any objection to that. She shall have absolute power. I have therefore executed the will so that it may stand as authority."

The document purports to be signed by Kunwar Khushal Singh, by two pleaders, and by no less than 10 other witnesses of apparent respectability. As the will purports to have been executed in 1879, however, and the defendants have not been called upon to prove it until the present suit was filed on 1st May 1923, nearly 44 years later, it has happened, not unnaturally, that all these witnesses have died. It has been urged very strongly on behalf of the defendants that the delay of the plaintiffs in bringing the suit has prejudiced the defendants and has prevented them from bringing the best evidence that would have been available, for instance, in 1903 and the following years, and this is an argument to which constant reference has been made whenever the evidence of the defendants has been criticised. It has been shown to us from the pedigree, and indeed it is not disputed, that the present plaintiffs were the nearest reversioners in 1903 as they are now, and that they alone would have been in a position to file a declaratory suit. We may remark here that the defendants did contest their legitimacy in the Court below, and have raised the question in appeal here, but we are convinced as the lower Court was, that there is no force in the objection, and that the first five plaintiffs are now, as they were in 1903, the nearest reversioners to the late Khushal Singh. The learned Sub-Judge at an early stage in his judgment referred to the remarks of their Lordships of the Privy Council in the case of *Rajendro Nath Holdar* v. *Jogendro Nath Banerjee* (1). In that case the will had been acted upon and recognized for 27 years by the whole of the family of the testator, and their Lordships remarked :

"If the document had been a fabrication, and if there were persons who might have intervened and have contested the will, the presumptive heir, who was in existence before his title was defeated by the birth of the present contesting respondent, might have come forward in one way or another and contested the will. Therefore, there arises from all these circumstances a very strong presumption, which their Lordships do not feel themselves at liberty to disregard, in favour of the will. No doubt these circumstances, as the law stands, are not conclusive against the first respondent. He has the right to call upon the appellant, the defendant in the suit, to prove his title ; but their Lordships cannot but feel that while he has that extreme right, every allowance that can be fairly made for the loss of evidence during this long period, by the death or otherwise, every allowance which can account for any imperfection in the evidence ought to be made ; and on the other hand, that in testing the credibility of the evidence which is actually given, great weight should be given to all those inferences and presumptions which arise from the conduct of the family with respect to the will and to the acts done by them under the will ..... In such a case the defendant, in order to defend his status, should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by mem-

(1) [1870] 14 M. I. A. 67=15 W. R. 41=2 Suther 422=2 Sar. 666 (P.C.).

bers of the family or other persons. The case of a Hindu claiming by adoption is perhaps as strong as any case of the kind that can be put; because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses the rights—he may lose them altogether—which he would have in his own family; and it would be most unjust after long lapse of time to deprive him of the status which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title."

Again in the case of *Kalyandappa* v. *Chanbasappa* (2) at p. 516 (*of* 22 *A. L. J.*) their Lordships remarked :

"But if a claimant chooses to run the risk that an adoption which he has not attacked will have every presumption made in its favour by reason of its long standing, he can wait till his reversionary right has accrued . . . . . ."

In the present case we know that the plaintiffs might have sued for a declaration when the adoption was made in 1903. It has been pointed out for reasons which will be given later that if they had done so they would have had to fight against the resources not only of the Sahanpur estate, but also of the Kuchesar estate as well, and that it would, therefore, have been very difficult for them to sue. But on the other hand it would be unfair to make the defendants suffer because the plaintiffs were not in a position to sue, and we think that in weighing the evidence we must give full force to the observations of their Lordships in these cases. They do not, however, go so far as to say that if there has been a long delay on the part of the plaintiffs, every presumption, both of law and fact, must necessarily be made against them though the tendency of the Court must invariably be to make such presumption, unless good cause is shown, against them.

The first and the most important presumption that we have been asked to make on behalf of the defendant-appellants is that under S. 90, Evidence Act.:

"Where any document, purporting or proved to be 30 years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested."

(2) A. I. R. 1924 P. C. 137=48 Bom. 411=51 I. A. 220 (P.C.).

If the original document which was produced in the settlement proceedings of 1897 had been produced in evidence in the Court below that Court might have presumed that the document was genuine. The original document not being forthcoming, however, there has been some considerable argument in this Court as to whether the presumption referred to in the section can be applied to a copy. To avoid any confusion we may say at once that we are in no doubt, but that the copy on the file is a true copy of the document produced in the settlement Court. It was made by the qanungo from the original and, therefore, fulfils the conditions of Cl. (iii), S. 63, Evidence Act. This is proved by the statement of the patwari. Moreover the order of the Settlement Officer shows that he saw the original and compared it with the copy. The debatable question is whether the genuineness of the original can be presumed from the copy. If we were to be guided by the wording of the section alone we might have some difficulty in holding that such a presumption might be made. There is, however, a preponderance of authority in favour of the proposition. In the case of *Khetter Chunder* v. *Khetter Paul* (3) such secondary evidence was admitted under S. 65 (c) and S. 90, Evidence Act, when the original was proved to have been lost from proper custody.

In a case reported in *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (4) it was held that S. 90 should be applied when the original has been destroyed, a Bench of two Judges of this Court following the decision of the Calcutta High Court quoted above. In the case of *Dwarka Singh* v. *Ramanand Upadhia* (5) a similar view was taken. Moreover in the case of *Luchman Singh* v. *Puna* (6) their Lordships of the Privy Council appear to have accepted the principle. That case has been strongly relied on by the appellants. The relevant evidence in that case was that of one witness who stated that he was present at the signing of the deed which he said was stated to be a deed of gift from Kali Babu to Ram Chander, and that of another wit-

(3) [1880] 5 Cal. 886=6 C. L. R. 199.
(4) [1900] 22 All. 294=(1900) A. W. N. 82.
(5) [1919] 41 All. 592=51 I. C. 275=17 A. L. J. 711.
(6) [1889] 16 Cal. 753=16 I. A. 125=5 Sar. 370 (P.C.).

ness that Kali Babu told him that there had been such a deed of gift. Their Lordships remarked :

"Whether that evidence would of itself prove the deed of gift need not now be discussed, but that it formed good ground for holding that there was a deed capable of being proved by secondary evidence cannot be doubted."

Their Lordships then go on to accept the opinion of the Courts below that the copy produced is a true copy of the original and conclude :

"When the copy is looked at it establishes the deed of gift on which the respondents rely."

In order to connect the copy with the deed of gift which was proved to have been executed the Courts must, we think, have made use of S. 90, Evidence Act. There is similar evidence in the present case, that is to say there is evidence that a will was executed and a copy produced which it is sought to connect with the will by the operation of S. 90. There is, however, this distinction to be made between the two cases. Their Lordships had before them certain findings of fact by which they were bound. They were satisfied from the evidence that a deed of gift had been executed, and that being so, they were prepared to accept the decisions of the lower Courts in making use of S. 90, Evidence Act. In the present case we are at this stage faced with the position that the trial Court has not found it proved that a will was executed, and has refused to exercise the option of making use of S. 90. The plaintiff-respondents have not been able to show us any authority for holding that the presumption cannot in any circumstances be applied to a copy. In fact it is obvious that there must be cases in which the presumption would be proper, as for instance, in the case of a registered document. It is certain, however, that such a presumption in the case of a copy of an unregistered document should only be made after a careful review of all the circumstances of the case, and we think it well therefore to consider all the circumstances in detail before pronouncing our decision on this point.

In any case, however, it was necessary for the defendant-appellants to prove that the original document had been lost or destroyed before they can ask the Court to admit the copy in evidence, and this, as we have already remarked, is the most difficult question in the case. (Here the judgment discussed evidence and concluded). We think, therefore, that we ought to decide the point in favour of the defendants, and hold that the loss of the original document has been established and that secondary evidence may be admitted. (The judgment again proceeds to consider evidence and then concludes). We have already remarked that we consider that secondary evidence of the document produced in the settlement proceedings of 1897 ought to be admitted and we have also shown that there is authority for applying the presumption allowed under S. 90, Evidence Act, to a copy of the original document, when the original document itself is not available. We have now to consider whether that presumption ought to be applied in the present case. It has been argued by Sir Tej Bahadur Sapru for the respondents that if there are considerations favouring the application of that section which are, however, in themselves not sufficient to justify the Court in applying it, the Court should not allow those considerations to be supported by other secondary evidence of the execution and contents of the original document. The point is a somewhat subtle one, but we think that it may be put fairly in this way. The circumstances of the case may or may not be sufficient to justify the application of S. 90. If they are not definitely insufficient, we ought to ignore that section altogether, and not to regard it with a benignant eye while we scrutinize any other secondary evidence of the contents of the document. In deciding whether the section ought to be applied, however, we are bound to take into consideration all the circumstances, including the evidence showing that a genuine will existed, and that it was acted on.

We have already described what the direct evidence in favour of the existence of the will is, and we are particularly impressed with the importance of the statement made by Bhagwan Singh to the effect that he saw a will a few months after the death of Khushal Singh and that he identified the signature of his brother Sheobaran Singh on the document. The trial Judge's reason for discarding this evidence seems to us to be insufficient. If his statement is believed not only is the existence of the will proved but also the signature of one

of the witnesses on it. We think further that the other witnesses in favour of the will have not been rated at their true value by the Judge. In each case some reason is found for doubting the credibility of the witness or the probability of his statement, but we think that the remarks we have made in regard to the evidence relating to the loss of the will must also apply here. If a suit had been brought in 1903 or thereabouts, there would almost certainly have been a greater mass of evidence to prove the existence of the will, and that evidence would have been more precise in character. Moreover, as we have stated before, some of the witnesses to the will were still alive, and their evidence too would have set at rest the question of whether such a will had been executed or not. We do not forget that there are several circumstances which appear to tell against the existence of the will prior to 1897, and the most important of these is the absence of any mention of the will in the deed of gift to Lachmi Bai, in her agreement connected therewith and in the power of attorney in favour of Umrao Singh. It has to be admitted and in fact it has been admitted on behalf of the defendants that this absence of any mention of the will is a remarkable circumstance that needs explanation. It is not, however, conclusive against the existence of the will. If no such will existed, the gift of such a large property to Mt. Lacchmi Bai was unnecessary. On the other hand, if a smaller property was to be given to her and a relinquishment of all further claim was to be obtained from her, it may have been considered politic to keep the will concealed from her at the time. All this in fact, might have been explained and of the three people who could have provided the explanation, two were alive in 1903 when the plaintiffs might have filed the declaratory suit and set these matters at rest.

A document which purported to be the will was produced in Court in 1897, was referred to in the registered deed of gift in 1902, was made the basis of the public adoption in 1903 and was referred to in the deed of adoption. It was admitted to be genuine in litigation in 1901 and in other litigations from 1903 to 1909, and mutation of names was made in the revenue Court on the basis of the adoption in 1910. Yet since 1879 when Khushal Singh died until 1923 when this suit was filed, no suggestion was made by anyone that a will had been forged or that the will produced in 1897 was a forged document. It was only when 44 speculators combined to take 192 shares of half the estate that the suit was launched. The combination of such a large number of speculators shows the extent of the risk which each was prepared to run, and also gives a fair idea of the resources which they had for procuring oral evidence.

We think after a careful consideration of the whole of the evidence that we ought to accept as proved the fact that a will was executed by Khushal Singh. We have already referred to the case of *Luchman Singh* v. *Puna* (6) and we propose to follow the process of reasoning which we believe to have been adopted by their Lordships of the Privy Council in that case and to accept the copy of the will as genuine, and we find that the Rani was empowered under the will to make an adoption in accordance with it.

There is one more point that has to be settled in connexion with the will. It has been argued on behalf of the plaintiffs that even if the will be held to be proved the adoption is invalid because it does not comply with the terms of the will. In para. 3, provision is made for adoption in the following order:

> "She should . . . . . adopt a boy in accordance with the custom prevailing among the Jats: in the first place from the family of the present rais of Kuchesar: in the second place a descendant of Rao Maharaj Singh, rais of Mohiuddinpur, and in the event of this being impossible, in the third place any boy belonging to the brotherhood."

In interpreting this passage the lower Court remarks that there is a clear provision in the will that when once an adoption has taken place out of a particular family, the members of the other two categories would have no right to urge it. This has a reference to a later passage in para. 3 of the will to the following effect:

> "But when a boy of one family has been adopted, a boy of another family shall not have any right to urge his claim for being adopted."

The conclusion of the lower Court apparently was that when an adoption has been made it could not be questioned on the ground that the order mentioned in the will has not been observed. But we do

not think that this is the proper interpretation of the will. The later passage appears to us to refer to the possible case of a boy in one of the two preferred families being born after an adoption had been made outside those families, in which case he was to have no power to contest the adoption. We think it is clear that the will intended that no boy outside the two families should be adopted while there was in existence a boy belonging to one of those families. We know as a matter fact that Inderjit Singh who is a grandson of Umrao Singh, and therefore a boy of the Kuchesar family, was in existence when the present principal defendant was adopted. Nevertheless we are satisfied that the adoption of Brijraj Saran Singh was valid under the will. He is a son of a sister of the Rani and a grandson of Umrao Singh. The mere fact that he was a daughter's son and not a son's son of the rais of Kuchesar does not place him outside the khandan or the family, and we think therefore that he must be held, to come into the first category mentioned in the will.

Our conclusion is therefore that the will has been proved, and that under it the Rani had power to adopt. It has been found by the lower Court that she did actually adopt Briiraj Saran Singh, and this finding has not been assailed before us. We have just found that this adoption was in accordance with the will.

It has been argued, however, that in any case the adoption of Brijraj Saran Singh is invalid because he was an orphan. The defendants have pleaded that Khushal Singh was subject to the customary law of the Jats of Ballabhgarh under which the adoption of an orphan is valid. It has not been denied that when Khushal Singh migrated from Ballabhgarh to Kuchesar he must have continued to be governed by the customary law if any such customary law prevailed in Ballabhgarh. Ballabhgarh was at the time of Khushal Singh's migration in the Delhi District, though it has since been transferred to Gurgaon. The district of Delhi was at the time part of the North-West Provinces, and the district of Gurgaon in which Ballabhgarh now lies is part of the Punjab. But although something has been said about these administrative changes we do not think that they can have any effect on the question, which is the customary law of the Jats of Ballabhgarh. The principal documentary evidence that has been referred to is that of the riwaj-i-am which differs from the wajib-ul-arz in being a record of the customs prevailing in districts as distinguished from villages. There are two copies of the riwaj-i-am of the Delhi District the authenticity of which is, of course, not denied, that of 1880 and that of 1912 and the customs are recorded in the latter copy in the form of question and answer. Question 83 on p. 41 of the official copy is :

"May a man give in adoption (i) his only son, (ii) his eldest son, (iii) his brother ?"

and the answer to the last question is :

"a brother can be given in adoption by his own brother, but cannot be adopted by his own brother,"

and this custom is stated to relate to "all tribes." In the introduction the Jats are shown as one of the divisions of the Kshattriya caste. There can be no doubt therefore that this record related to the Jats in the Delhi District in 1912. It is denied, however, that the custom recorded shows that an orphan can be adopted. It does not do so in so many words, but it is argued for the appellants that the custom is a necessary inference from the record of customs that a man may give his brother in adoption. The argument proceeds on these lines: the words "to give in adoption" may have one of two meanings, (i) to give permission for the adoption and (ii) to officiate at the ceremony of adoption as the person who gives in adoption. The second of these functions may be delegated to another, but the first cannot. The answer to Q. 87 of the same record shows that the only formalities necessary to constitute a valid adoption are the beating of drums and the distribution of sweets, and for the adopter to say before the relations assembled "I have adopted such and such person as son," the adopted person being present at that time. There is therefore no necessity for anyone to officiate at the ceremony as the person who gives in adoption. If therefore a man may 'give in adoption' his brother, the meaning must be, not that he performs the ceremony of giving, but that he gives the permission. The necessity for a brother to give his brother in adoption can only arise if the parents are dead,

and it therefore follows that an orphan may be given in adoption. It was argued for the plaintiffs that the recorded custom may merely mean that the father may be alive, but away, and in this case the brother might officiate at the ceremony. But this argument has no force if we accept the explanation given on behalf of the defendants, which we think we must do. The adoption of an orphan is therefore quite consistent with this entry in the "riwaj-i-am"; and the appellants wish us to go still further and hold that it is a necessary inference from it. The plaintiffs have pointed to a decision of the Privy Council reported in *Abdul Hussain Khan* v. *Mt. Sona Bibi* (7). They were there dealing with a case from Sind, but they quoted with approval some remarks made by the Punjab High Court in regard to custom in the Punjab to the effect that even in the Punjab there was no presumption in favour of custom as opposed to the personal law. In the present case, however, there is no need to fall back on any presumption, because the defendants not only have brought forward the evidence of the riwaj-i-am, but they have also produced a number of witnesses both to testify to the existence of the custom and to prove instances of it. The importance of the entry in the riwaj-i-am is emphasized in a number of recent decisions, for instance, in the case of *Ram Kishore* v. *Jai Narain* (8). Their Lordships of the Privy Council remarked that the trial Judge had been much influenced by the riwaj-i-am of the Gurgaon District in upholding an adoption, and they maintained his decision, which was to the effect that the adoption of an orphan among the Dhusars in the district of Gurgaon was valid. In the case *Mt. Vaishno Ditti* v. *Mt. Rameshwar* (9) their Lordships remarked :

"it has been held by this Board that the riwaj-i-am is a public record prepared by a public officer in discharge of his duties and under Government rules, that it is clearly admissible in evidence to prove the facts entered thereon subject to rebuttal and that the statements therein may be accepted even if unsupported by instances : *Beg* v. *Ailah Ditta* (10) ; *Ahmad Khan* v. *Channi Bibi* (11) at p. 383 (*of* 52 *I. A.*)"

and they go on to remark that even if there be no evidence of instances, if the custom spoken to by the party's witnesses is in accordance with the custom applicable to his community according to the Manual of the Customary Law of the district, there is sufficient prima facie evidence of the existence of the custom ; and they did in fact uphold an adoption under a custom that was not supported by any instances, on the ground that it was in accordance with what is laid down in the riwaj-i-am.

In the present case, however, as we have already remarked, there is a considerable body of evidence. The defendants produced 20 witnesses to testify to the existence of the custom, and 10 of these spoke to definite instances. It is true that the learned Subordinate Judge has not been satisfied that any of these instances has been satisfactorily proved except one. At the end of the judgment he has given in appendix 1 a list of the instances of orphans' adoptions which the defendants tried to prove, and in our opinion he has rejected the evidence somewhat summarily. For instance he took the case of Mukh Ram, No. 1 in the appendix. One witness came forward to state that an orphan could be adopted in the Jat community, and gave as an instance that Mukh Ram was adopted by Mt. Jasso, and later on Mukh Ram's son Molhar came forward to testify to the same effect. The lower Court has accepted the rebutting evidence to the effect that Molhar's "sons and parents were alive when he was adopted," but there is nothing to rebut the statement that Mukh Ram, the father, was an orphan when he was adopted. Again in the case of Mamraj No. 2 on the list, the statement made by Mamraj himself in a former suit in 1881 was produced in evidence. In that former suit Mamraj's adoption was being attacked, though not on the ground that he was an orphan. He was unlikely to say anything that could reflect on the legitimacy of his adoption, yet he came forward and said :

"I was a year old when Har Chand, my maternal uncle, took me in adoption . . . My father and mother both had died at the time of my adoption."

(7) A. I. R. 1917 P. C. 181=45 Cal. 450=45 I. A. 10 (P. C.).
(8) A. I. R. 1922 P. C. 2=49 Cal. 120=48 I. A. 405 (P. C.).
(9) A. I. R. 1928 P. C. 294=10 Lah. 86=55 I. A. 407 (P. C.).
(10) A. I. R. 1916 P. C. 129=44 Cal. 749=44 I. A. 89 (P. C.).
(11) A. I. R. 1925 P. C. 267=6 Lah. 502=52 I. A. 379 (P. C.).

The Judge has accepted the statement of one witness on the other side who deposed that Mamraj was adopted on the very day when he was born, both his parents being then alive. It has been suggested that the statement of Mamraj is not admissible under S. 13, Evidence Act, in proof of the allegation that he was an orphan when he was adopted. We think, however, that it ought to be admitted. Under S. 13, Evidence Act where the question is as to the existence of any right or custom Cl. (b).:

"particular instances in which a right or custom was claimed, recognized or exercised or in which the exercise was disputed, asserted or departed from"

are relevant facts. It is true that the question being adjudicated when Mamraj made his statement in 1881 was not that of whether an orphan could be adopted, and it may be said that his assertion was not one of the custom that was then in question. It was, however, an assertion that he was adopted and the question was whether he had been adopted, and it is clear that the assertion that he was an orphan at the time was not due to any indirect intention and may even have been against his own interests. We think that the lower Court was right in not accepting those cases where the adopted person was still alive but was not produced as a witness. But in the case of Kallu, No. 4 in the appendix, a witness Jaisi Ram came forward and stated that he had been present when Kallu was adopted and that Kallu's parents were then dead. The witness was then subjected to a long cross-examination as to dates and ages in which he sometimes seems to have found a difficulty in answering. The Judge remarked at the end of the examination :

"it was very difficult to get answers from the witness in cross-examination"

and in his judgment he remarks :

"Jaisi Ram is an unreliable witness as he did not give clear answers in cross-examination."

After reading the statement and the cross-examination, however, we feel no surprise that Jaisi Ram had to hesitate before replying to some of the questions, and we do not think that this alone was a good reason for holding him to be an unreliable witness If his statement is accepted the adoption is proved as there is no rebuttal. In the case of Gordhan No. 6 in the appendix, the Judge has held that the adoption of an orphan has been proved. It is now admitted on behalf of the plaintiffs that Gordhan was adopted ; but it is denied that the evidence proves that he was an orphan at the time. The evidence consists of the statements of two witnesses which were admitted by the lower Court under S. 13, Evidence Act, and as they do contain assertions that Gordhan was adopted when he was an orphan we do not think the evidence should be excluded on the ground that it is not clear whether that question was being agitated in those proceedings. It must be remembered that instances of the adoption of an orphan cannot in the ordinary course of events have been very frequent within living memory, and yet the defendants produced evidence as the above instances show.

In the case of Umrao, No. 9, two witnesses have deposed to his adoption when he was an orphan. Against this the plaintiffs produced one witness who denied that Umrao had been adopted by the alleged adoptive father Kure, and stated that on Kure's death certain persons got his property ; but in cross-examination he contradicted this and said that Umrao got Kure's property.

In these circumstances it seems to us to have been quite unfair to accept the plaintiffs' evidence rather than the defendants'. It is not necessary to go through all the other instances. Those given above appear to us to have been sufficient to establish the custom, especially when we find that the custom is in accordance with that recorded in riwaj-i-am. The form of adoption described in the riwaj-i-am is the "kriti" form, and not the "dattah" form which is prescribed by the Benares school. The ceremony of giving and taking is not necessary under the "kriti" form, and it is precisely this ceremony that makes the adoption of an orphan inconsistent with the "dattah" form, because there is no one to give an orphan. Moreover, the adoption of Brijraj Saran Singh undoubtedly took place ; it was public and there was no concealment about it. A large number of the brotherhood assembled to take part in it, priests from the ancestral village came to join it, and it was well-known that Brijraj Saran was an orphan. It was recognized by the family for a number of years and the

adopted son enjoyed the possession of the estate, and yet no one protested, until the present suit was filed that the adoption was contrary to custom. It is true that the plaintiffs produced a large number of witnesses to testify that the Jats were not governed by customary law but by the ordinary Mitakshara law. The Subordinate Judge has, however, remarked :

"It is not farfetched to find out that a host of witnesses produced on behalf of the plaintiffs are more tutored than otherwise. They have no idea of Hindu Law and do not know the principles on which Hindu Law forbids the adoption of daughter's son or sister's son . . . No reliance can be placed on these witnesses and there is no doubt in my mind that so far as the Punjab is concerned including the Delhi and Gurgaon Districts the agricultural population to a great extent follow the customary law."

We may add that whereas it may be easy to produce numerous witnesses to affirm generally that they are governed by the Mitakshara law, it is by no means easy to manufacture specific instances of a particular custom, and to produce witnesses who shall testify to them satisfactorily, and stand the test of cross-examination on every detail. We accept the conclusion of the Judge and hold that the customary law does prevail in the Delhi and Gurgaon districts ; but we differ from him when he says that the custom of adopting an orphan has not been proved to exist in the Jat community of Ballabhgarh tahsil. It has been suggested that even if this custom exists it does not follow that Khushal Singh was governed by it when he left Ballabhgarh in 1858. We do not think that we can accept this contention. If the custom of the adoption of an orphan prevailed in 1912, it follows that it had the ordinary attributes of custom, that is to say that it was ancient and unless there is evidence to the contrary, that it existed in 1858.

There is one more circumstance in favour of the custom of adopting an orphan that is worthy of mention. The suit brought on behalf of Inderjit in 1903 was intended not only to establish Inderjit's adoption but to get the defendant's adoption invalidated. If there was no custom allowing the adoption of an orphan, Girraj was likely to have made it a point of attack that the defendant was an orphan. This was not done. The inference is almost irresistible that the custom of adopting an orphan was too well known to be attacked.

In the course of arguments the respondents tried to show that the adoption of Brijraj Saran Singh must be invalid because he was not of the same "gotra" as Khushal Singh. We need only say that in the riwaj-n-am of 1880 it is recorded that a sister's son may be adopted, and that is the relation in which Brijraj Saran Singh stood to his adoptive mother. The wording of this riwaj-i-am makes it clear that the question for consideration is the relationship to the person adopting .and not to the deceased person. There is no such restriction in the riwaj-i-am of 1912. The fact is that the plaintiffs are trying to set up a special custom under which Brijraj Saran Singh could not be adopted and they have failed to prove it. It is admitted that under the Hindu Law the alleged restriction in regard to the "gotra" does not exist, and it follows that as the plaintiffs have failed to prove a special custom of this kind, the objection to the adoption on this ground must fail.

Our view of the whole case, which is obviously a difficult one, is that the learned Subordinate Judge though he has written what is in many ways a careful and able judgment, has been too much inclined to discard positive evidence in favour of an ingenious theory. The final result is that we allow the appeal, set aside the decree and order of the lower Court and direct that the plaintiffs' suit be dismissed with costs in both Courts.

S.N./R.K. *Appeal allowed.*

A I. R. 1929 Allahabad 571

Special Bench

SULAIMAN, MUKERJI AND BANERJI, JJ.

Sahdeo—Plaintiff—Applicant.

v.

Budhai and *others*—Defendants—Opposite Parties.

Misc. Case No. 1112 of 1928, Decided on 5th April 1929, Reference from Addl. Munsif, Allahabad, D/- 30th November 1928.

(a) Agra Tenancy Act (3 of 1926), Ss. 99 and 121—Suit for declaration of joint tenancy and possession—Defendants alleging to be tenants—Suit lies in revenue Court.

The plaintiff brought a suit for declaration that he was a tenant jointly with the defen-

dants and for possession jointly with the defendants. The defendants set up a right in themselves as tenants.

Held: that in view of S. 230 read with explanation and Sch. 4, serial numbers 12 and 15. the suit was not cognizable by the civil Court. [P 573 C 2]

(b) Agra Tenancy Act (3 of 1926), S. 230 —Scope.

Per Sulaiman, J.—S. 230 is very wide and mandatory. So long as the suit or application specified in Sch. 4 can be heard by the revenue Court the jurisdiction of the civil Court is completely ousted. [P 573 C 1]

Per Mukerji, J.—There can be no doubt that if S. 230 excludes a case from the cognizance of the civil Court the civil Court will have no right to have it on the simple ground that all cases of the civil nature should be heard by it. In order to see whether the case falls or not within the purview of S. 230 we must look to Sch. 4 and serial numbers and sections corresponding to serial numbers. [P 573 C 2]

(c) Agra Tenancy Act (3 of 1926), Ss. 99 and 121—Tenant need not declare that he is claiming through landholder.

Where a person is admitted to be a tenant of a holding it must be taken that he is claiming through the landholder. He cannot claim otherwise than through the landholder. It is not necessary therefore that before a suit is instituted under Ss. 99 and 121 that the defendants should have declared anywhere, either orally or in writing that he was claiming through the landholder: *A. I. R.* 1928 *All.* 269, *Confirmed.* [P 574 C 1]

(d) Agra Tenancy Act (3 of 1926) S. 121 (2)—Landholder necessary party to suit.

Section 121 (2) enjoins on the plaintiff the duty of making the landholder a party where the suit is against any person other than landholder. [P 574 C 2]

Shiva Prasad Sinha—for Opposite Parties.

Sulaiman, J.—This is a reference under S. 267, Agra Tenancy Act, made by the Additional Munsif of Allahabad as he was in doubt as to his having jurisdiction to entertain this suit. His reference is in accordance with a ruling of this Court, *Ram Pratab Singh* v. *Chhotey Lal Singh* (1). The reference came up first before another Bench which felt doubtful as to the correctness of that ruling. The matter has accordingly been referred to a larger Bench.

The plaintiff first instituted a suit for declaration of his right to a tenancy in the revenue Court but his plaint was returned for presentation to proper Court on the ground that the revenue Court had no jurisdiction to entertain the suit. He has now filed the suit in the civil Court and an objection has this time been raised by the defendants that the civil Court had no jurisdiction to hear the case. It is not necessary to set forth all the allegations in the plaint, but it would be sufficient to state that the plaintiff claimed that his father Daulat was a tenant jointly with defendants 1, 2 and 3, and that on the death of his father the plaintiff has succeeded to the joint tenancy. He claimed (a) a declaration to the effect that the plaintiff jointly with defendants 1 to 3 is a tenant of the holding specified in the plaint and that defendant 4 has no right or share in it, (b) and if for any reason the plaintiff is proved to have been dispossessed, he may be awarded possession over the same jointly with defendants 1 to 3. The dispute is undoubtedly with regard to the tenancy and the claim of the plaintiff is contested by the defendants.

No doubt under the the old Tenancy Act it used to be held by this High Court that a dispute between rival claimants to a tenancy is cognizable by the civil Court, particularly when the landholder is not a party to the proceeding. The Board of Revenue had expressed a contrary opinion.

The present case, however, is governed by the new Tenancy Act (Act 3 of 1926) and the old rulings are not necessarily applicable.

It is clear that the legislature has made drastic changes in the Tenancy law and the language of the relevant sections has been considerably altered so as to widen their scope very much. Under S. 99 of the Act a tenant who has been ejected or prevented from obtaining possession of any part of his holding otherwise than in accordance with the provisions of this Act by his landholder or any person claiming as landholder to have a right to eject him or any person claiming through such landholder or person, whether as tenant or otherwise, may sue the person so ejecting him or keeping him out of possession for possession and compensation. S. 121 provides that at any time during the continuance of a tenancy the tenant of a holding may sue the landholder, or any person claiming to hold through the landholder, whether as tenant or rent free grantee or otherwise, for a declaration of his right as tenant, and that in any such suit against the landholder or the person

(1) A. I. R. 1928 All. 269=26 A. L. J. 431.

claiming to hold through the landholder, the landholder should be joined as a party. These sections correspond to the old Ss. 79 and 95. S. 230 which has not been referred to in the order of reference or in the rulings cited in the judgment corresponds to the old S. 167 and provides in emphatic language that all suits and applications of the nature specified in Sch. 4 shall be heard and determined by the revenue Courts and no Courts other than the revenue Courts shall except by way of appeal or revision as provided in this Act take cognizance of any such suit or application or any suit or application based on a cause of action in respect of which adequate relief could be obtained by means of any such suit or applicition. The section is very wide aud mandatory. So long as the suit or application of the nature specified in Sch. 4 can be heard by the revenue Court the jurisdiction of the civil Court is completely ousted. The question which we have to answer is whether the present suit is of a nature specified in that schedule. It seems to me quite clear that the relief for declaration claimed by the plaintiff would fall within the four corners of S. 121 of the Act inasmuch as the defendants, although they had not claimed to be the landholder, certainly claimed to be tenants and therefore must be deemed to be persons claiming through the landholder. The relief for possession falls within the scope of S. 99 because here again the defendants are persons "claiming through such landholder or persons, whether as tenant or otherwise." It does not seem necessary that the defendants must set up a case of a special grant or special contract with the landholder or a subsequent recognizance by him of their title, coupled with a denial of the plaintiff's title. To place this restriction on the expression used in this section would be to limit the scope of the provisions by introducing new words into the sections. In group B of Sch. 4 serial Nos. 12 and 15 include suits under Ss. 99 and 121 of the Act and therefore make S. 230 directly applicable.

The explanation to S. 230 makes it still more clear that the revenue Court alone would have jurisdiction to entertain this suit when adequate relief could be granted by the revenue Court, it being immaterial whether the relief asked for is or is not identical with that which the revenue Court could have granted. I may further point out that a declaration granted in favour of a tenant in the absence of the landholder may lead to further litigation and need not be absolutely final and conclusive. On the other hand, if the suit is instituted in the revenue Court and the landholder is made a party under the provisions of S. 121 sub-Cl. (2) the dispute may be settled once for all. In this view of the matter I would hold that this suit is not cognizable by the civil Court and that the plaint ought to be returned for presentation to the revenue Court. This is my answer to the reference.

Mukerji, J.—I entirely agree with my brother Sulaiman's remarks but having regard to the importance of the question, I would like to add just a few words of my own.

There can be no doubt that if S. 230, Ten. Act of 1926, excludes the suit before us from the cognizance of the civil Court, the civil Court will have no right to hear it, on the simple ground that all cases of civil nature should be heard by it. In order to see whether the case falls or not within the purview of S. 230, Ten. Act, we have to look to Sch. 4 and serial Nos. 12 and 15. These numbers refer to Ss. 99 and 121, Ten. Act.

As already stated by my brother, Sulaiman, J., the suit is partly one for a declaration of title that the plaintiff is a co-tenant of a certain holding with the defendants. The plaintiff further wants that in case it should be proved that he is out of possession, he should be put in joint possession with the defendants. So far as his suit is one fer declaration of title, we have to see if it is covered by S. 121, Tenancy Act. That section reads as follows :

"(1) At any time during the continuance of a tenancy the tenant of a holding may sue the landholder, or any person claiming to hold through the landholder, whether as tenant or rent free grantee or otherwise, for a declaration of his right as tenant.

"(2) In any such suit against the landholder any person claiming to hold through the landholder may be joined as a party, and in any such suit against a person claiming to hold through the landholder, the landholder shall be joined as a party."

It will be noticed that the suit may lie not only against the landholder but also against

"any person claiming to hold through such landholder, whether as a tenant or....."

The question then is whether the defendants, who are interested in denying the plaintiff's title, are or are not persons who are claiming through the landholder. In my opinion, when a person is admitted to be tenant of a holding, it must be taken that he is claiming through the landholder. He cannot claim otherwise than through the landholder. It is not necessary, therefore, that before the suit is instituted under S. 121, that the defendant should have declared anywhere, either orally or in writing, that he was claiming through the landholder. The words "through the landholder" were put down because the classes of suits contemplated might include a suit which was directed not only against a tenant but also against people other than tenants. Those people would come under the words, "rent-free grantee or otherwise." The learned Judges who found difficulty in applying S. 121, Tenancy Act, were of opinion that the words; "claiming to hold through the landholder" implied a previous declaration of the character of the holding by the defendant. I respectfully differ from that opinion.

So far as the suit relates to possession or joint possession, almost the same remarks apply if we read S. 99 in the same light. The relevant portion of S. 99 reads as follows:

"A tenant..... prevented from obtaining possession of his holding.....(a) by his landholder..... or (b) any person claiming through such landholder..... whether as a tenant or otherwise may sue the person..... keeping him out of possession."

Now let us see whether the case before us falls or not entirely within the purview of this language. The persons who are interested in keeping the plaintiff out of possession are admittedly tenants. Being tenants, they are claiming, not through any title held in themselves but through a title held by the landholder. There seems therefore to be no escape from the language of S. 99 of the Act.

As my learned brother has already pointed out, the amended section relied on settled a great anomaly that existed under the Act of 1901, as interpreted by this Court. A suit by a person who was admitted to be a tenant aways lay in the civil Court. The successful plaintiff, after going through litigation in three Courts, still found himself confronted with a difficulty if the landholder was not inclined to accept him as a tenant. He had again to go through a campaign of litigation. To settle this anomaly, the language of Ss. 99 and 121 have been very wisely widely put, so that, once for all, the question of title might be settled to the satisfaction of the tenants and the landlord. That this idea was in the mind of the legislature is made perfectly clear by sub-S. (2), S. 121. It enjoins on the plaintiff the duty of making the landholder a party where the suit is against any person other than the landholder. The idea is that the landholder must be there, so that the question may be settled once for all in his presence.

I agree in answering the reference in the manner proposed by my brother Sulaiman, J.

Banerji, J.—I agree with the view taken by my learned brothers. I only wish to add that for the purpose of deciding whether a revenue Court or a civil Court has jurisdiction to try a suit one has got to refer to S. 230, Agra Tenancy Act. The intention of the legislature appears to be perfectly clear as in S. 230 it is provided that no Courts other than a revenue Court shall take cognizance of any suit based on a cause of action in respect of which adequate relief could be obtained by means of any suit or application. A reference to Sch. 4, Group B serial Nos. 12 and 15 makes it clear that the revenue Courts could grant the relief which the plaintiff seeks by the present suit. The cause of action alleged by him is of such a nature that no question can arise as to the jurisdiction of a revenue Court granting the relief the plaintiff asks for. I agree with my learned brothers that Ss. 99 and 121, Agra Tenancy Act, are wide enough to provide for the relief claimed by the plaintiff.

By the Court:—The present suit is not cognizable by the civil Court. We accordingly order that the Court of the Additional Munsif of Allahabad should return the plaint for presentation to the revenue Court. As the defendants have been inconsistently raising the question of jurisdiction in the two Courts, we direct that both parties should bear their own costs throughout.

V.B./R.K. *Reference answered in negative.*

A. I. R. 1929 Allahabad 575

DALAL, J.

Jwala and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 137 of 1929, Decided on 18th April 1929, against order of Addl. Sess. Judge, Cawnpore. D/- 19th January 1929.

Penal Code, Ss. 304, 149 and 323—Eight persons, none of whom carried lathies, beating another to death by breaking his ribs—It is for prosecution to prove that common intention was to break ribs or that breaking ribs was such act as they knew to be likely to be committed, if all are to be convicted under S. 304/149.

Where eight men, none of whom carried lathies, attacked and beat a man to death by breaking his ribs, it is for the prosecution to prove that the common intention was to break the ribs or that breaking of the ribs was such an act as they knew to be likely to be committed. In the absence of such proof, however, only those of them who were proved to have actually sat on the accused's body and to have brought pressure on his ribs can be convicted under S. 304/149. Others can be convicted only under S. 323/149. [P 575 C 2]

F. O. O'Neill—for Applicants.

Sankar Saran—for the Crown.

Judgment.—Eight men have been convicted of an offence under S. 304, I.P.C. for causing the death of one Durga by beating him with kicks and fists. There cannot be the slightest doubt that these eight men went to Durga's field and beat him. The motive appears to be their anger at Durga's cattle constantly grazing in the fields of other cultivators. The learned Judge of the lower Court has on the basis of the written statements of some of the appellants discovered another motive, that of the enmity of the zamindars against Durga. Such a deduction is entirely unfair to the appellants when no such enmity was put forward on behalf of the prosecution. The defence was that certain appellants were falsely implicated because they favoured certain zamindars. That is not a sufficient basis to jump to the conclusion that the zamindars had enmity against Durga and engineered the beating of Durga by their own partisans.

Death was caused by the breaking of a large number of ribs through pressure, and not by striking with lathis. It is clear, therefore, that some of the appellants must have acted in an unusual manner, and the Judge ought to have taken care to distinguish between the guilt of the different appellants. He has done nothing of the sort and lumped them all together in a conviction under S. 304. The charge framed is very unsatisfactory without keeping in mind the provisions of S. 149, I. P. C. The words of the charge are :

"You on or about the 8th day of August 1928 at Makraon in the morning conjointly caused the death of Durga Kumhar by beating him with fists, blows, kicks and knee-strokes and two to three of you bestrode Durga with full weight and force in such a way as to cause to Durga 19 injuries including fracture of 13 ribs in 15 places which injuries you knew likely to be fatal, though you did not intend to cause Durga's death, and thereby committed an offence punishable under S. 304 read with S. 147 (S. 149), I. P. C."

The common intention of the rioters is not mentioned ; nor is it mentioned that the ribs were likely to be broken in prosecution of the common object of the rioters. None of the rioters carried a lathi. So it is clear that the common object was only to cause simple hurt. It then rested with the prosecution to prove that the common object was the breaking of ribs, or that the breaking of the ribs was such an act as the members of that assembly knew to be likely to be committed. One witness, Bharose is a man gifted with observation and has given a very accurate description of the assault. The main argument of Mr. O'Neill was that the appellants were all wrongly prosecuted out of enmity, and that no one witnessed the occurrence. After reading the statement of Bharose I have not the slightest hesitation in believing that he did witness the occurrence. Mr. O'Neill's argument rested on what he chose to call the contradiction between the oral testimony and the deductions drawn by the doctor who held the post-mortem examination. There is no such contradiction in reality. The doctor agreed that pressure applied by men sitting on Durga may lead to the breaking of ribs. Bharose has very distinctly described this method of assault. This method of assault was adopted by Zulma, Jwala and Bharosa, and it can be said in their cases that their common object was such as to cause such hurt as they knew would be likely to result in death. As to those three men the conviction under S. 304/149 is sound, and I dismiss their appeals.

As to the other five, there is no evidence to put the common object beyond

that of causing hurt. Bharose has said that these men kept on kicking, and it can well be imagined that when some of the appellants were sitting on Durga the others could not inflict much injury on him by kicking. It cannot be expected that these five men would be prepared for the unusual course taken by Zulma, Jwala and Bharosa in sitting on a prostrate body and pressing down the ribs. If these three men had carried lathis, naturally the other men who joined in the assault would have been prepared to take into account blows with lathis and the likelihood of Durga's death. Rioters other than the three men could not be said to have predicted this extraordinary behaviour of these particular three men and to be prepared for the fatal result of the peculiar injuries caused by these three men. For this reason five men are guilty only of an offence under S. 323 read with S. 149, I. P. C. In their cases I alter the conviction accordingly and reduce their sentence to rigorous imprisonment for three months each. Jwala and Kanhaiya shall surrender to undergo the balance of their sentence.

S.N./R.K. *Order accordingly.*

A. I. R. 1929 Allahabad 576

DALAL, J.

Shamsher—Appellant.

v.

Gaya and *another*—Respondents.

Second Appeal No. 396 of 1927, Decided on 8th January 1929, against decree of Addl. Sub-Judge, Allahabad, D/- 24th November 1926.

Agra Tenancy Act (1926), S. 198 — On failure to recover rent, suit brought in civil Court—Plaintiff is entitled to declaration only and not to decree for possession.

Where a person, on failure to recover arrears of rent, brings a civil suit, he is entitled only to a declaration and not a decree for possession. When such declaratory decree is passed he is to seek his remedy in ejectment iu a revenue Court. [P 576 C 2]

Ambika Prasad, *Sehat Bahadur Lal* and *Anant Prasad*—for Appellant.

L. M. Roy and *Panna Lal*—for Respondents.

Judgment.—The process no doubt is very cumbersome, but I am afraid that in the present civil suit the plaintiff is only entitled to a declaration, and not a decree for possession. The plaintiff Gaya sued the defendant Shamsher in the revenue Court for recovery of arrears of rent, and the defence of the defendant Shamsher was that he paid the rent in good faith to one Ram Singh. The revenue Court decided in favour of Shamsher and dismissed the suit of Gaya. Though Gaya is not a zamindar, I think the provisions of S. 198, Tenancy Act, will apply when in any suit against a tenant under the Act the defendant pleads that the relation of landholder and tenant does not exist between the plaintiff and himself on the ground that he actually and in good faith pays the rent of his holding to some third person, the question of such payment of the rent to such third person shall be inquired into, and if the question is decided in favour of the defendant, the suit shall be dismissed. This was what happened in the revenue Court. In pursuance of the decision the provisions of Cl. 2, S. 198, will have operation. That clause runs as follows :

" The decision of the Court on such question shall not affect the right of any person entitled to the rent of the holding to establish his title by suit in the civil Court."

A suit for a declaration of title in the civil Court is, therefore, the only remedy provided for on failure of the plaintiff Gaya to recover rent from the defendant Shamsher. Both the subordinate Courts have held that the tenancy is not mortgaged to Ram Singh who claims to be a mortgagee. Gaya, therefore, is entitled to recover rent from Shamsher. Such a declaratory decree can be granted in the present suit. On the basis of that decree it will be open to the plaintiff to seek his remedy for ejectment in the revenue Court once Ram Singh's claim has been removed out of his way.

In the result I set aside the decree of the lower appellate Court and substitute in its place a decree for declaration that Gaya is entitled to recover the rent of the holding from the defendant Shamsher, and that Ram Singh has no right in the land in suit Gaya misconceived his remedy, but his allegations were correct. So I direct that he shall receive half costs of all the Courts. No costs are allowed to the defendant.

S.N./R.K. *Decree set aside.*

A. I. R. 1929 Allahabad 577

MUKERJI AND NIAMATULLAH, JJ.

Baijnath—Defendant—Appellant.

v.

Dhani Ram—Plaintiff—Respondent.

Second Appeal No 1781 of 1927, Decided on 26th April 1929, against decree of Dist. Judge, Agra, D/- 25th May 1927.

(a) Civil P. C., S. 96 (3)—Parties agreeing that Judge should decide case after hearing documentary evidence and making local investigation — They further agreeing to accept his decision—Decision being virtually award was not appealable—Civil P. C. Sch. 2, R. 16.

Parties to a suit agreed that the trial Judge should decide the case after hearing certain documentary evidence and making an inspection of the locality and further agreed to accept his decision.

Held : that there can be no appeal from the decision of the Court in this case because the Judge was constituted an arbitrator and his decision was virtually an award. [P 577 C 1]

(b) Court-Fees Act S. 12—One effective way of enforcing payment of deficiency in Court-fees is to refuse in second appeal to hear counsel of that party.

Where plaintiff-respondent fails to make up the deficiency in the Court-fees paid by him in the trial Court, one of the effective ways of enforcing the payment of such Court-fees is to refuse to hear the counsel of the respondent in second appeal ; 28 *All.* 270, (*F.B.*) *Expl.* and *Dist.* [P 577 C 2]

B. Malik and *Baleshwari Prasad*—for Appellant.

S. C. Das—for Respondent.

Judgment.—This is a second appeal by one who was the defendant in the suit. The parties to the suit, at one stage of it agreed that the learned Munsif before whom the suit was, should decide the case, after hearing certain documentary evidence and making an inspection of the locality. They agreed that they would accept the decision of the learned Munsif. On the case being decided by the Munsif, an appeal was filed by the defendant before the learned District Judge. The District Judge held that the parties had constituted the Munsif an arbitrator and no appeal lay from what was virtually an award. In this view, the learned Judge dismissed the appeal. In this second appeal, the view of the learned District Judge has been contested.

We are of opinion that the view of the learned District Judge is correct and we dismiss this appeal. On the question of costs, we are of opinion, that the respondent should not have any. We have refused to hear the learned counsel for the respondent. The reason was this. It was reported that there was a deficiency in the Court-fee paid by the plaintiff-respondent in the Court of first instance. The respondent was called upon to make good the deficiency, but he has not done it. The learned counsel for the respondent has urged that the only consequence of the non-payment of the Court-fee by his client should be that this Court will refuse to "issue the decree" in his favour till he makes good the deficiency. The learned counsel relies on the Full Bench case of *Mohon Lal* v. *Nand Kishore* (1). In that case, the question was whether the respondent, who had failed to make good the deficiency should have his appeal before the lower appellate Court (which had succeeded) dismissed or whether there was some other remedy to compel him to make good the deficiency. All that the learned Judges held was that the procedure of dismissing the respondent's appeal before the lower appellate Court was not a right procedure, and that the proper thing to do would be to :

"stay issuing the decree in favour of the respondent, if such should be passed, until such time as the additional Court-fee due by him may be paid."

As we read the judgment, the learned Judges never indicated that this was the only way of bringing pressure on the respondent to make good the deficiency. The Court-Fees Act does not provide any means by which the deficiency in Court fee can be realized. The Courts have always taken it upon themselves to realize it by such lawful means as might be open to them. One of us, and the learned Chief Justice, sitting together, have, more than once held that one of the ways that was open to the Court of enforcing payment would be not to hear the counsel for the respondent, who was in contempt. We followed this procedure and refused to hear the respondent's counsel in second appeal. In the result, the appeal is dismissed but without costs.

S.N./R.K. *Appeal dismissed.*

(1) [1905] 28 All. 270=2 A. L. J. 839=(1905) A. W. N. 280 (F.B.).

A. I. R. 1929 Allahabad. 578 (1)

NIAMATULLAH AND BENNET, JJ.

Katar Singh and *others*—Plaintiffs—Appellants.

v.

B. Bishamber Sahai and *others*—Defendants—Respondents.

Second Appeal No. 452 of 1929, Decided on 3rd May 1929. against the decree of Sub-Judge, Meerut, D/- 11th January 1929.

U.P. Land Revenue Act, S 118—Buildings belonging to one cosharer before partition can be sold by him though site on which they stood was assigned to other's share after partition.

Buildings belonging to a cosharer of a village can be sold by him in spite of the fact that after partition the site on which the buildings stood was assigned to the Kura of another cosharer, because there is nothing in S. 118 to affect the cosharer's ownership of those buildings. [P 578 C 2]

Peary Lal Banerji—for Appellants.

Judgment.—This is a second appeal by the plaintiff whose suit for recovery of possession of an enclosure and of the buildings in it has been dismissed by both the lower Courts. The facts are simple. Defendant 2 and the plaintiffs were cosharers in a village and defendant 2 was the owner of the buildings in question. As a result of the partition in the revenue Court under S. 118, Land Revenue Act, the site of the building which belonged to defendant 2 was assigned to the kura of the plaintiffs. The provision in that section is that the cosharer shall be allowed to retain the land occupied by his dwelling house and other buildings with the building therein on condition of his paying for it a reasonable ground rent to the cosharer in whose portion it may be included. Accordingly defendant 2 remained in occupation of his house. The present case has arisen because defendant 2 executed a sale-deed of the enclosure and the buildings in suit dated 23rd January 1927 in favour of defendant 1. The plaintiff-appellant contends that defendant 2 has no right to transfer either the site or the buildings. The lower appellate Court has found that defendant 2 had no right to transfer the site, and has granted a declaration that plaintiff is owner of the site. The plaintiff-appellant has come in second appeal asking for the relief of possession on the allegation that defendant 2 had no right to transfer the buildings. The situation before the partition was that defendant 2 was the owner of the building and the site. The effect of the partition was to transfer the site to the plaintiffs. There is nothing whatever in S. 118, Land Revenue Act to affect the ownership by defendant 2 of the buildings. Accordingly we consider that defendant 2 remained owner of the buildings. There is no restriction on the right of an owner of a building to transfer that buildings. The learned vakil for the appellant relied on certain rulings which deal with the rights of agricultural tenants to transfer buildings occupied by them in an agricultural village. In our opinion, those rulings have no application to the present case. Under S. 6, T. P. Act the owner of property may transfer it unless there is some legal restriction to the contrary. In the present case no such restriction is shown. Accordingly we consider that the decree of the lower appellate Court is correct and dismiss this appeal under O. 41, R. 11.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 578 (2)

MUKERJI, J.

Kunwar Ram Krishna—Appellant.

v.

Anand Krishna and *others*—Respondents.

Second Appeal No, 1915 of 1927, Decided on 11th April 1929, against decree of Addl. Sub-Judge, Bulandshahr, D/- 22nd April 1927.

(a) Evidence Act, S. 92—Party to registered sale-deed cannot prove contemporaneous oral agreement that title to portion of property sold would not pass to vendee.

It is not open to a party to a registered sale-deed te prove an oral agreement by evidence either oral or documentary contemporaneous with the sale-deed, that in spite of a certain property, belonging to the vendor, being entered in the sale-deed, title to it would not pass to the vendee : 43 *Mad.* 436, *Dist.* [P 580 C 1]

(b) Evidence Act, S. 115—Parties to sale-deed entering piece of property within Sub-Registrar's jurisdiction in order to give him jurisdiction cannot get any relief in Court of justice—Registration Act, S. 28.

Where the parties intended to hoodwink the Sub-Registrar by entering a piece of property within his jurisdiction in the sale-deed, in order to give that officer jurisdiction, the parties contemplated a fraud on the law of

registration and so should not be granted any relief in a Court of justice. [P 580 C 1]

P. L. Banerji and *Babu Lal Mital*—for Appellant.

S. N. Seth—for Respondents.

Judgment.—The plaintiffs, through their mother, and certain relations transferred to the defendant-apppellant two items of property, one being landed property and the other being certain houses occupied by tenants. The present suit was brought by the plaintiff-respondents to obtain a declaration that the house property was never intended to be sold and to be purchased and that, therefore, the plaintiff's title to the property remains intact. In the alternative the plaintiffs ask for delivery of possession. The defence was that parties did in fact intend to sell and did sell the house property and the defendant is the owner of the property and he is in possession of the same. The Court of first instance dismissed the suit. The Court below has decreed the suit for possession with respect of one-half of the property on the ground that the plaintiffs' title extended to only a half share. The Court found that the plaintiffs were out of possession.

In this Court, it has been contended that it was not open to the plaintiffs to prove the oral agreement set up by them which was calculated to contradict the registered sale-deed. It is further urged that if the plaintiffs' case be true, the parties were equally to blame for perpetrating a fraud on the law of Registration and, therefore, the plaintiffs were not entitled to any relief from a Court of justice. There is a cross-objection on behalf of the plaintiffs but it has not been pressed.

The first point has to be determined on a proper interpretation of two sections : one of the Evidence Act, S. 92 and the other of S. 54, T. P. Act. The latter provision of law enacts that in the case of tangible immovable property of the value of Rs. 100 or more. a sale can be effected by a registered instrument. This means that on the execution of the document of sale and the registration of it, title passes from the vendor to the vendee. S. 92, Evidence Act lays down :

"When the terms of a contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to the last section (that is to say, by the production of the original document), no evidence of any oral agreement or statement shall be admitted as between the parties to such instrument or their representatives-in-interest, for the purpose of contradicting, varying, adding to, or substracting from, its terms".

What the plaintiffs plead is this and nothing less than this. They say that when the plaintiffs' mother and relations agreed to sell the property and executed the sale-deed, the vendors and the vendee agreed that in spite of the execution of the sale-deed, title to one of the properties, ostensibly sold, shall not pass to the vendee. This is an oral agreement. It is true that some documentary evidence has been led to prove this oral agreement. The sale-deed was executed on 1st September 1920. On 6th September 1920, the vendee gave a note (unstamped) one to each of the three vendees, saying that he would reconvey the house property to the vendors, as the same had been entered in the sale-deed for purposes of registration. The notes were antedated and the date of the sale-deed was put down. But the section, as I undersand it, excludes evidence of all sorts, oral and documentary, when what is sought to be proved is an oral agreement or oral statement. This agreement, if it existed, must have existed on 1st September 1920.

The learned counsel for the respondents relies on proviso (1) of S. 92 and argues that he is entitled to prove under that proviso, such facts as would invalidate the document and, therefore, he is entitled to prove that the portion of the property that was within the jurisdiction of the Sub-Registrar, was not meant to be sold and, therefore, the Sub-Registrar had no jurisdiction to register the document and further, therefore, the sale-deed was invalid in law, as it required a valid registration. As I read proviso (1) of S. 92, the learned counsel's argument does not find any place into that proviso. The illustrative words are :

"fraud, intimidation, illegality, want of due execution, want af capacity in any contracting party, want or failure of consideration, or mistake in fact or law".

They explain what is meant by the proviso. The illustrations may not be exhaustive. I express no opinion on the point, but they certainly indicate what was in the mind of the legislature. They indicate that certain independent facts, although they may be intimately connected, may be proved, which would take

away from the document its normal value.

The learned counsel has cited the case of *G Narsimha Rao* v. *G. Papunna* (1), but that case does not discuss S. 92 at all. The case went up before the High Court as a second appeal and there was the finding of fact that a certain very small piece of property had been entered in the sale-deed simply with a view to obtain registration of the document at a particular place. On that finding of fact it was held that the registration was void. This case is no authority for the question which I have to decide, namely, whether it is open to a party to a registered sale-deed to prove an oral agreement, contemporaneous with the sale-deed, that in spite of a certain property, belonging to the vendor, being entered in the sale-deed, title to it would not pass to the vendee. In my opinion, the law does not grant such an opportunity to a party and if it did, the result would be simply disastrous.

The second contention of the appellant is equally good. If the facts, as alleged by the plaintiffs, be true, namely, the parties intended to hoodwink the Sub-Registrar by entering a piece of property within his jurisdiction in the sale-deed, in order to give that officer jurisdiction the parties contemplated a fraud on the law of registration. That being so, the plaintiffs should not be granted any relief in a Court of justice. In either view of the case, the plaintiffs' suit should have been dismissed. I allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs throughout. The cross-objection is also dismissed with costs. The respondents' counsel asks leave to appeal and it is granted.

S.N./R.K. *Appeal allowed.*

(1) [1920] 43 Mad. 436=38 M. L. J. 327=56 I. C. 519=11 M. L. W. 394.

A. I. R. 1929 Allahabad 580

NIAMATULLAH AND BENNET, JJ.

B. Sheo Prasad Singh — Judgment-debtor—Applicant.

v.

Muffassil Bank Ltd., Gorakhpur—Decree-holder—Opposite Party.

Execution First Appeal No. 249 of 1928, Decided on 22nd April 1929, against decree of Addl. Sub-Judge, Gorakhpur, D/- 14th April 1928.

Civil P. C., O, 34, R. 14 — Mortgage declared to be nullity — Mortgagee obtaining money decree in lieu of original supposed mortgage—R. 14 has no application,

Where a mortgage has been declared to be a nullity and the mortgagee obtains a money decree in lieu of what was originally considered to be a mortgage, there is no subsisting mortgage and O. 34, R. 14 can have no application : 39 *All.* 36; 42 *All.* 566, *Rel. on.* [P 581 C 2]

Shiva Prasad Sinha—for Applicant.

N. Upadhiya and *G. Agarwala*—for Opposite Party.

Judgment.—This is a judgment-debtor's appeal arising out of proceedings in execution of a simple money decree obtained by the decree-holder under the following circumstances:

On 6th April 1920, the appellant executed a deed of mortgage in favour of the decree-holder for Rs. 6,000. The appellant was a member of a joint Hindu family with his nephew, and the property hypothecated belonged to the joint family. Accordingly, the nephew instituted a suit for setting aside the mortgage in favour of the decree-holder. The suit succeeded, and a decree was passed in favour of the nephew on 6th December 1926 declaring the mortgage-deed to be invalid. The decree-holder then instituted a suit for simple money decree, which he obtained on 31st October 1927 for a sum of Rs. 12,621-14-0. In execution of that decree he attached the interests of the judgment-debtor in the mortgaged property. That the interests of a member of a joint Hindu family in the joint property can be attached by the creditor admits of no doubt, and has not been disputed in this appeal. The judgment-debtor objected to the attachment with reference to O. 34, R. 14, Civil P.C., which provides:

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of such suit notwithstanding anything contained in O. 11, R. 2."

The contention put forward on his behalf is that it is not open to the decree-holder to have the mortgaged property sold in execution of the simple money decree, except in the manner laid down in O. 34, Civil P. C, In our opinion this contention is absolutely untenable. O. 34, R. 14, pre-supposes that a valid mortgage capable of enforcement subsists and that,

if the mortgaged property is sold in execution of the simple money decree, the incumbrance created by the mortgage will continue to subsist. In the present instance, the mortgage originally made by the appellant has been declared to be a nullity. It cannot be regarded as a mortgage. In other words, no incumbrance exists. The decree-holder himself has obtained a simple money decree in lieu of what was originally considered to be a charge. If, therefore, there is no subsisting mortgage, O. 34, R. 14, can have no possible application. The cases *Chedi Lal* v. *Saadat-un-nissa Bibi*(1) and *Suraj Narain Singh* v. *Jagbali Shukul* (2), are in point. For these reasons we think that the order of the lower appellate Court is perfectly correct. We dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1916] 39 All. 36=36 I. C. 907=14 A.L.J. 902.

(2) [1920] 42 All. 566=57 I. C. 14=18 A.L.J. 677.

✻ A. I. R. 1929 Allahabad 581

MUKERJI AND YOUNG, JJ.

Mohammad Abdul Wahid Khan—Applicant.

v.

Radha Kishun and *another*—Opposite Parties.

Civil Revn. No. 288 of 1927, Decided on 8th May 1929, against order of Dist. Judge, Moradabad, D/- 8th September 1927.

(a) Civil P. C., S. 115 (1)—"Case decided" —Meaning explained.

The words "case decided by a Court" mean a matter which has been disposed of effectually by the Court and not merely for the time being. A purely ad interim order that does not effectually dispose of the matter before the Court would not be case decided: *A. I. R.* 1917 *P. C.* 71, *Foll.* [P 583 C 1]

(b) Charitable and Religious Trusts Act (14 of 1920), S. 2—District Judge is subordinate to High Court.

In the cases under Charitable and Religious Trusts Act, Judge acts as a Court of law and therefore under S. 3, Civil P. C., District Judge's Court is a Court subordinate to the High Court. [P 583 C 2]

(c) Charitable and Religious Trusts Act (14 of 1920), S. 7—Application to District Judge for advice is case.

When trustee makes an application to the District Judge to obtain his opinion or advice, a case is presented before the District Judge for decision: *A. I. R.* 1917 *P. C.* 71, *Appl.* [P 583 C 2]

✻ (d) Civil P. C., S. 115—High Court has revisional powers under Charitable and Religious Endowments Act—Charitable and Religious Endowments Act (14 of 1920), S. 12.

The acts of a District Judge under Act 14 of 1920, are open to correction by the High Court under its revisional jurisdiction exercisable under S. 115, Civil P. C. Legislators were not ignorant of the existence of revisional jurisdiction in the High Court when they framed S. 12. They might have said that neither an appeal nor a revision shall lie. The omisison of the word revision confirms the opinion that a revision is not shut out. [P 583 C 2, P 584 C 2]

(e) Civil P. C.. S. 115—Jurisdiction.

High Court cannot in revision correct an error of judgment. [P 585 C 1]

Peary Lal Banerji—for Applicant.

K. N. Katju and *Shiva Prasad Sinha* —for Opposite Parties.

Mukerji, J.—This is an application to revise an order of the District Judge of Moradabad, made on 13th September 1927 under the following circumstances. A certain Mahomedan gentleman made a waqf of his property for the benefit of his descendants, on 20th August 1915. The aforesaid property was subject to heavy encumbrances. The mutawalli for the time being, Mt. Jafri, who was the daughter of the dedicator, made an application to the District Judge of Moradabad, seeking his permission to sell a portion of the property of village Lohari Khadar. She had arranged with one Radha Kishen, one of the opposite parties in this case, that a 14 biswa share should be sold to Radha Kishen for the sum of Rs. 13,500. The learned District Judge granted the permission sought. Radha Kishen, as a matter of precaution, made an application to the District Judge, on 2nd September 1927 asking him to take steps to ensure that there was no litigation in future with respect to the property purchased by himself. He said, in the petition, that the property was waqf and people might, thereafter, raise all sorts of objections to the sale. Radha Kishen, therefore, proposed that the District Judge should issue a notification stating that so much property was being sold for so much, to such and such person and calling upon any person, who might be interested to do so, to file any objection before the Court. The District Judge acceded to this request and a notification was issued. Abdul Wahid Khan, the applicant before this Court sent in a letter to the District Judge saying that he had heard that the

property was being sold and he offered to pay Rs. 16,000 for the share 14 biswas, for the sale of which the District Judge had already granted permission for Rs. 13,500. The learned Judge directed Abdul Wahid Khan to appear before him on the 8th September, which date he had fixed for the appearance of persons who might be interested in the sale of the property. On that date, as the order sheet shows, in the presence of Radha Kishen and his counsel and Jafri Begum's counsel, the Judge accepted Abdul Wahid's offer of Rs. 16,000 for the sale of 14 biswas share. The same day, apparently, after Abdul Wahid Khan had left the Court, Radha Kishen made an application to the District Judge that without foregoing his right to bring a suit to obtain a specific performance of the contract for the sale that may exist in his favour, he was offering the sum of Rs. 16,000, for the property. The learned District Judge in the absence of Abdul Wahid Khan, made the following order:

"This is not unreasonable. I have no objection to the sale in favour of Radha Kishen for Rs. 16,000. My only reason for preferring Abdul Wahid was that he was offering a larger sum."

Abdul Wahid Khan, having come to know of this later order, presented a petition to the District Judge on 13th September complaining that the order in favour of Radha Kishen had been made ex parte, in his absence. He offered, by his petition, to pay Rs. 18,000 an amount being in excess of Radha Kishen's offer, by Rs. 2,000. He pointed out that it was to the interest of the waqf property that it should fetch as much price as was possible. On the same day, the learned Judge passed the order complained of. The learned Judge said that he had accepted Abdul Wahid's offer, because, at the time, his was the highest offer; but as Radha Kishen made the same offer and as there was a "sort of agreement" between the mutawalli and Radha Kishen the learned Judge had agreed that Radha Kishen should make the purchase. The learned Judge refused the application of Abdul Wahid Khan but made the remark that it was always open to Abdul Wahib to file a suit against the mutawalli.

It is urged on behalf of Abdul Wahid Khan that the learned Judge should not have altered his order of 8th September 1927, in the applicant's favour which had been passed in the presence of all parties and after hearing all parties, and that, in any case, the subsequent offer of Rs. 18,000 made by the applicant should have been accepted.

In answer to this contention on behalf of Abdul Wahid Khan, the learned counsel for the respondents has urged, first, that no revision is competent, the High Court having no power to revise an order of the District Judge passed under the Charitable and Religious Trusts Act (Act 14 of 1920), and secondly that in any case, the opinion of the District Judge, which was granted uuder S. 7 of the Act preferring Radha Kishen to Abdul Wahid was a matter entirely within the discretion of the Judge and that for that reason, it was not open to correction by the High Court, even if the High Court had the power to interfere.

As regards the first point, I am clearly of opinion that the contention has no force, whatsoever. The power to interfere in revision has been granted to the High Court under S. 115, Civil P. C. The conditions that must exist to enable the High Court to call for the record of any case are these:

(1) There should be a case decided by a Court.

(2) That Court should be subordinate to the High Court.

(3) And there should be no appeal allowed by the law.

There can be no doubt that the powers which may be exercised by the District Judge and the acts that he may perform uuder Act 14 of 1920, are exercised and performed by the Judge as a "Court." The section with which we are immediately concerned is S. 7 of the Act. It says that where a trustee wants advice or direction, he might apply to the "Court." The word "Court" is defined in the Act itself (vide S. 2 as amended by Act 41 of 1923) as "the Court of the District Judge or any other Court empowered in that behalf by the High Court in the exercise of its original civil jurisdiction. Thus, the officer whose order is complained of is a Court subordinate to the High Court and one of the conditions is thus complied with.

The second condition that is necessary is that there should be a case decided. The Civil Procedure Code does not define the word "case," nor does it say what it means by the word "decided"

in S. 115. In my opinion the words "a case decided by a Court" mean "a matter which has been disposed of effectually by the Court and not merely for the time being." Thus, a purely ad interim order or an order that does not effectually dispose of the matter before the Court, would, not be a "case decided."

As regards the third point, it is conceded that the law does not allow any appeal against an order made or advice given by the District Judge under S. 7 of the Act 14 of 1920. This is specifically mentioned in S. 12 of the Act.

The first two questions of jurisdiction and meaning of the words "case decided" came up for judicial interpretation before their Lordships of the Privy Council, in the well-known case of *Bala Krishna Udayar* v. *Vasudeva Ayyar* (1). That case arose under the Act 20 of 1863, the Religious Endowments Act. S. 10 of that Act was the subject-matter for the consideration of their Lordships of the Privy Council and the question that had to be answered was whether a District Judge could direct the committee of management, who had failed to make an election to the committee, within the statutory period to hold an election for the purpose of filling up a vacancy. The District Judge had declared that the person so elected, under his orders, by the members of the committee, should be one of the members of the same. This order was impeached before the High Court and the High Court in the exercise of its revisional jurisdiction under S. 115, Civil P. C. set it aside. Before their Lordships of the Privy Council it was contended that the High Court had no jurisdiction because its revisional power did not extend over the Judge and further, the matter before the Judge was not "a case decided." There Lordships of the Privy Council disallowed both these contentions. To start with, their Lordships pointed out that if a civil Court should act absolutely and whimsically in the matter of its jurisdiction, and there being no appeal allowed, there would be no remedy if the High Court were not empowered to interfere. Having pointed this out, their Lordships examined the law. Their Lordships examined the provisions of Act 20 of 1863 and came to the conclusion that the acts performed by the District Judge were performed by him as a Court of law and not merely as a persona designata, whose determinations were not to be treated as judgment of a legal tribunal. I have already pointed out that in this case before us, the Judge acts as a Court of law and, therefore, under S. 3, Civil P. C, the District Judge's Court is a Court subordinate to the High Court. Thus, one of the conditions laid down in S. 115, Civil P. C. exists. On the second question of what was a "case" decided, their Lordships remarked that there was no definition of the word case in the Code. Then they said.

"It cannot, in their Lordships' view, be confined to a litigation in which there is a plaintiff who seeks to obtain a particular relief in damages or otherwise, against a defendant who is before the Court. It must, they think, include an exparte application such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties. Their Lordships concur, therefore, with the High Court, in thinking that the matter adjudicated upon was a case within the meaning of S. 115 of the Code."

It will be noticed that in the opinion of their Lordships of the Privy Council, an exparte application might amount to to a case and the disposal of it would, necessarily, be a case decided.

Applying the law laid down by their Lordships of the Privy Council to the case before us, I have no hesitation in saying that when a trustee makes an application to the District Judge to obtain his opinion or advice, a case is presented before the District Judge for his "decision". Suppose in such a case, the District Judge says,

"I am overwhelmed with criminal work; let the applicant go to the Government Pleader for advice."

Can it be contended for a moment, that the High Court will have no power under S. 115, Civil P. C. to direct the District Judge to take up the application and give his advice or opinion to the applicant, on the ground that the District Judge failed to exercise a jurisdiction that was vested in him by law.

I come to the conclusion that the acts of the District Judge under Act 14 of 1920 are open to correction by the High Court under its revisional jurisdiction exercisable under S. 115, Civil P. C.

On the merits, the question is whether we should interfere and if so, how? At

(1) A. I. R. 1917 P. C. 71=40 Mad. 793=44 I. A. 261 (P.C.).

one stage of the argument it was contended, on behalf of the respondents, by their learned counsel that it was always open to the trustee seeking the District Judge's advice not to follow it and that, therefore, if the High Court substituted its advice in place of the District Judge's advice, the applicant (Jafri Begum) could always refuse to follow the High Court's opinion or advice and further, that, therefore, the High Court should not interfere with the District Judge's advice. This, in my opinion, is a very unsound argument. It is true, S 7, Charitable and Religious Trusts Act (Act 14 of 1920) does not say what is going to happen in case the applicant decides not to follow the District Judge's advice after seeking it. All that it does say is that a trustee, acting on the advice, shall be deemed to have discharged his duty as such trustee, in the matter in respect of which the petition was made. Because the legislature thought that it was not necessary for it to impose a penalty on the trustee, it does not follow that the District Judge should refuse to give his advice or direction or that the High Court, where it finds that the advice is entirely unsuitable, should not substitute its own advice or opinion in the matter. I need hardly point out that I am assuming that the High Court would interfere only in suitable cases and not at random or arbitrarily.

A case like this may easily arise. A trustee states his case in his petition and receives advice from the District Judge which is manifestly to the detriment of the trust property. The trustee may take upon himself the responsibility of ignoring that advice without bringing on himself any charge of committing breach of trust. He may also come up in revision before the High Court and show that the District Judge, in giving the advice, has not really considered the matter at all, has not applied his mind to the case and has thereby, in the exercise of his jurisdiction, acted with material irregularity. The High Court may think it fit to set aside the advice of the District Judge and put the trustee in possession of better advice. In my opinion, it is impossible to say that suitable cases may not arise in which, an exercise of the revisional jurisdiction of the High Court might be desirable. It may be pointed out, that in framing S. 12 of the Act (Act 14 of 1920) the legislature intentionally confined themselves to appeal and said nothing about revision. S. 12 runs as follows:

> "No appeal shall lie from any order passed or against any opinion or advice or direction given under this Act."

Having regard to the decision of the Privy Council, in *Bala Krishna Udayar* v *Vasudeva Ayyar* (1), quoted above, we cannot take it that the legislature were ignorant of the existence of revisional jurisdiction in the High Court when they framed the S. 12. They might have said that neither an appeal nor a revision shall lie. The omission of the word revision confirms my opinion that a revision is not shut out.

Coming to the merits of the case before us, the position seems to be this. Radha Kishen has already obtained a sale-deed in his favour from Mt. Jafri. It was executed on 12th September 1927 and registered on 13th September 1927, the latter being the date of Abdul Wahid's application offering Rs. 18,000. I do not approve of the learned Judge's preference of Radha Hishen to Abdul Wahid and in my opinion, Abdul Wahid, having offered Rs. 16,000 in the presence of Radha Kishen's counsel, and the learned Judge having accepted the same, it was not open to the Judge to accept the subsequent offer to Radha Kishen of Rs. 16,000. Ordinary business methods should have been followed. There was no question of an agreement being in existence with Radha Kishen, because the entire negotiation was, by consent, to be subject to the Judge's advice and opinion. At the instance of Radha Kishen himself, the notification was issued, inviting people to come and offer objections to the proposed sale to Radha Kishen. If Radha Kishen was going to buy the property cheap by paying rupees 2,500 less than the fair price, it was certainly open to the District Judge to advise Mt. Jafri not to accept that offer, and to advise her to accept Abdul Wahid's, for Rs. 16,000. Abdul Wahid's subsequent offer of Rs. 18,000 is of no consequence, coming as it did, five days later.

The District Judge, no doubt, acted somewhat improperly when he advised Mt. Jafri to accept Radha Kishen's

belated offer of Rs. 16,000. But did he act illegally or with material irregularity? As I have said, he was wrong, his advice was not sound. But that does not mean that he exercised his jurisdiction illegally or with material irregularity. He did consider the matter carefully, though I may not be in agreement with him, in the result. We cannot correct in revision, a mere error of judgment. On this ground we cannot interfere. There is another aspect of the case. Suppose it is a case in which we may interfere under the law. But we are not bound to interfere, unless we think that we ought to interfere. The question is, whether we should undo all the transactions that have already taken place; undo the sale, undo the mutation and undo all that has happened during over the last year and half, during which presumably, Radha Kishen has been in possession. The daughter of the dedicator, who is the trustee and, presumably the principal beneficiary under the waqf, is satisfied with the District Judge's order. We find that none, but the intending purchaser Abdul Wahid Khan, is interested in questioning the order. In the circumstances, I do not think that I should interfere and advise Jafri Begum to cancel the sale in favour of Radha Kishen and to execute a new sale in favour of Abdul Wahid Khan, for the same amount as has been paid by Radha Kishen.

In the result, I would dismiss the application, but under the circumstances without costs. The order impeached was certainly of doubtful propriety, and the contention of the respondents that the High Court had no revisional jurisdiction has been found to be untenable. I would make the parties pay their own costs of the present application.

Young, J.—I agree.

V.B./R.K. *Application dismissed.*

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* A I. R. 1929 Allahabad 585

DALAL, J.

Sis Ram and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 98 of 1929, Decided on 9th April 1929, against order of Sess. Judge, Moradabad, D/- 17th December 1928.

(a) Penal Code S. 366 - A—When after inducement offender offers girl to several persons, fresh offence is not committed at every fresh offer of sale.

An offence under S. 366-A, is one of inducement with a particular object and when after inducement the offender offers the girl to several persons a fresh offence is not committed at every fresh offer for sale. Several offers for sale evidence the criminal intention of the offender just as much as one offer for sale. If a person is convicted of seducing the girl he cannot be convicted over again for the same seduction unless in a case where the girl had returned to her parents and then subsequently there had been a fresh seduction.

[P 585 C 2]

*** (b) Criminal P. C., S. 397—Powers of High Court.**

High Court has power to direct separate sentences of separate trials to run concurrently.

[P 585 C 2]

Sankar Saran—for the Crown.

Judgment.—The case is a very clear one. All the appellants have been rightly convicted, and I dismiss the appeal. What delayed my decision for a considerable time was by reason of a second similar charge against Sisram and Debi for seducing the same girl. This refers to appeal No. 97. The learned Judge has not explained the circumstances. What the learned Government Pleader and I gather is that Sisram and Debi were separately tried for offering the girl after seduction to separate persons for sale. An offence under S. 366 A, however, is one of inducement with a particular object, and when after inducement the offender offers the girl to several persons, a fresh offence is not committed at every fresh offer for sale. Several offers for sale evidence the criminal intention of the offender just as much as one offer for sale. Under the circumstances once Sisram and Debi were convicted of seducing the girl they could not be convicted over again for the same seduction unless in a case where the girl had returned to her parents and then subsequently there had been a fresh seduction. Such is, however, not the case in appeal No. 97. The conviction in the case of appeal No. 97 would have been fully justified if there had not been a previous conviction in appeal No. 98. Under S. 397, Criminal P. C., this Court has power to direct separate sentences of separate trials to run concurrently. The order in appeal No. 97, therefore, shall be that the sentence in that case shall run concurrently with the sentence in appeal No. 98, and that otherwise the appeal is dismissed.

P.N./R.K. *Order accordingly.*

* A. I. R. 1929 Allahabad 586(1)

MUKERJI AND YOUNG, JJ.

Asa Ram and *another*—Plaintiffs—Appellants.

v.

Karam Singh and *others*—Defendants—Respondents.

Second Appeal No. 443 of 1927, Decided on 13th May 1929, against the decree of Addl. Sub-Judge, Saharanpur, D/- 15th November 1926.

*** Contract Act, S. 25 (3)—Defendant executing money bond in favour of plaintiff in consideration of his father's time barred debt—He is liable only to extent of joint family property as S. 25 (3) covers only case of person who would be liable to pay but for limitation barring suit.**

Where defendant executed a simple money bond in favour of the plaintiff in consideration of a debt owed by his father but which had become time barred at the date of the execution of the bond the son is not personally liable and the bond can only be enforced against him to the extent of the joint family property as S. 25 (3) covers only the case of a person who would be liable to pay but for the limitation barring the suit and so an agreement by a son to pay personally father's time barred debt is without consideration.

[P 586 C 2]

M. L. Agarwala—for Appellants.

M. A. Aziz—for Respondents.

Judgment.—This appeal raises a nice question of law. We have however no difficulty in deciding it. The first two defendants executed a simple money bond in favour of plaintiffs-appellants, in consideration of a debt owed by their father, but was one which had become time barred at the date of the execution of the bond in suit. The claim failed in the first Court, but succeeded in the lower appellate Court. Defendant 3, who was a minor brother of the other two defendants and who was not a party to the bond, was exempted from the claim. The learned Subordinate Judge, in decreeing the claim, directed that the amount of the decree should be realized from the ⅔rds share of the joint family property which belonged to the first two defendants.

The plaintiffs have come up in second appeal and it is contended that there should have been a personal decree against first two defendants, as the executants of the bond.

Reliance has been placed on S. 25, Contract Act. It is argued that defendants 1 and 2 agreed to pay a time-barred debt and therefore entered into valid contract with the plaintiffs and, as they agreed to pay personally, the personal agreement should have been enforced by the Court below.

Section 25 (3) runs as follows:

"An agreement made without consideration is void, unless it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behaif, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

The words "of which the creditor might have enforced payment," according to the learned counsel for the appellant, would include a debt which is not payable by the executants of the bond themselves. But as we read that sub-section, we think that it is meant to cover only the case of the person who would be liable pay but for the limitation barring the suit. In this case the bond could be enforced against the sons only to the extent of the joint family property. The sons would not be personally liable at all. That being the case, if the bond in suit did come, as to which we express no opinion, within S. 25 (3), any agreements as to liability which could not be enforced originally, could not be enforced under the new agreement. To make it clear, the sons were liable only to the extent of the family property. If they agreed to pay the father's debt, any agreement that they would pay personally would be without consideration as it would not be within S. 25 (3). No authority has been cited on either side. We think that the decree passed by the Court below is a just and proper decree and we see no reason to interfere with it, unless some clear authority is produced to induce us to do so. The appeal fails and is hereby dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 586(2)

MUKERJI AND NIAMATULLAH, JJ.

Girwar Singh—Defendant—Applicant.

v.

Shah Ram Chander—Plaintiff—Opposit Party.

Civil Revn No. 160 of 1928, Decided on 26th April 1929, against order of Dist. Judge, Mainpuri, D/- 2nd March 1928.

(a) Agra Tenancy Act (1926) S. 248 (3)—Suit for profits against lambardar — Claim

partially decreed — On appeal by plaintiff District Judge setting aside trial Court's order and remanding suit—No second appeal would lie against such remand.

A suit was brought for the recovery of profits from a lambardar amounting to less than Rs. 200, the suit was decreed partially and on appeal by the plaintiff the District Judge purported to set aside the order of the Assistant Collector, and remand the suit and defendant then filed a second appeal.

Held : that no second appeal would lie from the remand order of the District Judge.

[P 587 C 2]

(b) Agra Tenancy Act (1926) S. 253—Scope.

As revision lies only in those cases where appeal to the District Judge lies, no revision lies to the High Court in suits for profits decided by the revenue Courts if the valuation of the suit does not exceed Rs. 200 because in such cases no appeal lies to the District Judge.

[P 587 C 2]

Baleshwari Prasad—for Applicant.

M. L. Agarwala—for Opposite Party.

Judgment.—This is a defendant's application in revision purporting to have been made under S. 115, Civil P. C., and arises under the following circumstances:

The plaintiff, who is the respondent in this Court, brought a suit against the applicant for recovery of a certain amount of money, which was below Rs. 200, by way of profits, the applicant being the lambardar of a village. The Assistant Collector, First Class, gave a decree for the small sum of Rs. 33 and odd. The plaintiff-respondent filed an appeal before the learned District Judge, and that officer purported to set aside the order under appeal and remand the suit with the direction that accounts should be made up under certain directions given in the District Judge's judgment. The applicant then filed a second appeal; but in the course of the hearing of the appeal he took up the position that his petition of appeal might be treated as an application for revision. A preliminary objection is taken that this Court has no revisional power over this case.

We have heard the learned counsel for the parties. The situation seems to be this. The suit was filed after the new Tenancy Act of 1926 came into force. Under S. 242 of this new Act an appeal has been allowed in a suit for profits from a decree of the Assistant Collector, First Class, only where the valuation of the suit exceeds Rs. 200. It is clear therefore, that no appeal lay, in this particular caee to the District Judge and this is the complaint of the defendant appellant. The first question therefore is whether a second appeal lies. The reply of the respondents is that a second appeal is forbidden, from an order of remand, by S. 248 (3), Tenancy Act of 1926. This objection seems to be sound, and we hold that no second appeal lies.

As for revision, the jurisdiction of the High Court, as conferred by S. 115, Civil P. C., has been taken away by S. 264, Tenancy Act. The revisional power that has been conferred on the High Court by the Tenancy Act is the power to be found in S. 253 of the Act itself. This section gives jurisdiction to the High Court in cases decided by revenue Court, where an appeal lies to the District Judge. We have already stated that no appeal lay, in this case to the District Judge. The result is that the order of the District Judge is not open to revision by this Court. The application fails, and is hereby dismissed with costs.

S.N./R.K. *Revision dismissed.*

A. I. R. 1929 Allahabad 587

DALAL, J.

Shanker Singh and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 135 of 1929, Decided on 11th April 1929, against order of Sess. Judge, Farrukhabad, D/- 25th January 1929.

(a) Criminal P. C., S. 435 — Meaning of legality and propriety explained.

The words legality and propriety in S. 435 would both include questions of law as to whether a finding, sentence or order is legal or proper having regard to the evidence. The word, correctness, does not mean that the High Court may inquire whether the finding was acceptable to it on a balance of the evidence recorded in the trial Court. The correctness of the finding, sentence or order also implies a legal defence such as the finding being based on an entire want of evidence or being incorrect in the sense that witness may have said for instance, that no theft was committed and the Court may have recorded a finding that theft was committed. [P 588 C 1]

(b) Criminal P. C., S. 435—High Court is precluded from interfering if finding has basis in some evidence.

Where there is evidence of whatsoever character on which a particular finding of fact may be based, High Court is precluded under the terms of S. 435 from interfering in revision. [P 588 C 1]

A. P. Dube and *H. C. Desanges* — for Applicants.

M. Waliullah—for the Crown.

Judgment.—In this case it has been difinitely held by both the Subordinate Courts that Moti was not only beaten but was robbed of a sum of Rs. 150. It is argued here that this Court could revise the finding of fact of the subordinate Courts and hold that Moti was only beaten and that there was no robbery. Reference was made to the wording of S. 435, Criminal P. C., that this Court may send for a record to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed. Legality and propriety would both include questions of law as to whether a finding, sentence or order was legal or proper having regard to the evidence. Then there is the word "correctness." That does not mean that this Court may inquire whether the finding was acceptable to it on a balance of the evidence recorded in the trial Court. The correctness of the finding, sentence or order also implies a legal defence such as the finding being based on an entire want of evidence, or being incorrect in the sense that the witnesses may have said, for instance, that no theft was committed and the Court may have recorded a finding that theft was committed. The power of this Court in appeal is totally distinct from the power of this Court which can be exercised in revision. Where there is evidence of whatsoever character on which a particular finding of fact may be based this Court is precluded under the terms of S. 435, Criminal P. C., from interfering with that finding. In the present case there is evidence that Moti was not only beaten but was robbed also, and on that evidence the subordinate Courts could correctly arrive at a finding that a dacoity was committed. Under the circumstances the finding was correct, and no question can arise here on that point in revision. Having regard to the circumstances of the case, the sentence of imprisonment is justified. It is true that the fine of Rs. 100 on every one of the applicants is excessive. I reduce the fine in every case to Rs. 20 and the imprisonment in default to one month's rigorous imprisonment; otherwise the application is dismissed. The balance of the fine, if recovered, shall be refunded.

P.N./R.K. *Revision dismissed.*

A. I. R. 1929 Allahabad 588

DALAL, J.

Kundan Lal—Applicant.

v.

Manohar Lal—Opposite Party.

Criminal Revn. No, 155 of 1929, Decided on 19th April 1929, against order of Dist. Magistrate, Agra, D/- 31st January 1929.

Criminal P. C., S. 439—Court of revision cannot order further inquiry merely because of disagreement with Magistrate's conclusion.

A further enquiry may be ordered only in cases where a Magistrate has not taken sufficient trouble or has come to a perverse decision. But a Court of revision is not entitled to order further inquiry merely for the reason of the disagreement with the conclusion of the Magistrate. [P 583 C 2]

Hazari Lal Kapoor and *K. D. Malaviya*—for Applicant.

Saila Nath Mukerji—for Opposite Party.

Judgment.—I refrain from giving my opinion as to the meaning of the word "Dassa" and the propriety of its use by Kundan Lal, as occasion may arise for a suit in the civil Court. All I have to examine is whether it would be proper to order further enquiry in the criminal Court. I am decidedly of the opinion that the time of the criminal Court should not further be wasted. Monohar Lal took his chance. The Magistrate held a careful enquiry and arrived at a certain conclusion. A Court of revision merely for the reason of disagreement with that conclusion is not entitled to order further enquiry. A further enquiry may be ordered only in cases where a Magistrate has not taken sufficient trouble or has come to a perverse decision. On the evidence on the record I am satisfied that the Magistrate tried the case with great care and patience and examined the evidence to the best of his ability. Even if he came to a wrong conclusion, a Court in revision has no jurisdiction to order further enquiry. I set aside the order of the District Magistrate and direct the order of discharge of the Magistrate Mr. H. Husain, dated 8th November 1928, to stand.

S.N./R.K. *Order set aside.*

A. I. R. 1929 Allahabad 589 (1)

SULAIMAN AND PULLAN, JJ.

Ram Dawan Shukul—Plaintiff—Appellant.

v.

Ram Surat Shukul and *others*—Defendants—Respondents.

Second Appeal No. 1868 of 1927, Decided on 22nd April 1929, against the decree of the Addl. Sub-Judge, Azamgarh D/- 3rd May 1927.

Evidence Act, S. 115—Person consenting to transfer is estopped from claiming pre-emption not only against vendor and vendee but also against rival pre-emptor—Pre-emption.

By consenting to a transfer a person disqualifies himself from pre-empting and loses his right of pre-emption altogether. He is then estopped not only as against the vendor and the vendee but also against a rival pre-emptor. [P 589 C 1, 2]

R. C. Ghatak—for Appellant.

Mukhtar Ahmad—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for pre-emption The lower appellate Court has found that the plaintiff is a member of a joint Hindu family with Raja Ram who is the head and with Jagat and Vishnu Nath, his nephews. Under the sale-deed in question part of the property was transferred by the vendor to Jagat and Vishnu Nath and another part to two other persons. The sale-deed was contested by the head of the joint family Raja Ram. The learned Judge has referred to further circumstantial evidence indicating that the relations between the appellant and the vendees were cordial and the appellant took an active part in other connected transactions. From all this he has inferred that the appellant consented to this transfer and is therefore estopped from claiming the right of pre-emption. His suit has been dismissed. The rival suit for pre-emption has however been decreed. Both the plaintiff and the rival pre-emptor were impleaded in each other's suit as pro forma defendants.

The learned advocate for the appellant contends that even if the plaintiff is estopped as against the vendor and the vendees he is not estopped as against the rival pre-emptor who was no party to the transaction. In our opinion this contention cannot prevail. By having consented to the transfer the plaintiff disqualified himself from pre-empting and lost his right of pre-emption altogether. At that time the rival pre-emptor could not have come on the scene. Having lost his right he cannot now assert it as against the rival pre-emptor. The plaintiff's right of pre-emption entitled him to an offer being made before the transfer was effected. If he chose not to object to the transfer his right of pre-emption was gone. This plea is certainly open to the rival pre-emptor also who was impleaded in the suit. The finding of the Court below is a finding of fact and must be accepted in second appeal. The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 589 (2)

BANERJI AND KING, JJ.

Sundar Lal—Plaintiff—Appellant.

v.

Ghissa and *others*—Defendants—Respondents.

Second appeal No. 661 of 1926, Decided on 1st May 1929, against decree of Addl. Sub-Judge, Bulandshahr, D/- 6th January 1926.

Transfer of Property Act, S. 43 — One brother ostensibly selling property vested in another—On date of transfer brother having already disappeared and not known to be alive—Brother dying and property subsequently vesting in the vendor—In a suit by the transferee of property, S. 43 applies.

K a Hindu who had separated from his brother *D* sold to *S* the equity of redemption of certain property which had vested in his brother *D* under a deed of relinquishment and assignment executed by brothers on partition. *D* had disappeared and was not heard of. Transfer was made on the representation by *K* that the right of redemption exclusively vested in him by virtue of his ancestral right. There was a recital to this effect in the sale-deed. On the date of sale *D* was not known to be dead and it was proved that *D* died subsequent to the sale by *K*. *S* brought a suit for redemption of mortgage and possession. On the date of the suit the interest that *K* had transferred vested in him as the sole heir of his brother.

Held: that the necessary conclusion in view of the recital in the deed is that *S*'s vendor professed to transfer the property in suit for consideration as an ostensible owner of the property and that *S* did not know that on that date *D* was alive. As also there was a finding to the effect that *D* died subsequent to the transfer and as there was no suggestion that anybody but *K* was the heir of *D*, *S* was

entitled to bring into aid the provisions of S. 43: *A. I. R.* 1926 *All.* 102, *Dist.* [P 591 C 2]

Panna Lal—for Appellant.

Girdhari Lal Agarwala and *S. B. L. Gaur*—for Respondents.

Referring Order

Niamatullah, J.—This is a plaintiff's appeal and arises from a suit for redemption of a shop in Anupshahr, district Bulandshahr mortgaged by the brothers Shambhu Ram and Suraj Ram, by a deed dated 1st December 1884, to Inderman who is now represented by some of the defendants; the other defendants are transferees from his heirs. Suraj Ram one of the two mortgagors died issueless and his interest in the mortgaged property survived to Shambhu Ram. The last named died leaving three sons Bhura, Damodar and Krishna Ram. Bhura may be left out of account as he died leaving his two brothers as his only heirs. The equity of redemption thus became eventually vested in Damodar and Krishna Ram. They divided the family property held by them jointly and the equity of redemption was assigned to Damodar alone. Each of the two brothers executed a deed of relinquishment in favour of the other with respect to such properties as had been allotted to the share of one or the other.

The plaintiff alleges that Damodar disappeared some time before the year 1903. By a sale-deed dated 21st August 1903 Krishna Ram transferred the equity of redemption to the plaintiff-appellant claiming to be the owner thereof. The sale-deed recites that the shop, which was in possession of mortgagees, exclusively belonged to the executant by virtue of his ancestral right.

On 6th November 1924 the plaintiff-appellant brought the suit giving rise to this appeal claiming possession from the heirs of the mortgagee and their transferees by redemption of the mortgage under which they held. He based his title on the sale-deed dated 21st August 1903 above referred to. He alleged in the plaint that Krishna Ram was the owner of the mortgaged property at the time the sale-deed was executed. He could be the owner on that date only if Damodar, who admittedly had no wife or issue, had previously died.

The defence was that Damodar was alive when the sale-deed relied on by the plaintiff was executed, that a certain sum of money was due under a deed of further charge dated 26th January 1900 which must be paid in addition to the money due under the deed of mortgage dated 1st December 1884 and that the defendants are entitled to a certain sum representing costs of repairs of the mortgaged property effected by them.

The Court of first instance held that the plaintiff-appellant is not entitled to redeem because his transferor Krishna Ram has not been shown to be the owner of the property at the date of the sale-deed dated 21st August 1903, that the defendants were not entitled to any costs of repairs but that they were entitled to money due under the deed of further charge. On these findings the plaintiff's suit was dismissed. On appeal by the plaintiff to the lower appellate Court it was held, in agreement with the Court of first instance, that the plaintiff's title to the mortgaged property has not been established. The appeal was accordingly dismissed and plaintiff has preferred this second appeal.

The only contention put forward by the learned advocate for the appellant is that S. 43, T. P. Act is applicable to the facts found by the Courts below and that even if Krishna Ram was not entitled to the mortgaged property on 21st August 1903 he became subsequently entitled to it on the death of Damodar, which, according to the defendants occurred on 13th January 1914 a date mentioned in certain proceedings taken by Krishna Ram for letters of administration in respect of the estate of Damodar. The argument based on S. 43, T. P. Act was urged before both the lower Courts but it did not find favour. As I read the judgment of the lower appellate Court on this question, he found that so far as the knowledge of facts possessed by the plaintiff is concerned it warranted a belief in his mind that Damodar had died before 21st August 1903 and that he maintained throughout the trial that Damodar had died before that date. The learned Subordinate Judge has categorically mentioned what he thinks to be the requirements of the rule contained in S. 43, T P. Act. As it stands it would not in terms include all what the learned Subordinate Judge thinks is contemplated by that section. To attract the application of that section it seems to me only three conditions are

necessary, namely (1) an erroneous representation that the transferor had authority to transfer the property in question, (2) the transfer should be for consideration and (3) the transferor should be found to have subsequently acquired the interest which he had professed to transfer though he did not possess it. Prima facie the facts found in this case do bring the case within the purview of that section. Whether knowledge on the part of the transferee that the representation made to him was erroneous would take the case out of the section is a question not free from difficulty, but there is no finding by either of the two Courts that the plaintiff was aware of the fact that Damodar was alive when the sale in his favour was effected. On the contrary it is clear that Damodar had not been heard of for a long time before that date. The Courts below have refused to make a presumption that he had died at a given time because he had not been heard of for a number of years. This does not lead to the conclusion that the plaintiff knew that Damodar was alive in 1903. As I have already indicated the concluding part of the judgment of the learned Subordinate Judge shows otherwise.

In view of the importance of the question I think the case is a fit one for being heard by a Bench of two Judges. I therefore refer this appeal to such Bench.

Judgment.—The facts of this case are fully set out in the order of Niamatullah, J., referring this case to a Bench of two Judges, and it is unnecessary to re-capitulate them. It is contended by the learned advocate for the appellant that upon the facts of this case he is entitled to a decree as in view of the provisions of S. 43, T. P. Act, the appellant must be deemed to have acquired the interest of the mortgagors. There can be no doubt that the interest which the transferor purported to transfer subsists on the date of the suit. The question in this case is whether on the date of sale, namely, the 21st August 1903 the plaintiff knew that Damodar was alive and that his transferor had no interest which he could transfer. It was contended by the learned advocate for the respondents that the plaintiff should have set out in his plaint that on the date of the transfer Damodar was alive and that his vendor had no title to the property but that the plaintiff erroneously believed that his transferor had title. The evidence called on behalf of the plaintiff is to prove that Damodar was not alive on 21st August 1903 and that for some years he had not been heard of. There is no suggestion in the written statement, nor is it pleaded anywhere that the plaintiff did know that Damodar was alive on the date of the transfer. We have therefore come to the conclusion in view of the recital in the sale-deed that the plaintiff's vendor professed to transfer the property in suit for consideration as an ostensible owner of the property, that the plaintiff did not know that on that date Damodar was alive. The finding of the Court below is that the owner died in the year 1914. It is not suggested that anybody but the vendor of the plaintiff was the heir of Damodar. Under these circumstances we are of opinion that the plaintiff is entitled to bring into aid the provisions of S. 43, T. P. Act and that he is the owner of the equity of redemption.

Reliance has been placed on the case of *Mulraj* v. *Indar Singh* (1) and the cases referred to in the judgment of this Court. An examination of that case and the other cases makes it perfectly clear to us that the finding in that case, as also in the other cases referred to in that judgment, was that the transferee was aware of the true interest of the vendor with reference to the property in question. Those cases therefore cannot be of any help in deciding the present case and are clearly distinguishable upon the facts.

We allow the appeal, set aside the decree of the Court below and direct that a decree be prepared under the provisions of O. 34, R. 7. We declare that defendants 9-12 are entitled to receive the sum of Rs. 200 and the heirs of the original mortgagees are entitled to sum of Rs. 50. The plaintiff must deposit Rs. 250 as the money due to the mortgagees. Six months are allowed for redemption. The appellant will have his costs in this Court and in the Courts below.

V.B./R.K. *Appeal allowed.*

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(1) A. I. R. 1926 All. 102=48 All. 150.

A. I. R. 1929 Allahabad 592

MUKERJI AND YOUNG, JJ.

Chandu Mal—Defendant—Appellant.

v.

Darbari Lal and *others*—Plaintiff and Defendant—Respondents.

Second Appeal No. 89 of 1927, Decided on 10th May 1929, against decree of Dist. Judge, Aligarh, D/- 13th May 1926.

(a) U. P. Land Revenue Act, S. 233 (m)—Cl. (m) shuts out claim to set aside sale for want of jurisdiction of revenue authorities.

The language of Cl. (m) is very wide and would shut out any claim for setting aside a sale on the ground of want of jurisdiction on the part of the revenue authorities. [P 592 C 2]

(b) U. P. Land Revenue Act, S. 175—Suit to set aside sale for fraud is maintainable in case of taxes such as income-tax and Tax under Canal and Drainage Act.

The exception provided for in S. 175 in the case of land revenue applies equally to other taxes that are realizable as land revenue, such as income-tax and arrears of tax under the Canal and Drainage Act, and so there is no bar to the maintenance of a suit to set aside a sale on the ground of fraud in the case of such taxes. [P 592 C 2]

M. L. Agarwala, *K. Verma* and *H. P. Agarwala*—for Appellant.

Girdhari Lal Agarwala, *I. B. Banerji* and *Panna Lal*—for Respondents.

Judgment.—The respondent, Darbari Lal, was assessed with income-tax to the amount of about Rs. 83. He also owed, it appears, a small amount of money on account of irrigation dues. Both the taxes were due for the year 1923. Certain immovable properties of his, namely four shops, were attached and sold to realise the two taxes. They were sold on 17th March 1924, and were purchased by the appellant before us, Lala Chand Lal alias Chandu Mal. Darbari Lal thereupon brought the suit out of which this appeal has arisen to have the sale set aside on the ground that the sale was brought about by means of fraud to which the appellant was a party. The suit succeeded in the Court of first instance and an appeal by the auction-purchaser, Lala Chanda Lal, was dismissed, but on a ground which will be presently stated. The auction-purchaser has now come up in second appeal, and his contention is that the ground on which the learned Judge has dismissed his appeal was untenable and the learned Judge should have tried the question of fraud.

It appears that the learned appellate Judge was of opinion that the sale that was held was a nullity inasmuch as there was no previous sanction obtained from the Collector and there was no confirmation of the sale by the Commissioner. The argument on behalf of the appellant is that a revenue sale, or sale for recovery of a tax, which may be recovered as if the same were land revenue, cannot be challenged on any ground other than the one laid down in Cl. (1), S. 233, Land Revenue Act of 1901. Cl. (1) permits a party to maintain a claim to set aside a sale for arrear of revenue on the ground mentioned in S. 175. Apparently, the plaintiff's case was based on S. 175. Cl. (m), S. 233 shuts out :

"Claims connected with, or arising out of the collection of revenue, or on account of revenue, or on account of a sum which is by this or any other Act realizable as revenue."

The language of this Cl. (m) is very very wide and would shut out any claim for setting aside a sale made by the plaintiff respondent, on the ground of want of jurisdiction on the part of the revenue authorities.

In the course of the arguments, here, the question arose whether Cl. (1) would cover the sale of property for recovery of a tax which was other than the land revenue. We should think that it would cover a case like the present. Under the Income-Tax Act, S. 46, income-tax may be realized as if it were an arrear of revenue. Similarly under the Canal and Drainage Act the arrears may be recovered as land revenue. S. 175, Land Revenue Act provides an exception in the case of land revenue, and apparently the same rule would apply where any other tax could be realised as land revenue. There seems, therefore, to be no bar to the maintenance of the suit on the ground of fraud as provided in S. 175. In the result we allow the appeal, set aside the decree of the Court below and remand the appeal to that Court for disposal on the merits. Costs in the Courts below and in this Court will abide the result.

S.N./B.K. *Case remanded.*

* A. I. R. 1929 Allahabad 593

MUKERJI AND NIAMATULLAH, JJ.

Dip Chand—Applicant.

v.

Sheo Prasad and *others* — Opposite Parties.

Civil Revn. No. 251 of 1927, Decided on 30th April 1929, against order of Addl. Sub-Judge, Moradabad, D/- 19th October 1927.

*** (a) Precedents — Full Bench decision—Scope.**

A Full Bench case decided by hree Judges although it may be a decision of two Judges against the decision of a third, is always entitled to respect from a Division Bench presided over by two Judges. [P 594 C 2]

(b) Civil P. C., S. 115—Scope.

Revisional Court is not a Court of appeal and it is not every decision on a point of law or fact that can be corrected by the High Court in its revisional jurisdiction : *A. I. R.* 1917 *P.C.* 71, *Expl.* [P 595 C 1]

(c) Civil P. C., O. 21, R. 89 — Application to set aside sale—Certain auction purchasers not shown as opposite parties—Rejection of application held not mere wrong decision on point of law but irregularity of procedure justifying interference by High Court on revisional side—Civil P. C., S. 115

Where Court has acted by inventing a rule of procedure not warranted by law the High Court is not only competent to interfere but should interfere : 20 *Cal.* 8 ; *A. I. R.* 1926 *P.C.* 142, *Foll.* : 15 *All.* 407 ; 9 *A. L. J.* 12 ; 63 *I. C.* 140, *Ref.* [P 596 C 1]

Judgment-debtor made an application to set aside sale under O. 21, R. 89. The application was rejected on the ground that some auction purchasers were not shown as opposite parties and when they were so shown application was barred by limitation.

Held : that it was not a mere matter of interpretation of law. The Court below required where law itself did not require that it should have before it an application in writing in which certain persons namely the auction puschasers should be shown as opposite parties in the same way as defendants are described in a plaint. The learned Judge invented a procedure of his own quite unwarranted by O. 21, R. 89. It was not a case of mere wrong decision. It was a material irregularity justifying interference by High Court on revisional side. [P 595 C 1]

(d) Civil P. C., S. 115 (c)—Result of following ruling illegal—High Court can interfere.

If following a decision of High Court the Court arrived at a result which is an illegal action or an action which may be described as material irregularity, High Court will certainly have jurisdiction to interfere under the express language of S. 115 (c) although the result may have been arrived at in a way entirely unexceptionable : 21 *A.L.J. at p.* 315, *not Foll.* [P 595 C 1]

*** (e) Precedent — Stare decisis does not apply when point raised is one of procedure and not of substantive law.**

A ruling as old as 1891 need not be followed on the ground of stare decisis where the point raised is one of procedure alone and not of substantive law. [P 596 C 1]

*** (f) Civil P. C., O. 21, R. 92 (2)—Court has to give notice of application to set aside sale — Applicant need not indicate parties affected by his application.**

This rule indicates that the duty of giving notice should rest on the Court or its officials. At least there is nothing to indicate that the judgment-debtor, or the applicant for the setting aside of sale, should trace out who are the parties affected by his application, and make them parties to it. The duty sought to be cast on the applicant implies an investigation as to who are the actual purchasers and who have purchased for whom. The short period of 30 days might be materially shortened if the judgment-debtors were called upon to hold an investigation into the matter. There is no rule which says that the time occupied in obtaining copy of the report of the sale officer would be excluded from period of 30 days : (1891) *A. W. N.* 121, *held no longer good law.* [P 596 C 2]

K. N. Katju—for Applicant.

P. L. Banerji and *Shabd Saran*—for Opposite Parties.

Judgment.—This is an application to revise the order of the munsif of Chandausi, dated 16th June 1927, and arises under the following circumstances :

In execution of a simple money decree against the applicant, his property was sold in three lots on 10th March 1927. One Shiam Behari purchased the lot No. 1. The second lot was purchased, on the spot, by one Brij Bhukan Saran, but he declared that he was purchasing the same for one Kunwar Bahadur. The third lot was purchased on the spot by one Sarra Mal, but he declared that he was purchasing the property for himself and one Mohamad Raza Khan. On 2nd April 1927, the judgment-debtor put in an application to the Court stating that he had deposited the decretal amount and the 5% on the purchase money, and asked that the sale might be set aside. The application was, as the application itself mentioned, under O. 21, R. 89, Civil P. C. In the body of the application the judgment-debtor said that the purchasers were Shiam Behari, Kidar Nath and Sarra Mal. It appears that Brij Bhukan Saran was the clerk of the pleader B. Kidar Nath, and B. Kunwar Bahadur was the brother of B. Kidar Nath. The judgment-debtor, apparently, took the purchase by Brij Bhukan Saran as a purchase by his

master, B. Kidar Nath, himself. It also seems to be clear that Saran Mal's purchase was taken by the judgment-debtor to be entirely for himself without a partner.

One of the purchasers took exception to the application on the ground that the two other purchasers, B. Kunwar Bahadur and Mohammad Raza, had not been impleaded. Thereupon the judgment-debtor asked that notices might be issued to those purchasers also. This application was made more than 30 days after the sale, which, as we have already stated, was held on 10th March 1927.

The learned munsif held that the application of the judgment-debtor for setting aside the sale must fail, because he had failed

"to implead two of the auction purchasers within the period of limitation."

Incidently, we may mention that the sale in favour of Shiam Behari, at any rate, might have been set aside. However, that is a point which has not been discussed before us, and need not be separately considered, in the view we take of the whole case.

The judgment-debtor took an appeal to the learned District Judge, and it was heard by a learned Subordinate Judge. That officer upheld the order of the Court of first instance and dismissed the appeal. The judgment-debtor has come in revision.

A preliminary point has been taken on behalf of the respondents that no revision is competent. The learned counsel has taken his stand on several cases, and the case on which he relies most is the case of *Yad Ram* v. *Sunder Singh* (1), a case decided by three learned Judges, one of whom dissented from the opinion of the two others. In this case the judgment-debtor sold his property, after the auction sale, and yet applied for the setting aside of the sale. The Court of first instance held that the judgment-debtor having sold his property was not a person competent to apply for the setting aside of the sale. In arriving at this conclusion, the learned Judge of the Court of first instance followed a decision of this Court, in *Ishar Das* v. *Asaf Ali Khan* (2). It was held by Banerji, J. that in the view he took of S. 115, Civil P. C., as interpreted by their Lordships of the Privy Council in *Balkrishna Udayar* v. *Vasudeva Ayyar* (3), the High Court had no jurisdiction to entertain the application in revision. His Lordship was of opinion that the only matter in which the High Court could interfere was a matter in which the question of jurisdiction was involved. He pointed out that even Cl. 3, S. 115 must have "relation to the question of jurisdiction". It was on this ground that the learned Judge declined to interfere. Piggott, J. gave different reasons for coming to the same conclusion. He thought that it was impossible for him to say that in following a decision of this Court, namely, the case of *Ishar Das* v. *Asaf Ali Khan* (2), the Court below had acted illegally or with material irregularity. That was in substance the reason why the learned Judge refused to interfere with the order of the Court below, although he noticed that, in respect of the actual decision, the Allahabad High Court stood singularly alone in its view. Walsh, J., dissented and was inclined to follow, on the merits the judgment of Mr. Mullick in the case of *Dhanwanti Kuer* v. *Sheo Shankar Lal* (4). From the report it does not appear that this learned Judge expressed any detailed opinion on the question of jurisdiction.

There can be no doubt that a Full Bench case, although it may be the decision of two learned Judges against the decision of a third, is always entitled to respect from a Division Bench presided over by only two Judges. But what was actually decided in the case of Yad Ram is what we have already described. The net result of the opinion of the two learned concurring Judges was that the revision was thrown out. This case can be easily distinguished from the one before us. The question that had to be decided by the Court of first instance, in *Yad Ram's* case was a question of pure law, namely, whether a certain person was or was not entitled, on a correct interpretation of a certain rule of law, to apply for the setting aside of the sale. We are prepared to concede, and indeed we must concede, that a revisional Court is not a Court of appeal, and it is not

(1) A. I. R. 1923 All. 392=45 All. 425 (F.B.).
(2) [1912] 34 All. 186 = 13 I. C. 134 = 9 A. L. J. 19.
(3) A. I. R. 1917 P. C. 71=40 Mad. 793=44 I. A. 261 (P.C.).
(4) [1919] 4 Pat. L J. 340=51 I. C. 873.

every erroneous decision on a point of law or fact that can be corrected by the High Court in its revisional jurisdiction. In the case before us, it is not a mere matter of interpretation of law. The Court below has required, where the law itself does not require, that it should have before it an application in writing in which certain persons, namely, the auction-purchasers, should be shown as opposite parties, as the defendants are described, in a plaint.

In our opinion, the learned Munsif invented a procedure of his own, quite unwarranted by R. 89, O. 21, Civil P. C. It is not a case of mere wrong decision on a point of law.

The learned counsel for the respondents has strongly relied on a dictum of Piggott, J., in the case of *Yad Ram* v. *Sunder Singh* (1), at p. 315 (of 21 *A.L.J.*) The learned Judge has said that he could not see how the Court of first instance could be said to have acted illegally or with material irregularity in following a decision of this Court. With all respect, there is another view of the matter. The result of the decision is something entirely different from the reasons of the decision. The result of the decision in the case before his Lordship was that the Court of first instance held that the judgment-debtor was not a person entitled to make the application. That decision might be wrong or right. It was arrived at by following a dscision of this Court. The following of the decision of this Court constituted the reason of the decision; but the reason is something different from the result. If the result was an illegal action, or action which may be described as material irregularity, this Court would certainly have jurisdiction to interfere under the express language of S. 115 (c), although the result may have been arrived at in a way which is entirely unexceptionable. We are, therefore, unable to agree with Piggott, J. although we have the highest respect for his opinion.

The learned counsel for the respondent relied on the Privy Council case of *Balkrishna Udayar* v. *Vasudeva Ayyar* (3) and argued that for our interference under Cl. (c) S. 115, Civil P. C., there must be a question of jurisdiction. We have carefully read that case, and we are of opinion that that interpretation should not be put on their Lordships' judgment. It is true that at p. 799 (*of* 40 *Mad.*) their Lordships delivered themselves as follows:

> "It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

But, having said so, their Lordships said something further which clearly indicates that all that their Lordships meant to lay down was that the revisional Court was not a Court of appeal on a question of fact or a question of law. In the very case which was before their Lordships, they approved of the exercise of the powers under S. 115, Civil P. C., by the High Court.

There are many cases in which their Lordships themselves have interpreted the law in the way in which we propose to interpret it. In *Birj Mohun Thakur* v. *Rai Uma Nath Chowdhury* (5), a purchaser at a Court sale made an application for the setting aside of the sale on a ground which could not afford him any relief in the execution department. The learned Judge executing the decree entertained his application and set aside the sale. A Division Bench of the High Court interfered and set aside the Subordinate Judge's order. Their Lordships of the Privy Council approved of the conduct of the High Court. Their Lordships observed at p. 11 of the report that the Subordinate Judge, in acting as he did, exercised the jurisdiction which did not vest in him, and failed to exercise the jurisdiction which he had. This decision was, no doubt, given under the old Act of 1882; but there is no difference in the present law and the old law.

The latest pronouncement of their Lordships of the Privy Council will be found in the case of *Umed Mal* v. *Chand Mal* (6). In this case their Lordships approved of the interference by the Chief Commissioner of Ajmer-Merwara. The grounds on which the Chief Commissioner had interfered were approved of, and their Lordships pointed out that the fact that a person very much interested in the result of the litigation was absent

(5) [1893] 20 Cal. 8=19 I. A. 154=6 Sar. 245 (P.C.).
(6) A. I. R. 1926 P. C. 142=54 Cal. 338=53 I. A. 271 (P.C.).

from before the Court was itself a sufficient ground for interference by the highest court of appeal, as a Court of revision.

We are of opinion that, where a Court has acted, as in the present case, by inventing a rule of procedure, for itself, which is not warranted by the law, the High Court is not only competent to interfere but should interfere.

The learned counsel for the respondents has urged that the Munsif, in refusing to set aside the sale, was only following a case of this Court decided in *Karamat Khan* v. *Mir Ali Ahmad* (7). The learned counsel said that it being a two Judge case should be followed by us. We have already noticed his argument that the Court below should not be said to have acted illegally or with material irregularity, because it purported to follow a ruling of this Court. We shall not consider again that argument.

The case in the 1891 *Allahabad Weekly Notes* has not been followed unanimously in this Court. It was, no doubt, followed by a single Judge in *Ali Gauhar Khan* v. *Bansidhar* (8), but we have got against it, at least, two later decisions, namely, *Sarvi Begam* v. *Haidar Shah* (9) and *Ramraj Singh* v *Rabi Prasad* (10). In these cases, two different learned Judges of this Court held that an application for setting aside a sale under O. 21, R. 89, might be made oraliy. If an application could be made orally, how possibly could the decree-holder, or the auction-purchassr, be shown, in the oral application, as the opposite parties, as is done in the case of a plaint. We may point out that the decision of 1891 *Weekly Notes* need not be followed on the ground of stare decisis. The point raised is one of procedure alone, and not of substantive law. It cannot be said that people have acted on the basis of this ruling for a number of years and have accepted the rule laid down in the case as a substantive rule of law of the country. Further we may point out that the ruling was given under the old Code, and the present law is, surely not exactly the same as it was in 1882. We do not say that the result of the language employed in the Act of 1908, necessarily implies that a judgment-debtor asking for the setting aside of a sale after deposit of money should not show the persons interested in opposing the application as the opposite party. All that we mean to say is that the language is not the same, and the ruling given on consideration of a different language of the Code need not, necessarily, be by binding on us. In the earlier Code (S. 310 A) nothing was said as to who should be given notice of the application of the judgment-debtor to set aside a sale. Under the present Act O. 21, R. 92, sub-R. 2, para. 2 runs as follows :

"Provided no order shall be made, unless notice of the application has been given to all persons affected thereby."

This rule would indicate that the duty of giving notice should rest on the Court or its officials. At least there is nothing to indicate that the judgment-debtor, or the applicant for the setting aside of the sale, should trace out who are the parties affected by his application, and make them parties to it. The duty sought to be cast on the applicant implies an investigation as to who are the actual purchasers and who have purchased for whom. The short period of 30 days might be materially shortened, if the judgment-debtors were called upon to hold an investigation into the matter. There is no rule which says that the time occupied in obtaining a copy of the report of the sale officer would be excluded from the period of 30 days. For all these reasons, we are of opinion, with all respect, that the case of *Karamat Khan* v. *Mir Ali Ahmad* (7), is no longer a good law, and is not binding upon us.

Coming to the merits of the case, we have given sufficient indication to show that we are of opinion that the application should succeed. R. 89 does not require the party making the application to nominate any person as the opposite party. The facts of this very case show how difficult it may be for the applicant to discharge this duty in certain circumstances. The judgment-debtor appears to have been actually present on the spot, yet he was misled as to who were the actual purchasers. There is no question of "bringing anybody on the record." The learned Judge who decided the case of *Ali Gauhar Khan* v. *Bansidhar* (8), speaks of the decree-holder being

(7) [1891] A. W. N. 121.
(8) [1893] 15 All. 407=(1893) A. W. N. 173.
(9) [1912] 9 A. L. J. 12=13 I. C. 404.
(10) [1921] 63 I. C. 140.

'brought on the record." The execution case was one in which the decree-holder was a principal actor, and no question of his being brought on the record could arise. The auction-purchaser and the decree-holder being already on the record, and the unnecessary procedure of showing them as the opposite party cannot be insisted upon, unless there was a clear warrant to the effect in R. 89. In the result, we allow the appplication in revision, set aside the orders of the learned Munsiff and the Subordinate Judge, and set aside the sale. We note that on other points, the findings are in favour of the applicant. The applicant's costs in this Court and in the Courts below shall be paid by the respondents.

V.B./R.K. *Revision allowed.*

A. I. R. 1929 Allahabad 597 (1)

MUKERJI AND NIAMATULLAH. JJ.

Chandrika Rai—Applicant:

v.

Srikant Rai—Opposite Party.

Civil Revn. No. 278 of 1927, Decided on 26th April 1929, against order of Dist. Judge, Ghazipur, D/- 1st September 1927.

Guardian and Ward—Jurisdiction—District Judge appointing *X* as guardian—Prior to such appointment *Y* being in possession of minor's property as trespasser — District Judge has no jurisdiction to pass any order against *Y*.

Where the District Judge appoints certain persons as guardians of minor's he has no jurisdiction to pass any order against the person who was in possession of the minor's properties as trespasser prior to such appointment. What he can do is only to direct ths guardian now appointed to bring a suit against tha person. [P 597 C 2]

S. Z. Alam—for Applicant.

Jwala Prasad Bhargava—for Opposite Party.

Judgment.—This is an application by one Chandrika Rai against an order passed by the learned District Judge of Ghazipur on 1st September 1927, directing the applicant to pay to the respondent a certain sum of money which was to be reduced, partially, in the case of his returning certain bullocks. It appears that the applicant's father Sukhdeo Rai was appointed the guardian of certain minors. Sukhdeo Rai having died, the applicant continued to be in possession of the minor's property. Sri Kanth Rai, the respondent was then appointed the guardian of the minors. At his instance or that of the Judge himself, the applicant was called upon to furnish an account of the minor's properties he had in his possession. He furnished an account without any objection. The accounts were scrutinized and a Commissioner was appointed. As the result of the Commissiouer's investigation and report, the order complained of was made.

The points that have been taken for revision are that the learned District Judge has erred in not treating the report in a certain manner. In our opinion, we cannot go into the merits of the case. The revision should, however, succeed, on this simple ground, that the learned District Judge had no jurisdiction to make an order against the applicant who was not a guardian appointed by him. If he happened to be in possession of the minor's property, he was so as a trespasser. The District Judge can certainly direct Sri Kanth to institute a suit for accounts against the applicant and in that suit, the question how much is payable by the applicant, may be determined. The applicant will then have a chance of taking his case before an appellate Court As the things stand, we cannot scrutinize the evidence that was taken before the District Judge, because we are not sitting in appeal against his order. We set aside the order of the learned District Judge as passed without jurisdiction. We make no order as to costs because on the grounds taken by the applicant, he had no case to be put before us.

S.N./R.K. *Order set aside.*

A. I. R. 1929 Allahabad 597 (2)

MUKERJI, J.

Bhagwan Das Lachhmi Narain — Plaintiffs—Applicants.

v.

B. N. Ry. — Defendant — Opposite Party.

Civil Revn. No. 5 of 1929, Decided on 8th April 1929, against order of Sm. C. C. Judge, Deoria, D/- 17th September 1928.

(a) Civil P. C., O. 7, R. 11—Person claiming damages from railway but omitting to

gives details of his claim—Omission is not sufficient to dismiss his claim.

Where a person claims damages for "deterioration" of the goods from a railway company, but fails to furnish along with the plaint the details of his claim for damages, this omission by itself is not sufficient to dismiss his claim. [P 593 C 1, 2]

(b) Railways Act, S. 77—"Deterioration" does cover loss due to fall in market value —Words.

The word "Deterioration" does cover the fall in the market value of the goods which is due to the delay in delivery : 21 *Mad.* 172 ; 233 *P. L. R.* 1912 *not, Foll.* ; *A. I. R.* 1925 *Lah.* 255, *Ref.* [P 593 C 2]

A. P. Pandey—for Applicants.
B. Malik—for Opposite Party.

Judgment. — This is an application in revision against the decree of the Judge, Small Cause Court and arises under the following circumstances. The applicant firm indented some rice from a place called Burdaura served by the B. N. Ry. The goods were consigned to where the applicant lived namoly Deoria in the District of Gorakhpur. Unluckily, the railway receipt was made out to show that the goods were sent to a place called Jalalpur. In spite of this fact, a part of the consignment arrived at Deoria, nobody could tell how, on 14th April 1927. It was not till 8th May 1927 that the remaining portion of the consignment was received in Deoria and handed over to the plaintiff. The plaintiff-applicant, thereupon, brought his suit out of which this application has arisen to recover certain amounts of money including a sum of Rs. 230 as damages. The claim for damages was based on the allegation that by the time the goods arrived, the market for the goods (rice) fell and the plaintiff suffered a loss. The claim on the point was met on two grounds, namely there was in fact no loss, there being no fall in the market value and that, in any case, the plaintiff was bound to give a notice under S. 77, Railways Act, before instituting a suit. This part of the claim has been dismissed on both the grounds.

If I had thought that the suit could be maintained without a notice, I would have sent back the case for a retrial on the ground that the learned Judge was prejudiced by the fact that the plaintiff had not furnished any particulars of his claim for damages along with the plaint. Nobody had asked the plaintiff to furnish particulars and this omission on the plaintiff's part should not have been the cause of dismissal.

Section 77, Railways Act, requires that "where a person claims compensation for ..... deterioration ..... of goods delivered to be carried ....." the would-be plaintiff shall prefer a claim in writing within six months of the date of the delivery of the goods for carriage by the railway. The contention of the respondents is that the deterioration would cover the fall in the market value of the goods concerned. There seems to be a conflict of opinion among the authorities on this point. A Madras case, viz., *Madras Ry. Co.* v. *Govind Rau* (1) and a Lahore case. *Indian General Navigation and Ry. Co.* v *Harcharan Das* (2) held that the word "deterioration" would include a loss in the market value of the property and not only a depreciation in the quality of the goods. In a more recent case, *E. I. Ry. Co. Ltd.* v. *Diana Mal-Gulab Singh* (3) the Lahore High Court hold a contrary view, but it does not appear that the previous case in the same Court had been brought to its notice. A surer guide in the meaning of the word is furnished by the New English Dictionary of Murray. There, the word "deterioration" is shown as bearing the import of impairment of quality or value.

It appears to me that cases of late delivery must be occurring very often with the railways and in such circumstances, parties to the consignment would be prone to claim compensation. If the authors of the Railway Act were anxious to provide for loss, destruction etc., of the goods in transit, there was no reason why they should forget to provide for the loss of the value of goods owing to delay in delivery. I am of opinion that "deterioration" does include a loss in the value of the goods consigned owing to a delay in delivery. The result is that the application fails and it is hereby dismissed with costs.

S.N./R.K. *Application dismissed.*

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(1) [1898] 21 Mad. 172.
(2) [1912] 233 P.L.R. 1912=111 P.R. 1912 =15 I.C. 12=224 P.W.R. 1912.
(3) A.I.R. 1925 Lah. 255=5 Lah. 523.

"brought on the record." The execution case was one in which the decree-holder was a principal actor, and no question of his being brought on the record could arise. The auction purchaser and the decree-holder being already on the record, and the unnecessary procedure of showing them as the opposite party cannot be insisted upon, unless there was a clear warrant to the effect in R. 89. In the result, we allow the application in revision, set aside the orders of the learned Munsif and the Subordinate Judge, and set aside the sale. We note that on other points, the findings are in favour of the applicant. The applicant's costs in this Court and in the Courts below shall be paid by the respondents.

V.B./R.K. *Revision allowed.*

A. I. R. 1929 Allahabad 597 (1)

MUKERJI AND NIAMATULLAH, JJ.

Chandrika Rai—Applicant.

v.

Srikant Rai—Opposite Party.

Civil Revn. No. 278 of 1927, Decided on 26th April 1929, against order of Dist. Judge, Ghazipur, D/- 1st September 1927.

Guardian and Ward—Jurisdiction — District Judge appointing *X* as guardian—Prior to such appointment *Y* being in possession of minor's property as trespasser — District Judge has no jurisdiction to pass any order against *Y*.

Where the District Judge appoints certain persons as guardians of minors, he has no jurisdiction to pass any order against the person who was in possession of the minor's properties as trespasser prior to such appointment. What he can do is only to direct the guardian now appointed to bring a suit against that person. [P 597 C 2]

S. Z. Alam—for Applicant.

Jwala Prasad Bhargava — for Opposite Party.

Judgment.—This is an application by one Chandrika Rai against an order passed by the learned District Judge of Ghazipur on 1st September 1927, directing the applicant to pay to the respondent a certain sum of money which was to be reduced, partially, in the case of his returning certain bullocks. It appears that the applicant's father Sukhdeo Rai was appointed the guardian of certain minors. Sukhdeo Rai having died, the applicant continued to be in possession of the minor's property. Sri Kanth Rai, the respondent was then appointed the guardian of the minors. At his instance or that of the Judge himself, the applicant was called upon to furnish an account of the minor's properties he had in his possession. He furnished an account without any objection. The accounts were scrutinized and a Commissioner was appointed. As the result of the Commissioner's investigation and report, the order complained of was made.

The points that have been taken for revision are that the learned District Judge has erred in not treating the report in a certain manner. In our opinion, we cannot go into the merits of the case. The revision should however succeed, on this simple ground, that the learned District Judge had no jurisdiction to make an order against the applicant who was not a guardian appointed by him. If he happened to be in possession of the minor's property, he was so as a trespasser. The District Judge can certainly direct Sri Kanth to institute a suit for accounts against the applicant and in that suit, the question, how much is payable by the applicant, may be determined. The applicant will then have a chance of taking his case before an appellate Court. As the things stand, we cannot scrutinize the evidence that was taken before the District Judge, because we are not sitting in appeal against his order. We set aside the order of the learned District Judge as passed without jurisdiction. We make no order as to costs because, on the grounds taken by the applicant, he had no case to be put before us.

S.N./R K. *Order set aside.*

A. I. R. 1929 Allahabad 597 (2)

MUKERJI, J.

Bhagwan Das Lachhmi Narain — Plaintiffs—Applicants.

v.

B. N. Ry.— Defendant — Opposite Party.

Civil Revn. No. 5 of 1929, Decided on 8th April 1929, against order of Sm. C. C. Judge, Deoria, D/- 17th September 1928.

(a) Civil P. C., O. 7, R. 11—Person claiming damages from railway but omitting to

give details of his claim—Omission is not sufficient to dismiss his claim.

Where a person claims damages for "deterioration" of the goods from a railway company, but fails to furnish along with the plaint the details of his claim for damages, this omission by itself is not sufficient to dismiss his claim. [P 598 C 1, 2]

(b) Railways Act, S. 77—"Deterioration" does not cover loss due to fall in market value—Words.

The word "Deterioration" does not cover the fall in the market value of the goods which is due to the delay in delivery: 21 *Mad.* 172; 233 *P. L. R.* 1912, *not Foll. A. I. R.* 1925 *Lah.* 255, *Ref.* [P 598 C 2]

A. P. Pandey—for Applicants.

B. Malik—for Opposite Party.

Judgment.—This is an application in revision against the decree of the Judge, Small Cause Court and arises under the following circumstances. The applicant firm indented some rice from a place called Burdaura served by the B. N. Ry. The goods were consigned to where the applicant lived namely Deoria in the District of Gorakhpur. Unluckily, the railway receipt was made out to show that the goods were sent to a place called Jalalpur. In spite of this fact, a part of the consignment arrived at Deoria, nobody could tell how, on 14th April 1927. It was not till 8th May 1927 that the remaining portion of the consignment was received in Deoria and handed over to the plaintiff. The plaintiff-applicant, thereupon, brought his suit out of which this application has arisen to recover certain amounts of money including a sum of Rs. 230 as damages. The claim for damages was based on the allegation that by the time the goods arrived, the market for the goods (rice) fell and the plaintiff suffered a loss. The claim on the point was met on two grounds, namely there was in fact no loss, there being no fall in the market value and that, in any case, the plaintiff was bound to give a notice under S. 77, Railways Act, before instituting a suit. This part of the claim has been dismissed on both the grounds.

If I had thought that the suit could be maintained without a notice, I would have sent back the case for a retrial on the ground that the learned Judge was prejudiced by the fact that the plaintiff had not furnished any particulars of his claim for damages along with the plaint. Nobody had asked the plaintiff to furnish particulars and this omission on the plaintiff's part should not have been the cause of dismissal.

Section 77, Railway Act requires that "where a person claims compensation for ..... deterioration ..... of goods delivered to be carried ....." the would-be plaintiff shall prefer a claim in writing within six months of the date of the delivery of the goods for carriage by the railway. The contention of the respondents is that the deterioration would cover the fall in the market value of the goods concerned. There seems to be a conflict of opinion among the authorities on this point. A Madras case, viz., *Madras Ry. Co.* v. *Govind Rau* (1) and a Lahore case, *Indian General Navigation and Ry. Co.* v. *Harcharan Das* (2) held that the word "deterioration" would include a loss in the market value of the property and not only a depreciation in the quality of the goods. In a more recent case, *E. I Ry. Co. Ltd.* v. *Diana Mal-Gulab Singh* (3) the Lahore High Court held a contrary view, but it does not appear that the previous case in the same Court had been brought to its notice. A surer guide in the meaning of the word is furnished by the New English Dictionary of Murray. There, the word "deterioration" is shown as bearing the import of impairment of quality or value.

It appears to me that cases of late delivery must be occurring very often with the railways and in such circumstances, parties to the consignment would be prone to claim compensation. If the authors of the Railway Act were anxious to provide for loss, destruction etc., of the goods in transit, there was no reason why they should forget to provide for the loss of the value of goods owing to delay in delivery. I am of opinion that "deterioration" does not include a loss in the value of the goods consigned owing to a delay in delivery. The result is that the application fails and it is hereby dismissed with costs.

S.N./R.K. *Application dismissed.*

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(1) [1898] 21 Mad. 172.
(2) [1912] 233 P. L. R. 1912=111 P. R. (1912)=15 I. C. 12=224 P. W. R. 1912.
(3) A. I. R. 1925 Lah. 255=5 Lah. 523.

A. I. R. 1929 Allahabad 599 (1)

MUKERJI AND NIAMATULLAH, JJ.

Faqir Chand—Defendant—Applicant.

v.

Lala Harkishun Das — Plaintiff — Opposite Party.

Civil Revn. No. 309 of 1928, Decided on 26th April 1929, against order of Munsif, Bareilly, D/- 2nd June 1928.

Civil P. C., S. 115—Suit dismissed for default—Plaintiff appearing on same day and satisfying Court for his non-appearance—Court restoring suit on plaintiff's application—Defendant filing application to revise order restoring suit—High Court has jurisdiction to revise order and plaintiff's appearing on same day and giving explanation to satisfaction of Court is sufficient ground for restoration of suit—Civil P. C., O. 9, R. 9.

On a date fixed for fixing of issues, plaintiff being absent, the suit was dismissed for default. The plaintiff appeared on the same day and gave an explanation for his non-appearance which satisfied the Court, upon which the Court, on application by the plaintiff filed on the next day, restored the suit after giving notice to the defendant. The defendant then filed application to revise the order restoring the suit.

Held : that High Court had jurisdiction to revise the order.

Held further : that the fact that the plaintiff appeared on the same day and gave an explanation to the satisfaction of the Court was sufficient ground for restoration of the suit : *A.I.R.* 1921 *All.* 1, *Dist. A.I.R.* 1925 *All.* 610 (*F. B.*), *Rel. on.* [P 599 C 2]

U. S. Bajpai, *Hazari Lal Kapoor* and *G. S. Pathak*—for Applicant.

M. L. Agarwala—for Opposite Party.

Judgment.—The respondent brought a suit, in the Court of the Munsif of Bareilly, against the applicant, in which 17th January 1928 was fixed for fixing of issues. On that date the case was called, the plaintiff was found absent and the suit was dismissed for default. The same day, the plaintiff appeared with an application for restoration, but it appears that the application was actually filed the next day. The learned Munsif after issuing notice to the other side, restored the suit. The defendant has come up in revision, asking that this order restoring the suit should be set aside. A preliminary objection has been taken by the learned counsel for the respondent that no revision lies. He relies on the Full Bench case *Buddhoo Lal* v. *Mewa Ram*(1). In that case what was to be decided was "where a Subordinate Court had merely decided the question of jurisdiction, whether an application in revision lay in the High Court or not."

Three learned Judges as against two held that no application in revision lay. It was laid down that the decision of one of the issues which did not dispose of the whole case was not a "case decided," within the meaning of S. 115, Civil P. C. In a recent case which came up in revision before this Court, the question was whether the setting aside of a decree, which had been passed ex parte by the appellate Court, constituted a case fit for revision by this Court. Three learned Judges held that it was a 'case' within the meaning of S. 115. We are of opinion that the circumstances before us fall within the purview of the later ruling, viz : *Ram Sarup* v. *Gaya Prasad* (2). We hold that we have jurisdiction to revise the order of 2nd June 1928. Coming to the merits, we find that while the learned Munsif thought that the plaintiff's conduct was negligent, he did not hold that there was no sufficient cause for the plaintiff's non-appearance when the suit was called for hearing, within the meaning of O. 9, R. 9, Civil P. C. The fact that the plaintiff appeared the same day and gave an explanation which satisfied the learned Munsif was sufficient ground for restoration of the suit. There is nothing to revise, and we dismiss the application with costs.

P.N./R.K. *Revision dismissed.*

(1) A. I. R. 1921 All. 1=43 All. 564 (F. B.).

(2) A. I. R. 1925 All. 610 (F. B.).

A. I. R. 1929 Allahabad 599 (2)

BOYS, J.

Dalle Singh—Applicant.

v.

King-Emperor—Opposite Party.

Criminal Revn. No. 212 of 1929, Decided on 22nd April 1929, against order of Sess. Judge, Shahjahanpur, D/- 29th January 1929.

Criminal P. C., S. 110 — Mere suspicion unless supported by good reasons is inadmissible to support order under S. 110—Evidence of general bad character is admissible but its weight varies with circumstances of each case.

"Suspicion" is worthless and inadmissible to support an order under S. 110 unless supported by good reasons and then it is the

reasons and the facts on which the suspicion is based, and not the suspicion, to which only weight can be given. Evidence of the accused's general bad character is admissible to prove the general repute of the accused, but its weight must vary according to particular circumstances. [P 600 C 1]

Saila Nath Mukerji—for Applicant.

M. Waliullah—for the Crown.

Judgment.—I do not think the order calling for security from Dalle Singh for a period of one year can be maintained, and that for more than one reason. The police put up against this man by way of evidence four dacoity cases in which he had been acquitted. As regards only one of these can the Judge state even, and states rightly, that it leaves "some residum of suspicion against him." There are two other cases in which he is said to have been suspected both rejected by the Judge. "Suspicion" is worthless and inadmissible unless supported by good reasons and then it is the reasons and the facts on which the suspicion is based, and not the suspicion, to which only weight can be given. So far as there is any evidence justifying the order the Judge finds it in the evidence of nine prosecution witnesses, of whom he eliminates one, who give evidence of the accused's general bad character. Such evidence is, of course, admissible to prove the general repute of the accused, but its weight must vary according to particular circumstance. In the present case the accused was admittedly in the "valalat" from December 1924, to the 22nd March 1926, when he was acquitted. Some S. 107 proceeding was started against him, but in March 1926, he left India and did not return till January 1928. Some dacoities are said to have been committed in April, 1928, and Dalle Singh was arrested on 21st April 1928, but has been acquitted of any participation in those dacoities. He remained in Jail under these charges and in connexion with the gang case till the 9th December 1928. He was arrested at the door of the Jail and these proceedings were forthwith started against him. The facts that I have given make it manifest that for the last year past at any rate Dalle Singh cannot have committed any thefts, robberies etc., such as are said to form the basis of the present proceedings. it would appear that the only period during which he could have committed any crime which is really material to the present case is the first four months of last year. It would seem manifest that Dalle Singh is a person who to say the least of it, is very unfortunate to have been suspected so often, but I have to consider whether there is evidence to support the charge now made against him. There is nothing proved by the lower Courts against him at any time at all. But he has been under arrest for two long periods and his name associated with these dacoities. It is manifest that under these circumstances any number of witnesses would be prepared to come forward and say that he did not bear a good character. I think in the citcumstances of this case something more definite than that is required. But this is not the only consideration. He has been called on to furnish security for a year. Any act of any sort or description whatever which he can have committed which would justify his being so-called on must of necessity have been committed before 21st April 1928, when he was arrested. Had these proceedings been started then and carried through successfully the period of one year's security would now have elapsed. For both the above reasons I do not think that this order should be maintained, and I set it aside and direct that the security called for be discharged and cancelled and unless he is wanted in any other matter he will forthwith be set at liberty.

S.N./R.K. *Order set aside.*

A. I. R. 1929 Allahabad 600

SULAIMAN AND PULLAN, JJ.

Surajmal and *another*—Appellants.

v.

Shankar and *others*—Respondents.

Second Appeal No. 792 of 1927, Decided on 22nd April 1929, against decree of Dist. Judge, Meerut, D/- 18th June 1926.

(a) Agra Pre-emption Act, Ss. 14 and 15—Mere posting notice is not sufficient—It must be served.

Although the word "issue" in S. 15 is ambiguous, mere posting of a notice is not sufficient, but there must be actual service of notice on the persons having right of pre-emption. [P 601 C 1,2]

(b) Agra Pre-emption Act, S. 17—Scope.

When the Court comes to the conclusion that the amount entered in the sale-deed is

grossly excessive and it is convinced that the whole of that amount could not have been paid to the vendor and there is no other material on the record to come to a definite finding as regards the actual price of it, it is entitled to proceed to find the market value of the property under S. 17 of the Act.

[P 601 C 2]

S. C. Goyle and *P. L. Banerji*—for Appellants.

K. N. Katju—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit for pre-emption. Before the sale took place a notice was sent by registered post to the plaintiffs, but the lower appellate Court has found that this was not actually served on them. The defendants appealed and on their behalf a ground was taken that the mere posting of a notice was quite sufficient and that service of it was immaterial. This contention cannot be accepted. S. 14 of the Act does not say that a notice is merely to be sent to all the persons having a right of pre-emption but prescribes that the cosharer proposing to sell may "give notice by registered post to all such persons" which undoubtedly implies that the notice must be given to the persons concerned. The use of the word "issue" in S. 15 is ambiguous, but reading the whole of that section, particularly the later portion of it which lays down that the right of pre-emption would not be extinguished unless such person within the period of one month of the receipt of the notice communicates his intention to purchase, no doubt is left that service on the pre-emptors is essential. Their right is only extinguished when they allow one month to expire after the receipt of such notice. There is, therefore, no force in this ground.

The next ground relates to the question of consideration. The ostensible sale price was Rs. 7,500. Both the Courts below have found that the oral evidence produced by the plaintiffs that part of this amount was actually returned was not worthy of credit. But the lower appellate Court has gone on to consider the circumstances of the case and has come to the conclusion that the ostensible price is grossly excessive. It then considered the market value of the property and came to the conclusion that even Rs. 4,750 which had been found by the first Court to be the value was itself excessive, but inasmuch as there was no cross-objection it did not reduce that amount.

We think that when the Court came to the conclusion that the amount entered in the sale-deed was grossly excessive and it was convinced that the whole of that amount could not have been paid to the vendor and there was no other material on the record to come to a definite finding as regards the actual price of it, it was entitled to proceed to find the market value of the property under S. 17 of the Act. The finding that Rs. 4,750 is not below the market price must be taken as a finding of fact which is binding on us in second appeal. We, therefore, think that there is no force in this appeal. It is dismissed with costs including in this Court, fees on the higher scale.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 601

DALAL, J.

Dodey Ram—Defendant—Appellant.

v.

Mt. Gulkando and *others* — Plaintiff and Defendants—Respondents.

Second Appeal No. 2189 of 1927, Decided on 1st May 1929, against decree of Addl. Sub-Judge, Shahjahanpur, D/- 27th May 1927.

(a) Transfer of Property Act, S. 52—Doctrine applies even to involuntary sales.

Where a person purchased property at auction sale in execution of Government dues while a suit by a mortgagee for sale of property on foot of a prior mortgage was pending and where the property was sold in execution of a final decree for sale, the doctrine of lis pendens applies and the purchaser at first auction has no longer any right of redemption left: 26 *Cal.* 966; *A. I. R.* 1922 *Pat.* 542 *Rel. on.* [P 602 C 1]

(b) Transfer of Property Act, S. 52 — Notice of pending suit is not necessary.

Section 52 does not confine the doctrine of lis pendens to cases where the party has notice of the pending suit. The doctrine is stated in generel terms, and those who deal with properties covered by a contentious suit or proceeding have to abide by the result of that suit whether they are aware of the pendency of the suit or not. [P 602 C 1]

Shiva Prasad Sinha and *S. Z. Alam*—for Appellant.

Harnandan Prasad—for Respondents.

Judgment.—The defendant purchased the property in suit at auction sale in execution of Government dues while a

suit by a mortgagee for sale of the property on foot of a prior mortgage was pending. The suit by Banwari Lal was filed in 1921, and a preliminary decree on a compromise was passed on 10th March 1921. The defendant purchased on 31st August 1921 and took possession. The defendant was not a party to the suit for sale brought by Banwari Lal. That suit proceeded without the defendant being a party, and finally the property in suit was purchased by the plaintiff in execution of a final decree for sale on 11th April 1923. The lower appellate Court has held that the doctrine of lis pendens applied, and that the defendant having purchased during the pendency of the suit for sale was bound by the proceedings in that suit and the final purchase by the plaintiff. He further held that the defendant had no longer any right of redemption left.

The circumstances of this case are entirely covered by a Bench Ruling of the Calcutta High Court in *Har Shankar Prasad Singh* v. *Shew Gobind Shaw* (1). It is a ruling of 1899 and has been consistently followed. The doctrine of lis pendens applies both to voluntary and involuntary sales. It was so held by the Patna High Court also in 1922 in *Mathura Prasad* v. *Dasai* (2). The *Calcutta* case is further applicable in barring the right of the defendant to redeem. It was held there that the defendants having purchased a share of an estate at a revenue sale acquired it subject to the mortgage which they were bound in law to discharge before the sale in execution of the mortgage decree had actually taken place, or before, at any rate, that sale had been confirmed; and that having failed to do so, and there being no equities to the contrary, the right of redemption was extinguished. It was argued here that the law would be differently applied as the defendant had no notice of the pending suit for sale and of the auction sale in favour of the plaintiff. S. 52, T. P. Act, however, does not confine the doctrine of lis pendens to cases where the party has notice of the pending suit. The doctrine is stated in general terms, and those who deal with properties covered by a contentious suit or proceeding have to abide by the result of that suit whether they are aware of the pendency of the suit or not. I dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

(1) [1899] 26 Cal. 966=4 C. W. N. 317.
(2) A. I. R. 1922 Pat. 542=1 Pat. 287.

A. I. R. 1929 Allahabad 602

SULAIMAN AND BANERJI, JJ.

Mt. Imtiaz Bibi — Plaintiff—Appellant.

v.

Mt. Kabia Bibi—Defendant—Respondent.

Second Appeal No. 732 of 1926, Decided on 6th April 1929, against decree of Sub-Judge, Meerut, D/- 21st January 1926.

Civil P. C., S. 47—Legal representative of deceased judgment-debtor asserting that certain property is his own and not part of assets of deceased in his hands—His objection is one under S. 47 and so it cannot be raised by regular suit.

The legal representative of a deceased judgment-debtor, when he is asserting that a certain property is his own property and no part of the assets of the deceased in his hand, is raising an objection relating to the execution discharge and satisfaction of the decree within the meaning of S. 47 and the question is between the representatives of the parties. Hence if the objection is not raised in execution proceedings it cannot be raised by a regular suit: 12 *All.* 313 (*F.B.*); *Expl.* and *Foll.* 39 *All.* 47; 31 *All.* 82 (*F.B*),; 26 *All.* 447 (*F.B.*); *A. I. R.* 1928 *All.* 363, *Ref.* [P 603 C 1]

Hem Chander Mukerji—for Appellant.

Panna Lal—for Respondent.

Judgment.—This case has been referred to a larger Bench on account of an apparent conflict between the case of *Dulla* v. *Shib Lal* (1) and the case of *Bulaqi Das* v. *Kesri* (2). One Abdul Rahman died in 1917 leaving a widow Mt. Kabia Bibi and a daughter as well as three brothers as his heirs. One of his brother Abdul Karim promptly made a gift of his share which he had inherited in favour of his wife Mt. Imtiaz Bibi. A suit was brought by Mt. Kabia Bibi for recovery of her dower debt against the heirs of the deceased by realization of the amount out of the assets left by him. There can he no doubt that the heirs were liable to pay the dower debt when they took the assets. A compromise decree was passed in favour of Mt. Kabia Bibi against the heirs including

(1) [1917] 39 All. 47=36 I. C. 281=14 A.L.J. 846.
(2) A. I. R. 1928 All. 363=50 All. 686.

Abdul Karim. Abdul Karim died afterwards and his heirs including Mt. Imtiaz Bibi his widow, were brought on the record as the legal representatives of the deceased judgment-debtor. Mt. Kabia Bibi decree-holder proceeded to execute the decree and attached the property of her deceased husband in the hands of his heirs including the share in the possession of Mt. Imtiaz Bibi. No objection appears to have been raised by the latter on the occasion and the property was sold and purchased by the decree-holder Mt. Kabia Bibi herself. Mt. Imtiaz Bibi has now brought the suit for recovery of possession on the ground that it was no part of the assets of the deceased Abdul Karim and could not have been validly sold in execution of a money decree against Abdul Karim. Both the Courts below have dismissed the suit on the ground that it was barred by S. 47, Civil P. C.

It appears to us that this case is concluded by the ruling in the Full Bench case of *Seth Chand Mal* v. *Durga Dei* (3) which has been followed in subsequent cases. There too a simple money decree was passed against a judgment-debtor who died and his legal representatives were brought on the record in execution proceeding to represent him. They raised the question as to a certain property which they said was no part of the deceased's assets in their hands but was their own property. Four out of the five learned Judges held that the case was covered by old S. 244, Civil P. C., Straight, J., on p. 322 remarked that:

"When the representative of the deceased judgment debtor says in regard to the property which he contends is not the property of the deceased judgment-debtor but is his property, that it can rightly be said that he thereby sets up a jus tertii."

He admitted that the case would be different if he were trustee or representing some character wholly separate from his personal and individual character. Edge, C. J., on pp. 323 and 324 also pointed out the same distinction and held that:

"Where the representative merely asserts that the property sought to be sold is his own property to which he is beneficially entitled by purchase or from its having come to him otherwise than as a representative of the deceased judgment-debtor, it is not a case in which he has set up a jus tertii."

The learned Judge also agreed that the case would be different if the representative of the judgment-debtor opposed the execution on the ground that the property vested in him as trustee or as executor of someone else. Brodhurst, J., concurred in the opinion. Mahmood, J., also agreed with that view and on p. 327 pointed out that a distinction was to be drawn between the capacity of the judgmont-debtor as representing his own interest which did not vest in him and which one would call a legal jus tertii. The learned Judge held that as soon as a person is impleaded and objects against the execution of the decree he is bound so long as he claims in respect of the property against which execution is sought a right no other than that which vests in him in his own person, he is bound to raise those objections in the execution of the decree and cannot be allowed to re-agitate the matter in a regular suit. Tyrrel, J., however, dissented. Although in that case the point arose in appeal and before the property presumably was actually sold, the case is a clear authority for the view that the legal representative of a deceased judgment-debtor, when she is asserting that a certain property is her own property and no part of the assets of the deceased in her hand, is raising an objection relating to the execution, discharge and satisfaction of the decree within the meaning of S. 47, Civil P. C., and that the question is between the representatives of the parties.

In the present case also Mt. Imtiaz ought to have objected to the attachment of the property in her hands on the ground that it was no part of the assets of her deceased husband but had been acquired by her under a gift previous to the attachment. She was bound to raise this objection if it were good, as she was asserting her own personal rights to the property and was not putting forward the claim of any stranger to the execution proceedings. The case in our opinion is therefore fully covered by the ruling in the Full Bench case quoted above which has never been doubted in this Court. It was expressly followed, as it was bound to be, in the case of *Dulla* v. *Shib Lal* (1). The only difference between the latter case and the present case is that there the legal representatives were brought on the re-

(3) [1890] 12 All. 313=(1890) A. W. N. 137 (F.B.).

cord before the decree was passed. The principle underlying both is, however, same.

The rulings in the Full Bench cases of *Gulzari Lal* v. *Madho Ram* (4) and *Bhagwati* v. *Banwari Lal* (5), are not directly in point. We would also hold that the case of *Bulaqi Das* v. *Kesri* (2), does not deal with the point which arises in this particular case and it is not therefore necessary for us to express any opinion on the question decided there. We accordingly dismiss this appeal with costs including in this Court, fees on the higher scale.

S.N./R.K. *Appeal dismissed.*

(4) [1904] 26 All. 447=1 A. L. J. 65=(1904) A. W. N. 61 (F. B.).
(5) [1909] 31 All. 82=1 I. C. 416=6 A. L. J. 71 (F. B.).

A. I. R. 1929 Allahabad 604

BANERJI AND KING, JJ.

Zafar Ahsan and *others*—Defendants—Appellants.

v.

Zubaida Khatun and *others*—Defendants—Respondents.

First Appeal No. 271 of 1926, Decided on 13th May 1929, against decree of First Sub-Judge, Moradabad, D/- 22nd March 1926.

(a) Minor—Mortgage in favour of minor can be enforced by him—Transfer of Property Act, S. 7.

Where a mortgage is made in favour of a minor, and the latter has paid full consideration for it, he can enforce the mortgage: 30 *Cal.* 539 (*P. C.*), *Dist.*; 33 *Mad.* 312, *Diss. from*; 40 *Mad.* 303, *Ref.*; 33 *All.* 657; 33 *All* 62; 33 *Mad.* 312; *A. I. R.* 1924 *Lah.* 611, *Foll.*; 13 *A. L. J.* 185, *not Foll.* [P 605 C 1]

(b) Transfer of Property Act, S 60—Integrity of mortgage is broken by mortgagee becoming heir to mortgagor.

When the mortgagee becomes an heir to the mortgagor and inherits a portion of the mortgage it cannot be said that the integrity of the mortgage has not been broken: 31 *All.* 335, *Rel. on.* [P 605 C 1]

M. A. Aziz—for Appellants.
B. Malik—for Respondents.

Judgment.—This is an appeal by four defendants in a suit for sale on a mortgage executed by one Mazhar Ahsan. Mazhar Ahsan, the mortgagor, married three ladies and appellant 1 is the son of Mazhar Ahsan by the eldest wife. The other three defendants are the children by the second wife and the plaintiff is Mazhar Ahsan's daughter by the third wife. The plaintiff's mother died in the year 1911. In order to pay off the dower debt due by Mazhar Ahsan to the mother of the plaintiff the mortgage-deed in suit dated 17th April 1914, was executed by Mazhar Ahsan in favour of the plaintiff. The deed, Ex. 1 at p. 45, sets out the consideration to be Rs. 3,500 which Mazhar Ahsan states was due by him to Zubaida Khatun, the mortgagee, which she had inherited partly from Mt. Hasan Bano her mother and partly from Mt. Zahida Khatun, the sister of the mortgagee. Mt. Zahida Khatun died after the death of her mother and before the execution of the mortgage-deed. The defence to the suit was every conceivable point that could be taken in the case as will be apparent from the points argued by the learned advocate for the appellant before us.

The learned Subordinate Judge granted a decree for sale of the mortgaged property except a one eleventh share which the plaintiff had inherited from the estate of Mazhar Ahsan who had died before the institution of the suit. As we have already stated the appellants are four in number. Appellant 1 has, in addition to the grounds taken by the other appellants, urged that the terms of an award which was made upon a reference by him and his father after the death of his mother bars the plaintiff's claim on the mortgage inasmuch as Mazhar Ahsan could not transfer any property according to the award. The award is Ex. E-1 and is to be found at p. 33. The arbitrator as regards the third issue held that Mazhar Ahsan will have no power to transfer the zamindari properties which were on the date of the award, namely, 1st February 1891, owned and possessed by the defendant. The short answer to the plea, and a complete answer is that it has not been proved, as a matter of fact, as held by the learned Subordinate Judge, that the properties mortgaged by Mazhar Ahsan were in his possession on 1st February 1892. The learned advocate for the appellants has contended that inasmuch as in a suit in the year 1917 all kinds of pleas were put forward by the defendants but no plea was taken that the property mortgaged was not in Mazhar Ahsan's possession on 1st February 1892, the conclusion is that the pro-

Abdul Karim. Abdul Karim died afterwards and his heirs including Mt. Imtiaz Bibi his widow, were brought on the record as the legal representatives of the deceased judgment-debtor. Mt. Kabia Bibi decree-holder proceeded to execute the decree and attached the property of her deceased husband in the hands of his heirs including the share in the possession of Mt. Imtiaz Bibi. No objection appears to have been raised by the latter on the occasion and the property was sold and purchased by the decree-holder Mt. Kabia Bibi herself. Mt. Imtiaz Bibi has now brought the suit for recovery of possession on the ground that it was no part of the assets of the deceased Abdul Karim and could not hove been validly sold in execution of a money decree against Abdul Karim. Both the Courts below have dismissed the suit on the ground that it was barred by S. 47, Civil P. C.

It appears to us that this case is concluded by the ruling in the Full Bench case of *Seth Chand Mal* v. *Durga Dei* (3) which has been followed in subsequent cases. There too a simple money decree was passed against a judgment-debtor who died and his legal representatives were brought on the record in execution proceeding to represent him. They raised the question as to a certain property which they said was no part of the deceased's assets in their hands but was their own property. Four out of the five learned Judges held that the case was covered by old S. 244. Civil P. C. Straight, J., on p. 322 remarked that:

> "When the representative of the deceased judgment-debtor says in regard to the property which he contends is not the proporty of the deceased judgment-debtor but is his property, that it can rightly be said that he thereby sets up a jus tertii."

He admitted that the case would be different if he were trustee or representing some character wholly separate from his personal and individual character. Edge, C. J., on pp. 323 and 324 also pointed out the same distinction and held that:

> "Where the representative merely asserts that the property sought to be sold is his own property to which he is beneficially entitled by purchase or from its having come to him otherwise than as a representative of the deceased judgment-debtor, it is not a case in which he has set up a jus tertii."

(3) [1890] 12 All. 313=(1890) A. W. N. 137 (F.B.).

The learned Judge also agreed that the case would be different if the representative of the judgment-debtor opposed the execution on the ground that the property vested in him as trustee or as executor of some one else. Brodhurst, J., concurred in the opinion. Mahmood, J., also agreed with that view and on p. 327 pointed out that a distinction was to be drawn between the capacity of the judgment-debtor as representing his own interest which did not vest in him and which one would call a legal jus tertii. The learned Judge held that as soon as a person is impleaded and objects against the execution of the decree he is bound so long as he claims in respect of the property against which execution is sought a right no other than that which vests in him in his own person, he is bound to raise those objections in the execution of the decree and cannot be allowed to reagitate the matter in a regular suit. Tyrrel, J., however dissented. Although in that case the point arose in appeal and before the property presumably was actually sold, the case is a clear authority for the view that the legal representative of a deceased judgment-debtor, when she is asserting that a certain property is her own property and no part of the assets of the deceased in her hand, is raising an objection relating to the execution discharge and satisfaction of the decree within the meaning of S. 47, Civil P. C., and that the question is between the representatives of the parties. In the present case also Mt. Imtiaz ought to have objected to the attachment of the property in her hands on the ground that it was no part of the assets of her deceased husband but had been acquired by her under a gift previous to the attachment. She was bound to raise this objection if it were good, as she was asserting her own personal rights to the property and was not putting forward the claim of any stranger to the execution proceedings. The case in our opinion is therefore fully covered by the ruling in the Full Bench case quoted above which has never been doubted in this Court. It was expressly followed, as it was bound to be, in the case of *Dulla* v. *Shib Lal* (1). The only difference between the latter case and the present case is that there the legal representatives were brought on the re-

cord before the decree was passed. The principle underlying both is however same.

The rulings in the Full Bench cases of *Gulzari Lal* v. *Madho Ram* (4) and *Bhagwati* v. *Banwari Lal* (5), are not directly in point. We would also hold that the case of *Bulaqi Das* v. *Kesri* (2), does not deal with the point which arises in this particular case and it is not therefore necessary for us to express any opinion on the question decided there. We accordingly dismiss this appeal with costs including in this Court, fees on the higher scale.

S.N./R.K. *Appeal dismissed.*

(4) [1904] 26 All. 447=1 A. L. J. 65=(1904) A. W. N. 61 (F.B.).
(5) [1909] 31 All. 82=1 I. C. 416=6 A. L. J. 71 (F.B).

A. I. R. 1929 Allahabad 604

BANERJI AND KING, JJ.

Zafar Ahsan and *others*—Defendants—Appellants.

v.

Zubaida Khatun and *others*—Defendants—Respondents.

First Appeal No. 271 of 1926, Decided on 13th May 1929, against decree of First Sub-Judge, Moradabad, D/- 22nd March 1926.

(a) Minor—Mortgage in favour of minor can be enforced by him—Transfer of Property Act, S. 7.

Where a mortgage is made in favour of a minor, and the latter has paid full consideration for it, he can enforce the mortgage : 30 *Cal.* 539 (*P.C.*), *Dist.*; 33 *Mad.* 312, *Diss. from*; 40 *Mad.* 308, *Ref.* ; 33 *All.* 657 ; 38 *All.* 62 ; 33 *Mad.* 312 ; *A. I. R.* 1924 *Lah.* 611, *Foll.* ; 13 *A. L. J.* 185, *not Foll.* [P 605 C 1]

(b) Transfer of Property Act, S. 60—Integrity of mortgage..

When the mortgagee becomes an heir to the mortgagor and inherits a portion of the mortgage it cannot be said that the integrity of the mortgage has not been broken : 31 *All.* 335, *Rel. on.* [P 606 C 1]

M. A. Aziz—for Appellants.

B. Malik—for Respondents.

Judgment.—This is an appeal by four defendants in a suit for sale on a mortgage executed by one Mazhar Ahsan. Mazhar Ahsan, the mortgagor, married three ladies and appellant 1 is the son of Mazhar Ahsan by the eldest wife. The other three defendants are the children by the second wife and the plaintiff is Mazhar Ahsan's daughter by the third wife. The plaintiff's mother died in the year 1911. In order to pay off the dower debt due by Mazhar Ahsan to the mother of the plaintiff the mortgage-deed in suit dated 17th April 1914, was executed by Mazhar Ahsan in favour of the plaintiff. The deed, Ex. 1 at p. 45, sets out the consideration to be Rs. 3,500 which Mazhar Ahsan states was due by him to Zubaida Khatun, the mortgagee, which she had inherited partly from Mt. Hasan Bano her mother and partly from Mt. Zahida Khatun, the sister of the mortgagee. Mt. Zahida Khatun died after the death of her mother and before the execution of the mortgage-deed. The defence to the suit was every conceivable point that could be taken in the case as will be apparent from the points argued by the learned advocate for the appellant before us.

The learned Subordinate Judge granted a decree for sale of the mortgaged property except a one-eleventh share which the plaintiff had inherited from the estate of Mazhar Ahsan who had died before the institution of the suit. As we have already stated the appellants are four in number. Appellant 1 has, in addition to the grounds taken by the other appellants, urged that the terms of an award which was made upon a reference by him and his father after the death of his mother bars the plaintiff's claim on the mortgage inasmuch as Mazhar Ahsan could not transfer any property according to the award. The award is Ex. E-1 and is to be found at p. 33. The arbitrator as regards the third issue held that Mazhar Ahsan will have no power to transfer the zamindari properties which were on the date of the award, namely, 1st February 1891, owned and possessed by the defendant. The short answer to the plea, and a complete answer is that it has not been proved, as a matter of fact, as held by the learned Subordinate Judge, that the properties mortgaged by Mazhar Ahsan were in his possession on 1st February 1892. The learned advocate for the appellants has contended that inasmuch as in a suit in the year 1917 all kinds of pleas were put forward by the defendants but no plea was taken that the property mortgaged was not in Mazhar Ahsan's possession on 1st February 1892, the conclusion is that the pro-

perty was in his possession on that date. We are unable to accept this contention.

The first point taken by the learned advocate for the appellants on behalf of all the appellants is that the mortgage-deed being in favour of a minor was void in law. The contention of the learned advocate is that even if a minor pays full consideration for a mortgage a transfer of immovable property in favour of a minor is void in view of the ruling of their Lordships of the Privy Council in the case of *Mohori Bibee* v. *Dharmodas Ghose* (1). The learned advocate in support of his contention has cited before us the case of *Navakotti Narayan Chetty* v. *Logalinga Chetty* (2). He has to confess that there is no other case supporting the contention put forward by him, but he probably does not know that there is a judgment of a single Judge of this Court which referred to the case in *I. L. R.*, 33 *Mad.* 312 (2) and which was on appeal under S. 10, Letters Patent set aside, the Bench not following the case in *Navakotti Narayan* v. *Logalinga Chetty* (2). The case in *Navakotti Narayan* v. *Logalinga Chetty* (2) had been overruled by a Full Bench of the Madras High Court in the case of *Raghavachariar* v. *Srinivasa Raghava Chariar* (3). Now turning to the case law as far as this Court is concerned that case in *Navakotti Narayan* v. *Logalinga Chetty* (2) has never been followed and has been definitely distinguished and differed from except in the case we have mentioned, namely, *Mt. Munni* v. *Madan Gopal* (4).

We may mention that the law as laid down by several Benches of this Court is that when a transfer is made of property in favour of a minor and the minor has paid consideration for it such a transaction cannot be held to come within the principle laid down by their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (1). The first case is that of *Ulfat Rai* v. *Gauri Shankar* (5). A certificated guardian had transferred some immovable property belonging to himself to his minor wards in satisfaction of money which he owed to them and it was held by a Bench of this Court that the transaction was a bona fide one and for the benefit of the minors and that the transfer in favour of the minors was valid and could be enforced by them. The case reported in *I. L. R.*, 33 *Mad* 312 (2) was relied on by the learned vakil who appeared for the respondents in the case and was not followed by this Court.

There are two cases in *Vol.* 38 *of the I. L. R. All. Series.* At p. 62 is to be found the case of *Munni Kuar* v. *Madan Gopal* (6) and it was held in that case that inasmuch as there was nothing in law to prevent a minor from becoming transferee of immovable property so a minor in whose favour a valid deed of sale had been executed is competent to sue for possession of the property conveyed. The cases on the subject were fully discussed and the case in *Navakotti Narayan* v. *Logalinga Chetty* (2) was distinguished. At p. 154 another Bench of this Court in *Narain Das* v. *Mt. Dhania* (7) held that a minor was capable of purchasing immovable property and where such a purchase has been completed by execution and registration of a sale-deed he can sue to recover possession of the property purchased upon tender of the balance of the purchase money. An examination of the headnote would have shown to the learned counsel that the case in *Navakotti Narayan* v. *Logalinga Chetty* (2) had been dissented from. It is unnecessary to refer to any other case, but we may refer to the case of *Thakur Das* v. *Mt. Pulti* (8) where a Bench of the Lahore High Court held that a mortgage in favour of a minor was enforceable by him where the consideration has been paid by him in full. We are in entire agreement with the view taken in the cases referred to above. We are of opinion that there is absolutely no force in the contention put forward by the advocate for the appellants.

The next point taken is that no consideration passed from the plaintiff in this case to Mazhar Ahsan because the

(1) [1903] 30 Cal. 539=30 I.A. 114=7 C.W.N. 441=8 Sar. 374 (P.C.).
(2) [1910] 33 Mad. 312=4 I.C. 383=19 M. L.J. 752.
(3) [1916] 40 Mad. 308=31 M.L.J. 575=36 I.C. 921=(1916) 2 M.W.N. 363 (F.B.).
(4) [1915] 13 A.L.J. 185=27 I.C. 733.
(5) [1911] 33 All. 657=11 I.C. 20=8 A.L.J. 670.
(6) [1916] 38 All. 62=31 I.C. 792=13 A.L.J. 1084.
(7) [1916] 38 All. 154=35 I.C. 23=14 A.L.J. 55.
(8) A.I.R. 1924 Lah. 611=5 Lah. 317.

allegation of Mazhar Ahsan that the dower-debt of the plaintiff's mother was Rs. 24,000 was incorrect and that the real amount of the dower was Rs. 1,000 and that has been admitted. The learned Subordinate Judge, in our opinion, has given good grounds for rejecting the contention of the appellants. It is inconceivable to us that a gentleman of the age if Mazhar Ahsan could marry a young lady of 18 ; (It is not suggested that the plaintiff's mother did not belong to the same society as Mazhar Ahsan who was over 50 years old and who had a number of children) and the dower debt should have been fixed at only Rs. 1,000. We have not the slightest doubt whatsoever that the statement of the witnesses who have come forward to prove that the dower debt of the plaintiff's mother was Rs. 1,000 is absolutely false. The theory of remission was a pure fabrication, and we are of opinion that the plaintiff has proved that the dower debt of her mother was Rs. 24,000 and the legal share which the plaintiff was entitled to in the dower debt was Rs. 3,000.

The next point urged was that the mortgage-deed had not been legally proved. An examination of the evidence of the witnesses on whom the appellants rely clearly shows that they are palpable liars and have come forward to give evidence to support the appellants' case for some ulterior motive. In our opinion the plaintiff has proved the execution of the mortgage. Lastly it has been urged, and in our opinion rightly urged, that the learned Subordinate Judge was in error in holding that the defendants were not entitled to redeem their share of the mortgaged property by paying a proportionate share of the mortgage money. Reference has been made by the learned Subordinate Judge to two cases which in our opinion are clearly distinguishable and do not lay down what the learned Subordinate Judge says they do. When the mortgagee becomes an heir to the mortgagor and inherits a portion of the mortgage it cannot be said that the integrity of the mortgage has not been broken. We agree with the view taken in the case of *Hamida Bibi* v. *Ahmad Husain* (9). We are of opinion that the defendants are entitled to redeem their share of the mortgaged property by paying a proportionate share of the mortgage money. We therefore allow the appeal in part and direct that a fresh decree be drawn up in accordance with O. 34, R. 4, Civil P. C. The shares of the defendants are as follows :

Zafar Ahsan's share is two-eleventh and as the interests of all the other heirs in the property of Mazhar Ahsan have been transferred by the deed dated 2nd December 1923, to Azhar Ahsan their share will be nine-eleventh. The mortgage must be deemed to be a good mortgage to the extent of Rs. 3,000. We direct a decree to be prepared under O. 34, R. 4, and fix six months from this date as the date for payment. Parties will bear their own costs in both Courts.

S N./R.K. *Decree modified.*

(9) [1909] 31 All. 335=1 I.C. 779=6 A.L.J. 387.

A. I. R. 1929 Allahabad 606

MUKERJI, J.

Mohammad Ishaq and *another*—Judgment-debtors.

v.

Baldeo Prasad and *others* — Decree-holders.

Execution Second Appeal No. 2344 of 1927, Decided on 18th July 1928, against decree of Sub-Judge, Jhanpur, D/- 15th August 1927.

Limitation Act, Art. 182—Application for execution—Giving of time to judgment-debtor without record in the proceedings—Art. 182 and not Art. 181 applies—Art. 181.

Article 182 is the article framed for an application for execution of a decree. Art. 181 could be brought into play only when there are definite circumstances which would make Art. 182 inapplicable. Those circumstances should not and cannot include an alleged fact that the judgment-debtor had been given time out of Court without any record of that fact being placed in the proceedings.

A decree-holder made an application for execution. Before the date fixed for sale, the decree-holder made another application to the Court stating that he had given the judgment-debtor six month's time, that his application may be struck off and the judgment-debtor saddled with costs. He was not taken on his word and the Court directed that the judgment-debtor should appear in order to verify the application. On the day fixed for appearance the judgment-debtor did not appear and Court struck off the application. More than three years after this an application for execution was again made. It was attempted to prove the oral agreement granting six months' time to bring the case within the purview of **Art. 181.**

Held : that the only article that could apply to the subsequent application was Art. 182 and not 181 : *A. I. R,* 1927 *All.* 16 ; *A. I. R.* 1927 *All.* 165, *Dist.* [P 607 C 2 ; P 608 C 1]

Majid Ali—for Appellants.

Mahmood Ullah for *A. M. Khaja*—for Respondents.

Judgment.—This appeal must be allowed. The facts briefly are these : A decree for sale was made so far back as in 1917. The application for execution out of which the present appeal has arisen was made on 18th October, 1926. The application that was made just before the present application was made on 2nd August 1923. 24th October 1923 was fixed for sale in execution of the previous application. On 4th October 1923, the decree-holder made an application to the Court stating that he had given the judgment-debtor six months' time to pay up, that his application might be, for the moment, struck off as infructuous, and that the judgment-debtor might be saddled with the costs of the execution. On this application being made before the Court, it passed an order to the effect that unless and until the judgment-debtor's signature was obtained on the application, the Court would direct the decree-holder to pay his own costs of the execution. The Court fixed 9th October 1923, for the appearance of the judgment-debtor. The judgment-debtor did not appear on that date to signify his agreement to the grant of time, and thereupon on the same date (9th October 1923) the Court passed the following order :

"An application is struck off. The decree-holder has not produced the judgment-debtor. The latter has not come forward to support decree-holder's application. The decree-holder should pay his costs."

On 18th October 1926, as I have already stated, the present application for execution was made, that is to say, more than three years after the previous application. The judgment-debtor met this application with the plea of limitation.

In the Courts below, the decree-holder sought to prove by oral evidence, that, as a matter of fact, the decree-holder and the judgment-debtor had agreed that the latter should have six months' time to pay up, and that, therefore, the decree-holder was at liberty to make an application for execution at any time within three years of the expiry of the period of six months. Apparently the Courts below thought that, in the circumstance, Art. 181 would apply.

In appeal by the judgment-debtors it has been contended that the Courts below should not have allowed themselves to travel beyond the face of the record, and the application was virtually time barred.

On the facts stated above it seems to me to be quite clear that the application of 18th October 1926, was time barred. When the decree-holder in his application dated 4th October 1923, stated that he had given the judgment-debtor six months' time, he was not taken on his own word, and the Court directed that the judgment-debtor should appear in order to verify the application. It may be that the application was based on a fact, or it may not have been based on a fact. The trend of the argument of the learned counsel for the respondents before me has been that unless the judgment-debtor was really anxious to have time, the decree-holder was not likely to say so in his application. I would not travel into the region of speculations, but it goes without saying that the decree-holder may have had his own reasons for delaying the execution. If the judgment-debtor was anxious to have time, he would have been in the Court earlier than the decree-holder himself. Anyhow, the Court wanted to be satisfied that the judgment-debtor was a party to the aplication and it was not satisfied. The result of the Court not being satisfied that the judgment-debtor had asked for time was that it ordered the decree-holder to bear the costs of the execution proceedings. If the decree-holder had granted time to the judgment-debtor at the latter's request the result would have been that the cost of the execution proceedings would have been borne by the judgment-debtor.

The question is whether after this order of 9th October, 1923, was passed, was it open to the decree-holder to come before the Court, and to make an attempt to prove an oral agreement, in order that he might bring into his aid Art. 181, Lim. Act.

For the respondents tne learned counsel has cited Full Bench cases : *Chattar Singh* v. *Kamal Singh* (1) and *Baij Nath* v. *Ram Bharos* (2). Those cases

(1) A.I.R. 1927 All. 16=49 All. 276 (F.B.).
(2) A.I.R. 1927 All. 165=49 All. 509 (F.B.).

are really against the decree-holders. They establish this that where an execution application is struck off, for the convenience of the proceedings in Court, the decree-holder is entitled to ask those proceedings to be revived. Here the decree-holder was at liberty to proceed with the execution application. He failed to prove, though called upon to do so, before the Court, while the previous execution proceedings were pending that the parties had agreed to a grant of time. In the circumstances, the only article that could apply to the subsequent application for execution would be Art. 182, Lim. Act, and not Art. 181. I am of opinion that the order of 9th October 1923, must be treated as a definite order against the decree-holder, by which the Court declined to accept the decree-holder's allegation of fact, namely, that six months' time had been granted to the judgment-debtor. In that case, it should not be open to the decree-holder to prove, in the subsequent proceedings, that his statement of fact made on 4th October 1923, was true. Even if it be the case that the decree-holder is not estopped from proving in the subsequent proceedings, the fact that he had granted six months' time, Art. 182 would apply and not Art. 181. Art. 182 is the article framed for an application to the execution of decree. Art. 181 could be brought into play only when there were definite circumstances which would make Art. 182 inapplicable. In my opinion those circumstances should not and cannot include an alleged fact that the judgment-debtor had been given time out of Court, without any record of that fact being placed in the proceedings.

The result is that the appeal succeeds, the decrees of the Courts below are set aside, and I hereby dismiss the application for execution, made on 18th October 1926.

The appellants will have their costs throughout.

V.B./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 608

DALAL, J.

Beni Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 230 of 1929, Decided on 16th April 1929, against order of Session Judge, Muttra, D/- 22nd February 1929.

Criminal P. C., S. 110—Scope.

What S. 110 desires to guard against is the freedom of a dangerous man without security and not freedom entirely. [P 608 C 2]

Ram Nama Prasad—for Applicant.

M. Waliullah—for the Crown.

Judgment.—These proceedings must be quashed. On 22nd September 1928 the Sub-Divisional Magistrate of some place not noted issued notice to Beni Singh as follows :

" you are by habit extortionist and so desperate and dangerous as to make you being at large hazardous to the community. I call upon you to show cause why you should not be ordered under S. 110 (f), Criminal P. C. "

to execute a bond with sureties. The order is wrongly worded. There is no mention in Cl. (f) of an " extortionist. " Extortionist is mentioned in Cl. (d) and not in Cl. (f). Another mistake in the notice is that what the section desires to guard against is the freedom of a dangerous man without security and not freedom entirely. To judge by the notice one would think that the Sub-Divisional Magistrate was determined to send Beni Singh to prison contrary to law. There can be no hazard to the community under the present circumstances, because Beni Singh is not at large without security. A Magistrate of Agra has placed him under security on 13th August 1928. So obviously no hazard to the community exists until 13th August 1929. These proceedings against Beni Singh are entirely misdirected. I hereby quash them and direct that no such proceedings may be taken against him until 13th August 1929 or until the order of Mr. Lalta Prasad, Magistrate, First Class of Agra dated 13th August 1928 is earlier set aside.

S.N./R.K. *Proceedings quashed.*

* A. I. R. 1929 Allahabad 609

BENNET, J.

Mahabir—Defendant—Appellant.

v.

Baijnath Singh and *others* and *another* —Plaintiffs and Defendant — Respondents.

Second Appeal No. 329 of 1929, Decided on 11th April 1929, against decree of Addl. Sub-Judge, Allahabad, D/- 31st October 1928.

(a) Agra Tenancy Act (1926), S. 266 (1)—Scope.

It is wrong for a revenue Court to decree ejectment at the instance of one cosharer alone. [P 609 C 2]

*** (b) Cosharer—In execution of decree for ejectment, obtained without other cosharers' consent one cosharer obtaining possession—Joint possession cannot be refused to other cosharers although their title was never denied and although such joint decree might result in breach of peace.**

Where a cosharer obtains a decree for ejectment from a revenue Court without the consent of the other cosharers and obtains possession in execution of the decree, a decree for joint possession cannot be denied to the other cosharers although their title was never denied and although there might be apprehension of a breach of the peace if such joint decree were granted : *A. I. R.* 1928 *All.* 472 (*F.B.*), *Discussed* and *Dist.* [P 610 C 1, 2]

N. Upadhiya—for Appellant.

Judgment.—This is a second appeal against the concurrent judgments of the two lower civil Courts which have awarded the respondent-plaintiffs a decree for joint possession as cosharers with the appellant in certain plots in which it is admitted that the respondents own 13/16th shares. The points raised in appeal are that joint possession should not have been granted because the defendant had not denied the title of the plaintiffs and because there was an apprehension of the breach of the peace. The facts are simple. The plots in question were held by a tenant Mata Mahesh and all the cosharers, i. e. appellant and the respondents, brought a suit in the revenue Court for ejectment of the tenant. Under the Agra Tenancy Act 3 of 1926 it is necessary that all the cosharers should join in such a suit, and by bringing this suit along with the respondents the appellant clearly admitted that respondents were cosharers with him in regard to this tenancy. Subsequently one of the respondents applied for withdrawal of the suit, and it was withdrawn. The appellant then applied for reinstatement and without the consent of the other cosharers he obtained a decree of ejectment and delivery of possession in execution by himself alone though in the name of the cosharers. These proceedings were clearly not binding on any other cosharers, and they were clearly contrary to the provisions of the Tenancy Act. Under S. 266 (3) where the remaining cosharers refuse to join a cosharer in a suit for money recoverable by them jointly, such a cosharer may sue separately for his share joining the remaining cosharers as defendants. The suit, however, in the revenue Court was not for money but for ejectment. Under S. 266 (1) it was necessary, therefore, for all the cosharers to join in the suit, and when the other cosharers refused to proceed with the suit it was wrong for the revenue Court to have decreed that suit of ejectment at the instance of the appellant alone. The method, therefore, by which the present appellant recently obtained possession of this holding was by a trick imposing on the revenue Court. The learned advocate for the appellant seems to think that his client's case is improved by pointing out the fact that his client purported to act in the name of all the cosharers. But under S. 266 (1) one cosharer cannot act on behalf of all the cosharers unless he has been appointed as an agent to act on behalf of them all, and the learned advocate has failed to show that his client had any such authority.

The possession by the appellant was obtained on 13th April 1926. Subsequent to this the tenant was again put in possession by the plaintiffs, but the appellant brought a criminal suit for trespass against him and obtained possession from the criminal Court on 31st December 1926. The argument for the appellant is far from clear. On the one hand, his learned counsel contends that he is in joint possession on behalf of all the cosharers in virtue of the possession which he took in the name of all the cosharers on 13th April 1926, and on the other hand his learned counsel contends that he has to remain in actual separate possession and oust the possession of other cosharers and reduce their rights to merely obtaining profits from him..

Reliance for this position is placed on a Full Bench ruling of this Court, reported in *Hanuman Prasad Narain Singh* v. *Mathura Prasad Narain Singh* (1) This ruling laid down at p. 995 (*of* 26 *A. L. J.*) :

"A decree for joint possession may certainly be granted to one co-sharer against another . . . Such a decree may undoubtedly be given even where the plaintiff has not been in actual possession."

At p. 998, it is stated :

"That the Court has some discretion in the matter of granting a decree is obvious from the decision of the Privy Council in the case of *Watson and Co* v. *Ram Chund Dutt* (2) but we find no authority in that judgment for holding that in the exercise of their discretion the Courts are to be guided by any other consideration than the rights and interests of the parties concerned. Such considerations, as the danger of a riot or criminal proceeding have really nothing to do with the rights and interests of the parties inter se and should not, we consider, be entertained by a civil Court. The question whether the Court has any discretion to refuse to grant a decree in such a case on the ground that it would be impracticable, must be answered in the negative. If the plaintiff is entitled to a decree in accordance with the principles of justice, equity and good conscience, as laid down in the decision of the Privy Council, we consider that the Court must give him a decree whether it believes that it would be useful to him or not".

I may note that this portion of the ruling fully disposes of the second ground of appeal that possession should not have been granted because there was an apprehension of the breach of the peace. It was further stated at p. 996 :

"We think, therefore, that we answer this part of the question by saying that the Court has no discretion to refuse a decree merely on the ground that it would be inadvisable for reasons unconnected with the rights of the parties."

On receipt of the ruling of the Full Bench the original Bench deciding the suit held as follows on p. 997 :

"We must accordingly examine the facts of this case and the findings of the Court below. In the written statement the defendant did not expressly deny the plaintiff's title. The main point taken in para. 18 was that the sir and waste lands had been in exclusive possession of the defendant, and the plaintiff had no right to get actual possession thereof . . . We therefore think that as in this case the defendant's possession had been exclusive and peaceful for a long number of years this is not a fit case in which his possession can be disturbed by passing a decree for joint possession in favour of the plaintiffs."

This shows that the grounds which influenced the original Bench in refusing to grant the plaintiffs a decree for separate possession were, firstly, that the defendants had been in exclusive and peaceful possession for a long number of years with the consent of the plaintiff and secondly that there had been no denial of the title of the plaintiffs. Of these conditions the only one which exists in the present case is that the defendant has not denied the title of the plaintiffs. The possession of the defendant has been exclusive and peaceful for a long number of years, nor has it been at any time with the consent of the plaintiffs. Further the case of sir land is altogether different from the case of a tenancy. If joint possession were refused in the present case on the ground that a general rule of refusal should apply to cases like the present, then it would be open to any cosharer to obtain possession by any means whatever of the land of a tenant and to claim that he can hold that land in his separate possession against the claim of his cosharers. This I consider would be a very improper and inequitable proposition of law. Accordingly I dismiss this appeal under O. 41, R. 11.

S.N./R.K *Appeal dismissed.*

(1) A. I. R. 1923 All. 472=26 A. L. J. 992 (F. B.).

(2) [1891] 18 Cal. 10=17 I. A. 110=5 Sar. 535 (P. C.).

A. I. R. 1929 Allahabad 610

NIAMATULLAH, J.

Zafaryab Hasan and *others*—Defendants—Appellants.

v.

Umar Daraz Ali Khan and *others*—Plaintiffs—Respondents.

Second Appeal No 536 of 1926, Decided on 11th July 1928, against decree of Sub-Judge, Muzaffarnagar, D/- 19th September 1925.

(a) Limitation Act, Art. 11-A—Art 11-A does not apply if plaintiffs is claiming on his original title.

Article 11-A can only apply if the suit as brought is one by a decree-holder or auction-purchaser as such and cannot apply if the plaintiff falls back upon his original title as owner of the property in suit, treating the defendant as holding permissively : *A. I. R.* 1926 *Cal.* 377, *Foll.* [P 611 C 2]

(b) Transfer of Property Act, S. 106—Representatives of tenant holding over—Notice to quit is not necessary.

The representatives of a tenant holding over cannot be considered to be holding over in terms of S. 116 and are not entitled to notice required by S. 106 of that Act.

[P 612 C 1]

Mohammad Husain—for Appellant.

Iqbal Ahmad and *Mukhtar Ahmad*—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiff-respondent for ejectment of the defendant-appellant. It is not now disputed that the plaintiff-respondent is the owner of the house in dispute. It was occupied by one Mazhar Ali against whom a suit for ejectment was brought sometime before 1921. The plaintiff-respondent re-let the house to Mazhar Husain by an instrument dated 19th December 1921, under which he was entitled to retain it at monthly rent of Rs. 4. He agreed to vacate the house of his own accord at the end of one year from the date of the agreement. Mazhar Ali continued to hold under the agreement, though he does not seem to have ever paid any rent. Mazhar Ali died leaving a number of heirs, including the defendant-appellant. Plaintiff-respondent brought a suit for ejectment of the heirs of Mazhar Ali, and obtained a decree in execution whereof the defendant-appellant objected to his own possession being interfered with on the ground that he had not been impleaded in the suit. This objection was upheld by an order dated 22nd December 1923, which runs as follows:

"Wahidul Hasan claims title to the house from his father. The decree-holder has obtained decree against his other brothers but did not implead Wahidul Hasan probably because the latter was then out and not in actual possession of the house. In any case when he has now taken possession his resistance is bona fide, and the decree-holder must get a decree against him in regular course."

The present suit was brought on 4th March 1925, for ejectment of the defendant-appellant, the allegations against him being that as one of the heirs of his father Mazhar Ali he has no right to the occupation of the house any more than the other heirs had. In defence it was pleaded that the defendant was in possession of the house in dispute in his own right as owner thereof, and that Mazhar Ali did not occupy the house as a tenant holding from the plaintiff-respondent. In the alternative, it was maintained that if the relationship of landlord and tenant be found to exist, the defendant cannot be ejected, no notice to vacate having been given. All these pleas were overruled by the lower Courts, and a decree for ejectment was passed in favour of the plaintiff-respondent. Before the lower appellate Court it was urged that the suit was barred by limitation inasmuch as it was instituted more than one year after the order dated 22nd December 1923 quoted above. The suit was said to be governed by Art. 11-A, Lim. Act. Although the plea was raised for the first time before the lower appellate Court, it was entertained but rejected on the merits by that Court. The present second appeal has been preferred by the defendant-appellant. The learned counsel, who appeared in support of the appeal, has urged (1) that the plaintiff's suit was barred by Art. 11-A, Lim. Act, and (2) that the defendant-appellant being a tenant, as alleged by the plaintiff-respondent the suit is not maintainable in the absence of notice required by law. I do not think any of these two contentions can prevail. Art. 11-A, Lim. Act applies to a suit

"by a person against whom an order has been made under the Code of Civil Procedure, 1908, upon an application by the holder of a decree for the possession of immovable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery of possession thereof or upon an application by any person dispossessed ef such property in the delivery of possession thereof to the decree-holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order."

It should be read with R. 103, Civil P. C. to which it is co-related and which provides that

"any party not being a judgment-debtor against whom an order is made under R. 98, R. 99 or R. 101 may institute a suit to establish the right which he claims to the present possession of the property."

It is clear to my mind that Art. 11-A Lim. Act can only apply if the suit as brought is one by a decree-holder or auction-purchaser as such and cannot apply if the plaintiff falls back upon his

original title as owner of the property in suit treating the defendant as holding permissively. This view finds support from *Ambika Charan Bhakta* v. *Ram Prasad Chatterjee* (1). The plaintiff's cause of action in the present suit is not the adverse order passed in proceedings in execution of the decree obtained by him against the other heirs of Mazhar Ali but is based on his title as owner of the house in dispute and on the defendant occupying the house as one of the heirs of Mazhar Ali and as such not entitled to retain possession thereof contrary to the wishes of the plaintiff-respondent. He (plaintiff-respondent) need not in such a case refer to the previous litigation ending in the decree and unsuccessful execution thereof. He may even concede in favour of the defendant-appellant that he should have been impleaded in the previous suit, and that, not having been impleaded, the decree was inoperative against him, and yet can sue in ejectment in the exercise of his undoubted right as an owner. For these reasons I am of opinion that the present suit is not one contemplated by O. 21, R. 103, Civil P. C. and that Art. 11-A, Lim. Act has no application.

The second ground urged on behalf of the appellant is equally untenable. At best Mazhar Ali was a tenant holding over after the determination of the period reserved by the agreement of tenancy. His occupation was at sufferance. His heirs including the defendant-appellant were not expressly or impliedly admitted to the tenancy. They cannot be considered to be holding over in terms of S. 116, T. P. Act and were not entitled to notice required by S. 106 of that Act :

> " A tenant holding over after the expiry of his term becomes a tenant on sufferance and the landlord's assent alone will suffice to convert such a tenancy into a tenancy from year to year or from month to month according to the nature of the original case. The representatives of a tenant on sufferance, are however mere trespassers, and the lessor cannot by his assent alone, convert such representatives into tenants without their concurence. "

Vadappalle Narasimham v. *Dronamaraja Seetharamamurthy* (2). The defendant-appellant has throughout repudiated the title of the plaintiff-respondent, claiming to hold not as an heir of Mahzar Ali but in his own right as owner. The plaintiff-respondent has not accepted him as his tenant by receipt of of rent or otherwise. His possession, therefore, cannot be regarded as that of a tenant entitling him to receive notice to vacate as required by S. 106, T.P. Act.

The learned counsel for the appellant has raised a subsidiary point in reference to the frame of the suit and to the non-payment of Court-fee which is payable on the market value of the house in dispute, assuming the defendant-appellant to be holding otherwise than as a tenant. The plaintiff-respondent has stated all the facts leading to the institution of the suit and has described accurately the present position of the defendant-appellant in relation to the house in dispute. He has not treated him as a tenant, nor has he taken upon himself to characterise his possession as that of a trespasser. He has valued the right in question in the suit at Rs. 43 without stating how that figure is arrived at. No question as to Court-fee was raised in either of the two Courts below, and I am not in a position to say whether there is any insufficiency in the Court-fee paid. The plaintiff-respondent's right to relief cannot be affected by non-payment of full Court-fee which can always be recovered if a good case is made out for that.

In the view of the case which I have taken this appeal must fail. It is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(1) A. I. R. 1926 Cal. 377
(2) (1908) 31 Mad. 163=18 M. L. J. 26.

A. I. R. 1929 Allahabad 612

DALAL, J.

Tilak Singh—Plaintiff—Appellant.

v.

Sheo Nandan Misir and *others*—Defendants—Respondents.

Second Appeal No. 1708 of 1927, Decided on 19th April 1929, against decree of Addl. Sub-Judge, Jaunpur, D/- 25th July 1927.

(a) Agra Tenancy Act, S. 20 (3)—Application.

The interest of a permanent lessee of agricultural land, although declared to be transferable by the lease, cannot be transferred, as such transfer is barred by the proivisions of S. 20 (3). *A.I.R.* 1926 *All.* 412, *Rel. on. A.I.R.* 1926 *All.* 432, *not Appl.* [P 613 C 1]

(b) Civil P, C., O. 9, R. 6—Scope.

Even where a suit is exparte the plaintiff has to prove his case before he can obtain a decree. [P 613 C 1]

Gadadhar Prasad—for Appellant.

Haider Mehdi and *Zafar Mehdi*—for Respondents.

Judgment.—The plaintiff sued for recovery of possession of certain rights in a particular area of land on the basis of his purchase from one Bechu. Bechu had been given this land on lease by the zamindar in 1893. The transfer in favour of the plaintiff was made in 1923. The defence was that the interest of a thekedar is, subject to the terms of his lease, heritable, but not transferable, as laid down in S. 20 (3), Tenancy Act of 1901. Both the subordinate Courts have held that the lease was an agricultural lease. The terms were read out to me in vernacular and they justify the opinion of the two subordinate Courts. The first ground of appeal here is that the lease having given transferable powers, the transfer of the lease ought to have been upheld. The point has been decided by this Court in *Majid Husain* v. *Kurban Ali* (1). The interest of a permanent lessee of agricultural land, although declared to be transferable by the lease, cannot be transferred as such transfer is barred by the provisions of S. 20 (3), Tenancy Act of 1901. The second ground is based on the ruling of this Court in the case of *Ballabha Das* v. *Murat Narain Singh* (2). In that case the provisions of the Transfer of Property Act were applied to a lease on the ground that the lease was one of proprietary rights. The consideration will depend upon the interpretation of the document in suit, and the decision given in the case of another lease can be no guide to a decision as regards the lease in the present suit. The third ground was that the contesting defendant had no right to contest the suit because she had no interest in the property. If she had no interest in the property it is not explained why she was made a party (defendant) to the suit. The fact that she was made a party proves her possession, and as a person in possession she is entitled to object to her ejectment. Further, even where a suit is ex parte, the plaintiff must prove his case before he can obtain a decree. In the present case he has failed to prove the effective character of the transfer on the basis of which he sued for possession. This appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(1) A.I.R. 1926 All. 412.
(2) A. I. R. 1926 All. 432=48 All. 385.

A. I. R. 1929 Allahabad 613

BOYS AND BENNET, JJ.

Moola—Plaintiff—Appellant.

v.

Bhuriya and *another*—Defendants—Respondents.

Second Appeal No. 1204 of 1926, Decided on 29th April 1929.

Agra Tenancy Act (1901), S. 95—Where it is deducible from plaint that plaintiff's sole object is to obtain declaration to tenancy, his suit is triable by revenue Court, although one of the reliefs asked for is such as, if that alone were asked, can be entertained by civil Court—Practice—Jurisdiction.

Where from the plaint as framed it is possible to deduce that the one and only object of the plaintiff is really to obtain a declaration of his right to a tenancy the suit is triable by a revenue Court only, whether or no one of the reliefs asked for is such a relief as could, if that alone had been asked for, be entertained by a civil Court, because it is the essential object of the plaintiff which has to be considered and if he can obtain that object by a suit in the revenue Court the revenue Court is the proper Court: *A. I. R.* 1928 *All.* 538, *Dist.* 5 *A. L. J.* 514 and 36 *All.* 48, *Rel. on.* [P 614 C 1]

N. C. Vaish—for Appellant.

Akhtar Husain Khan for *M. L. Agarwala*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit in which the plaintiff asked for the following reliefs:

"(a) That it may be declared that the plaintiff is the adopted son of Sahi Ram deceased, and that he is in possession as such of the estate of Sahi Ram aforesaid, laid at Rs. 1000.

"(b) That an injunction may be issued to the defendants restraining them from offering obstructions to the possession of the plaintiff laid at Rs. 20."

One or two observations may be made about this relief before we proceed. The body of the plaint refers to the entire estate of Sahi Ram, and it is in respect of that estate that the plaintiff asks for a declaration that he is in possession. But on the other hand the plaint refers specifically to the occupancy lands of the deceased, and the inference is clear that the estate consisted only of an occupancy holding. The next point is that the relief is really two reliefs joined in one paragraph, and it is really a matter of drafting merely that the paragraph was not divided into two, and we do not think, therefore, that the mere conjunction of the two reliefs in one paragraph makes them otherwise than two reliefs, or that it can form the foundation of any conclusion as to the real object of the

plaintiff. If such a conclusion can be drawn against him it could equally well be drawn if the first relief had been separated into two. The defendant denied the adoption and pleaded S. 11, Civil P. C. The trial Court held that the suit was triable by a civil Court but that the plaintiff had failed to prove his adoption. The lower appellale Court did not decide the question of adoption because it decided the preliminary point against the plaintiff holding that the suit was not triable by a civil Court but could have been tried and should have been tried by a revenue Court under S. 95, Tenancy Act of 1901. The plaintiff comes here in appeal, the grounds of his appeal being framed as follows:

"Firstly, because the Courts (sic, Court) below erred in holding that the suit was not maintainable in a civil Court"

"Secondly, because it is amply proved on the evidence on the record that the appellant is the duly adopted son of Mt. Bhuria."

The only point with which we are concerned is whether the lower appellate Court was right in holding that the suit was not maintainable in a civil Court It is clear that where the one and only object of the plaintiff is really to obtain a declaration of his right to a tenancy the suit is triable by a revenue Court and by the revenue Court only, whether or no one of the reliefs asked for is such a relief as could, if that alone had been asked for, be entertained by a civil Court. We have been referred to the decision in *Misri Lal* v. *Gopi Charan* (1). In that suit the plaintiff made a widow and the zamindar parties and he asked for cancellation of a document of relinquishment executed in favour of the zamindar by the widow, and he also asked for a declaration that he was the occupancy tenant of a holding. The plaintiff subsequently withdrew the prayer for a declaration that he was the occupancy tenant and confined his suit to the relief asking for the cancellation of the document. It was held that the jurisdiction of the civil Court to grant this relief was barred by S. 167, Tenancy Act, that the real test was whether the dispute was one in respect of which any suit or application could have been brought in the revenue Court. It is true that in that case Sulaiman, A. C. J., at p. 24 said:

"The Court cannot grant the declaration sought for without deciding the question of the disputed tenancy as against the contesting zamindar."

and in the present case that particular test does not apply. In that case the plaintiff would have had no case for the cancellation of the document unless he first established that he was the tenant. Here in the matter of adoption a plaintiff could clearly have a right to obtain a declaration of his adoption without establishing any point, such as that he was a tenant, appropriate to the jurisdiction of the revenue Court. The principle, however, does underline the case to which we have referred that it is the essential object of the plaintiff which has to be considered, and if he can obtain that object by a suit in the revenue Court, the revenue Court is the proper one. There are, however, two other cases and possibly more which are directly in point, namely, *Dorilal* v. *Sardar Singh* (2) and *Ramcharittar Rai* v. *Jinsi Ahirin* (3). This is sufficient for the disposal of the appeal, but we would add one observation. While the principle has been accepted that where from the plaint as framed it is possible to properly deduce that the sole object of the plaintiff is to obtain something which he could obtain from the revenue Court, he must go to the revenue Court for it. But this must not be taken to mean that it follows that in every case where two reliefs have been joined in the same plaint, one which taken by itself would be congnizable by the civil Court, and the other which taken by itself would be cogizable by the revenue Court, in no case would it be proper to permit the the plaintiff to strike out the relief which was properly cognizable by the revenue Court and pursue the relief in the civil Court which was properly cognizable by such a Court. The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1928 All. 538.

(2) [1908] 5 A.L.J. 514=(1908) A. W. N. 240.

(3) [1913] 36 All. 48=21 I. C. 859=11 A.L.J. 1022.

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* A. I. R. 1929 Allahabad 614

DALAL, J.

Achhaibar Misir and *another*—Applicants.

v.

Emperor—Opposite Party.

Criminal Misc. Case No. 119 of 1929, Decided on 10th April 1929.

(a) Criminal P. C., S. 497 (1)—Magistrate should not refuse bail unless likelihood of accused absconding or terrorizing prosecution witnesses or committing similar or other serious offence.

A Magistrate has jurisdiction to grant bail under S. 497 (1), and he should refuse to grant bail unless it is for such reasons as likelihood of the offender absconding in case of bail or of his terrorizing prosecution witnesses, or of his committing similar or any other serious offence while on bail. [*P* 615 C 1]

*** (b) Criminal P. C., S. 496—Applicability—Criminal P. C., S. 498.**

The proviso in S. 496 that bail can be granted only to a person other than a person accused of a non-bailable offence is not applicable to the Court of Session acting under S. 498, Criminal P. C. [P 615 C 2]

S. D. Sinha and *A. P. Pandey*—for Applicants.

Judgment.— Applications for bail were put up before the two subordinate Courts, one of the Magistrate and one of the Judge, and neither appears to have realized what kind of an inquiry was necessary in the matter. The Magistrate had jurisdiction to grant bail under S. 497 (1). Reasons given by him are such as would necessitate severe punishment in case of conviction, but are not reasons for a refusal to grant bail. It mayhappen that there may be likelihood of an offender absconding in case of bail, or of his terrorizing prosecution witnesses. That would be a reason for using discretion against him in refusing to grant him bail. Another reason may be that he may commit a similar or any other serious offence while on bail. No such reason is given by the Magistrate. When the matter went up before the Sessions Judge the reason given by him which looks like a reason of want of jurisdiction, must be due to want of reference to the law on the subject at the time of passing the order. The applicants are in the lock-up and under arrest. It is a mistake of the Judge to believe that his jurisdiction arises only when accused persons are put up before a Court. This excuse even is not technically correct because the applicants did appear before the Court of Magistrate who refused to grant bail. Under S. 496 bail may be granted to any person who is arrested or detained without a warrant by an officer-in charge of a police Station, or appears or is brought before a Court. In the present case the applicants have appeared before a Court and also have been arrested.

The proviso in this section that bail can be granted only to a person other than a person accused of a non-bailable offence is not applicable to the Court of session acting under S. 498, Criminal P. C. This Court being far away is not in a position to appreciate the circumstances of the case and to discover whether the applicants may or may not be released on bail without fear of their absconding, or terrorizing prosecution witnesses, or committing a similar or any other offence while on bail. The proper order for me to pass, therefore, will be what I propose to pass. I set aside the order of the Sessions Judge dated 8th April and direct him to reconsider the application for bail according to law and the instructions given in this order. A copy of this order shall be sent to the Sessions Judge.

S.N./R.K. *Case remanded.*

A. I. R. 1929 Allahabad 615

BANERJI AND KING, JJ.

Mohammad Niaz, Ahmad Khan and *others*—Defendants—Appellants.

v.

Nanhe Mal—Plaintiff—Respondent.

First Appeal No. 218 of 1926, Decided on 12th April 1929, against decree of Addl. Sub-Judge, Meerut, D/- 25th January 1926.

Evidence Act, S. 92 (4)—Mortgage suit for sale—Defendant pleading subsequent oral agreement to accept six shops worth Rs. 95,000 and 7,000 cash in full satisfaction of mortgage—On date of agreement Rs. 1,12,000 due on mortgage—Oral agreement being modification of original contract was inadmissible.

In a mortgage suit for sale the defendant pleaded that plaintiff mortgagee had subsequently orally agreed to accept in full satisfaction of the mortgage debt a conveyance of six shops valued at Rs. 95,000 and Rs. 7,000 in cash. On the date when the oral agreement was made a sum of Rs. 1,12,000 was due on the mortgage.

Held : that the oral agreement amounted to a modification of the original contract and was inadmissible under S. 92 (4) : 42 *Mad.* 41, *Foll.* [P 616 C 2]

B. E. O'Conor, K. N. Katju and *M. A. Aziz*—for Appellants.

Tej Bahadur Sapru, P. N. Sapru and *Ambika Prasad*—for Respondent.

Judgment.— This is an appeal by some of the defendants in a suit for sale on foot of a mortgage of 30th April 1919 which had been executed by one Mr.

Muhammad Ismail Khan in favour of the plaintiff-respondent. Md. Ismail Khan died on 9th November 1919. In September 1919 Md. Ismail Khan had executed a deed of wakf. Ex. 10, by which he had appointed certain persons as mutawallis. Defendants 1 to 4 are the legal heirs of Mohammad Ismail Khan, defendants 5 to 9 are the trustees under the wakf, and defendant 10 is a subsequent mortgagee of the property in suit. Various pleas were taken by the defendants and the points that were in controversy before the Court below were whether Mohammad Ismail Khan had validly executed the mortgage, and the mortgage was legally enforceable, and whether the rate of interest was excessive; and the last question, which was the only question in controversy before us, was whether an agreement had been entered into between the plaintiff Nanhe Mal and the mutawallis on 19th December 1924 that in full satisfaction of the mortgage debt the plaintiff would take a conveyance of six shops and a sum of Rs. 7,000 in cash.

The learned Subordinate Judge has decided all the issues in favour of the plaintiff. He found that the defendants had not proved the alleged agreement, and further that evidence was not admissible to prove the agreement, which would have amounted to a variation of the original contract, namely that entered into by Mohammad Ismail Khan with the plaintiff on 9th December 1919. The appellants before us, who are the heirs of Mohammad Ismail Khan and a trustee, had in their grounds of appeal taken various points. The only point which has been seriously put forward before us is as regards the question whether the agreement of 19th December 1924 could have been legally proved and whether the defendants had proved that agreement.

We have come to the conclusion that the finding of the learned Subordinate Judge on both the points is correct. On the date when the agreement was entered into it cannot be denied that a sum of Rs. 1,12,000 was due to the plaintiff on the mortgage. The case for the defendants is that the plaintiff agreed in full satisfaction of the mortgage to take a conveyance of six shops valued at Rs. 95,000 and Rs. 7,000 in cash, that is a total sum of a Rs. 1,02,000. According to the plaintiff the value of the shops is much less than Rs. 95,000 but it is unnecessary for the purpose of this case to consider what was the real value of the shops. We are of opinion that the oral agreement amounted to a modification of the original contract and was inadmissible under S. 92, Cl. 4, Evidence Act. It is unnecessary to refer to all the cases cited before us. We agree with what was held in the case of *G. P. Mallapa* v. *Naga Chetty* (1).

As the Court below has decided that upon the evidence the defendants have not been able to prove the oral agreement we will record a finding, though, in view of our finding that evidence was inadmissible, it is not necessary to do so. (Here the judgment discussed evidence and concluded.) We have, therefore, come to the conclusion on the question of fact that the finding of the learned Subordinate Judge is correct. We do not accept everything that Nanhe Mal had said about the settlement but it was for the defendants, who alleged the agreement, to prove beyond all doubt a final settlement as alleged in the written statement and this in our opinion, the defendants have failed to do. The result is that we dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1918] 42 Mad. 41=35 M. L. J. 555=8 M. L. W. 522=18 I. C. 158=(1919) M. W. N. 719.

A. I. R. 1929 Allahabad 616

BENNET, J.,

Sheo Saran Rai—Appellant.

v.

Jaimangal Misir and *another*—Respondents.

Second Appeal No. 304 of 1929, Decided on 8th April 1929, against decree of Dist. Judge, Gorakhpur, D/- 20th December 1928.

(a) Mortgagor and Mortgagee—Usufructuary mortgagor perpetually leasing mortgaged property and then selling his rights in it to mortgagee himself—Mortgagee purchases subject to perpetual lessee's right to redeem.

Where a usufructuary mortgagor first makes a perpetual lease of the property mortgaged and subsequently sells whatever rights he has in the property to the mortgagee himself, the mortgagee purchases merely the remaining rights of the mortgagor in the equity of redemption subject to perpetual lessee's right to redeem. [P 617 C 2]

(b) Jurisdiction—Civil or revenue Court.

Where a plaint as originally drafted would clearly lie in the civil Court and subse-

quently evidence showed that in regard to part of the property for which the suit is brought a suit might have laid in the revenue Court, civil Court has jurisdiction to grant relief for possession. [P 617 C 2]

(c) Agra Tenancy Act (1926), S. 99 (1)—Perpetual lessee suing landholder for possession—Suit number being undivided—Suit involving redemption of mortgage with regard to part of suit number—Civil Court is proper forum for suit for possession and two separate suits are not necessary.

Although under S. 99 (1) a perpetual lessee can sue a landholder for possession or for preventing him from obtaining possession of his holding, still where the suit number is undivided and the suit involves redemption of a mortgage with regard to part of the number, civil Court is the proper forum for a suit for possession and two separate suits, one in civil Court and the other in revenue Court, with regard to the two parts of the property are not necessary. [P 618 C 1]

Shankar Saran—for Appellant.

Judgment.—This is a second appeal by the defendant against the concurrent decrees of the two lower civil Courts, decreeing possession of the property in suit to the plaintiff-respondent. The plaintiff brought his suit for redemption of plot 585, area 62 acres in mauza Ranighat. The following facts have been proved. On 10th January 1916 one Kodai Rani made a usufructuary mortgage to the defendant-appellants of 35 acre of this plot and of another plot. On 28th May 1925 Kodai Rai made a perpetual lease of the plot in suit to the plaintiff. On 26th March 1927 Dudh Nath, the son of Kodai Rai, sold whatever rights remained to him in two pie zamindari share to which this plot appertained to the defendants. The first question that was argued was that by some rule of law not explained the purchase by the appellant of the rights of Kodai Rai in two pie zamindari share would prevent the plaintiff from suing for redemption.

It appears to me that it was perfectly legal for Kodai Rai to make a perpetual lease in favour of the plaintiff of this plot. The usufructuary mortgage provided that redemption might take place on 13th Jeth, Fasli 1324, i. e., in 1918. At that date or after that it was open to Kodai Rai to obtain possession of the mortgaged area by paying off the mortgage-money. Therefore, it was open to Kolai Rai to make a perpetual lease including that area and thereby he transferred to the lessee the right to redeem the mortgaged area and obtain possession from the appellant. Subsequently when the appellant purchased the rights of Kodai Rai in the two pie zamindari share the appellant did not purchase the whole equity of redemption of Kodai Rai, because Kodai Rai had already parted with the part of that equity of redemption which he had transferred to the plaintiff, the perpetual lessee. The appellant merely purchased the remaining rights of Kodai Rai and his son in the equity of redemption subject to the right of the perpetual lessee to redeem. In regard to ground 4 of appeal that the mortgage became extinguished by the purchase of the rights of Kodai Rai in the two pie share, this argument is unsound, because between the rights of the mortgagee and the rights purchased from Kodai Rai by the mortgagee there intervened the estate of the perpetual lessee, viz., the rights of redemption. No argument was addressed to me on ground of appeal No. 5. On ground of appeal No. 1 it was argued that the lower Courts were wrong in holding that the suit was cognizable by the civil Court.

It is true that under S. 99 (1) a perpetual lessee could sue a landholder for possession or for preventing him from obtaining possession of his holding. The lower appellate Court is incorrect in referring to S. 202 of that Act which merely applies to thekadars, and has nothing to do with the present case. But the suit was brought for redemption of the whole area 62 acres, and it was only subsequently discovered that it was not the whole plot 585 which was mortgaged to the appellant, but only 35 acres out of that plot. I do not think that in such a case where a plaint as originally drafted would clearly lie in the civil Court and subsequently evidence showed that in regard to part of the property for which the suit is brought a suit might have laid in the revenue Court, it should be held that the civil Court has not jurisdiction to grant relief for possession. Further the suit is for possession of a single khasra 585. It appears to me that there is nothing in law which would require a person in the position of the plaintiff to file separate suits in the civil and revenue Courts for possession of the two parts of this undivided number, nor would it be for the public convenience

to invent such a rule. The number being undivided and the suit involving redemption of a mortgage, it appears to me that the civil Court is the proper forum for a suit for possession in which redemption of part of the property is involved. I dismiss this appeal under O. 41, R. 11.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 618

SULAIMAN AND PULLAN, JJ.

Sakina Begam and *others*—Appellants.

v.

Harnam Singh and *another*—Respondents.

First Appeal No. 270 of 1927, Decided on 3rd May 1929, against decree of Sub-Judge, Agra, D/- 15th May 1926.

(a) Agra Pre-emption Act (1922), S. 4—Right to receive malikana is not interest of cosharer.

The mere right to receive malikana dues is not an interest of a cosharer in a part of the mahal: 42 *All.* 262, *Rel. on.* [P 618 C 2]

(b) Agra Pre-emption Act (1922), S. 11—Scope.

Before a suit for pre-emption can be maintained, it is necessary to find that the interest transferred is not only a proprietary interest but also that of a cosharer or a petty proprietor. [P 619 C 1]

S. Abu Ali and *S. K. Dar*—for Appellants.

N. P. Asthana—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for pre-emption. The rights and interest of Balbir Singh in mahals called 10 biswa mahal and 7½ biswa mahal were sold under a sale-deed dated 10th February 1925, to Dr. Masha Ullah Khan whose heirs are the appellants before us. Balbir Singh was recorded in the khewat as the superior proprietor (Malik Ala) in respect of the entire 20 biswas. The plaintiff Harnam Singh is recorded as an inferior proprietor (Malik adna) of a share out of the 20 biswas. The vendee denied the plaintiff's right to sue for pre-emption. The learned Subordinate Judge has held that the plaintiff is a cosharer and, therefore entitled to maintain the suit. He has not separately considered the question whether the interest transferred is pre-emptible.

The constitution of this village is very peculiar but there is no dispute about its characteristic features. The village is divided at least into two mahals called the 10 biswa mahal and the 7½ biswa mahal. The counsel for the parties admit that the settlement for the payment of Government revenue has been made by the Government with the proprietors called the inferior proprietors among whom the plaintiff's name appears. But these inferior proprietors are bound to pay not only the Government revenue and the cesses but also a fixed sum of malikana dues amounting to Rs. 190 to the superior proprietor who is also described as the lambardar.

It is quite clear that Balbir Singh cannot be treated as a cosharer of the plaintiff Harnam Singh. The rights of Balbir Singh and Harnam Singh were quite different, distinct and independent. Balbir Singh is not a proprietor of any share or part in a mahal as referred to in S. 4. His rights whatever they may be extended to the entire 20 biswas. He has transferred his entire rights. The present plaintiff is in no sense a cosharer of Balbir Singh in the right so transferred by him.

Section 4, Pre-emption Act, defines a cosharer as any person other than a petty proprietor entitled as a proprietor to any share or part in a mahal or a village. Balbir Singh undoubtedly was not a petty proprietor. He cannot be called a person entitled as proprietor to a share or part in this mahal. The Government revenue was not settled with him. Both Balbir Singh and the body of inferior proprietors cannot be called cosharers in this mahal at one and the same time. The right of Balbir Singh was confined to a realization of the malikana dues from the inferior proprietors who alone could let out the lands to tenants and collect rents. In a somewhat analogous case arising under the old law a Bench of this Court held in the case of *Abdul Wahid* v. *Halima Khatun* (1), that the right to receive malikana allowance could not be the subject of a suit for pre-emption. On the analogy of that case we hold that the mere right to receive malikana dues is not an interest of a cosharer in a part of the mahal.

It is therefore quite obvious that the present plaintiff cannot be allowed to pre-empt this interest. The interest transferred is a right in the entire 20

(1) [1920] 42 All. 262=59 I.C. 188=18 A.L.J. 210.

biswas and in that right the plaintiff is not a coparcener. Under S. 11 of the Act a right of pre-emption accrues when a cosharer or a petty proprietor sells any proprietary interest in land forming part of any mahal or village. Thus before a suit for pre-emption can be maintained it is necessary to find that the interest transferred is not only a proprietary interest but also that of a cosharer or a petty proprietor. This is not so in the present case. The sale accordingly is not pre-emptible.

We should not be understood to decide that no right of pre-emption would accrue inter se if cosharers in the inferior proprietary interest were claiming pre-emption on account of a sale of an inferior proprietary right. We accordingly allow the appeal and setting aside the decree of the Court below dismiss the plaintiff's suit with costs in both Courts.

S.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 619

SULAIMAN AND PULLAN, JJ.

Man Singh—Appellant.

v.

Guman Singh and *others*—Respondents.

Second Appeal Nos. 703 and 704 of 1927, Decided on 4th April 1929, against decree of Dist. Judge, Agra, D/- 13th January 1927.

Pre-emption—When transfer falls within definition of mortgage by conditional sale, it is pre-emptor's duty to show that it is out and out sale — In absence of circumstances showing that, no pre-emption suit would lie—Transfer of Property Act, S. 58(c)

In the case of a transaction falling within the definition of mortgage by conditional sale it is the duty of pre-emptor to show that it is an out and out sale transaction. But in the absence of any circumstance showing the same, the transfer is a mortgage by conditional sale and no suit for pre-emption lies: *A. I. R.* 1923 *All.* 586, *Ref.* [P 620 C 1]

N. P. Asthana—for Appellant.

B. Malik and *Baleshwari Prasad*—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for pre-emption. The transfer took place under a document which was described as a sale deed but it contained a condition that the property will be re-transferred on payment of the consideration within three years. The plaintiffs' case was that the transaction was really one of sale and they were entitled to pre-empt the property transferred. Both the vendors and the vendees pleaded that the transaction was one of a mortgage by conditional sale and no right to pre-empt accrued on it.

The Courts below have treated this case as if it turned entirely on the construction of the document in question. Both Courts have come to the conclusion that in view of certain rulings the transaction was an out and out sale coupled with an agreement to re-transfer the property on payment of the mortgage within three years. The learned District Judge has conceded that the recent rulings of this Court favoured the view advocated on behalf of the defendants. But he has followed an earlier ruling of this High Court supported by the decision of a Full Bench of the Madras High Court. We may point out that in none of the cases relied upon by him except the case of *Bishambhar Nath* v. *Muhammad Ubaidullah Khan* (1) the transfer and the contract for re-sale were embodied in one and the same document. The Privy Council case referred to by him was a case prior to the Transfer of Property Act, which now defines a mortgage by conditional sale in S. 58, sub-Cl. (c).

It cannot be stated broadly that in every case where there is an ostensible sale subject to the condition of re-purchase, the transaction cannot be a sale but must always be a mortgage by conditional sale. It seems to us that it is always open to a pre-emptor who is no party to the transaction to show by evidence, direct or circumstantial, that although the transaction was clothed in that particular garb it was in reality and substance a sale transaction. But where there are no such special circumstances, and we have only a transfer of the property subject to the condition of re-sale, it seems to us that the case would fall within the definition of a mortgage by conditional sale as laid down in S. 58 (c). It is not necessary that the deed itself should contain the words, mortgage, mortgagor, mortgage money or security for the loan. If such words were expressly entered in the deed, the transaction would hardly be an ostensible sale. Even if the language of the document on the face of it suggests that it is a sale transaction, but the sale itself is subject to the condition of re-transfer as provided by sub-Cl. (c) to the section the transac-

(1) A. I. R. 1923 All. 586=45 All. 581.

tion would become one of mortgage by conditional sale and not an out and out sale.

In the present case there are no special circumstances which would necessarily show that the transaction was an out and out sale. The lower appellate Court has not found that full price was actually paid. Even the learned Munsif only thought that there was not any great disparity between the amount of the sale deed and actual value of the land sold. On the other hand, both the transferor and the transferee asserted that the value of the property was considerable. The mere fact that there was a previous usufructuary mortgage is not conclusive either way. It may also be stated that the circumstance that both the transferrer and the transferee united in pleading that this was a mortgage, does not necessarily go against the plaintiffs. But, in the case of a transaction falling within the definition of mortgage by conditional sale it is the duty of plaintiff to show that it is an out-and-out sale transaction. In the absence of any circumstance showing that, we must hold that the transfer is a mortgage by conditional sale and that no suit for pre-emption lies. The result therefore is that this appeal is allowed, the decrees of the Courts below are set aside and the plaintiffs suit is dismissed with costs including fees on the higher scale.

S.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 620

DALAL, J.

Dudh Nath Singh—Plaintiff—Appellant.

v.

Mt. Munna Kuar and *others*—Defendants—Respondents.

Second Appeal No. 694 of 1928, Decided on 2nd May 1929, against the decree of the Sub-Judge, Azamgarh, D/- 20th January 1928.

Deed—Construction— Whether document in question was will.

A and *B* were joint brothers. On the death of *A*, *B* and *A*'s daughter's son *D* applied respectively for mutation of names in their favour. Subsequently an application was presented to the revenue Court in which *B* declared that his name may be entered against the property by right of inheritance during his life-time and after his death half the property may be entered in the name of *D* and the other half in the name of his daughter.

Held : that this application operated as will of *B*. *A. I. R.* 1928 *All.* 641 (*F. B.*) 7 *All.* 163 ; 36 *Cal.* 149, *Rel. on.* 10 *Cal.* 792 (*P.C.*), *Ref.* 33 *Mad.* 304 *Dist.* [P 621 C 2]

H. P. Sen—for Appellant.

Rudra Narain for *K. Verma*—for Respondents.

Judgment. — Mahabir Singh and Nandan Singh were two brothers of whom Mahabir Singh died first. The plaintiff Dudhnath, minor, is daughter's son of Mahabir Singh. On the death of Mahabir Singh, Nandan Singh applied for mutation of names in his favour and so did Mt. Jhunna Kuar, mother of Dudhnath and daughter of Mahabir Singh. On 16th August 1923 Nandan Singh and Mt. Jhunna Kuar put in a petition to the Court in which Nandan Singh declared that his name may be entered against the property by right of inheritance during his life time and after his death half the property may be entered in the name of the plaintiff Dudhnath and the other half described as Nandan Singh's own in the name of his daughter Mt. Munna Kuar defendant. On the death of Nandan Singh Dudhnath under the guardianship of his mother sued for the recovery of half the property on two grounds.

(1) That Mahabir Singh and Nandana Singh were separate ; and (2) That the instrument of 16th August 1923 filed in the revenue Court during mutation proceedings amounted to a will by Nandan Singh with respect to the property in suit, and that the terms thereof should be carried out. Dudhnath's claim on the first ground must obviously fail. Even if Mahabir Singh and Nandan Singh were separate the person entitled at present to the possession of the property would be Mt. Jhunna Kuar and not the plaintiff Dudhnath. As it is, the subordinate Courts have held that Mahabir Singh and Nandan Singh were joint. It was not necessary to record that finding, and Dudhnath's suit must fail by reason of the existence of his mother.

On the decision of the second question the two subordinate Courts have differed. The trial Court held the document to be a will, while the lower appellate Court held that it was not a will because it was irrevocable. I disagree with that

Court in its opinion that the document is irrevocable. Nandan Singh received no consideration for bequeathing half the property to Dudhnath, and, therefore, the instrument was not binding on him. If the document were taken to be a settlement of family disputes it ought to have been registered as it dealt with immovable property of the value of over Rs. 100 see; *Ramgopal* v. *Tulshi Ram* (1). As far back as 1884 a Bench of this Court held a document of this nature to be a will. A sonless Hindu widow, in possession of a deceased husband's estate as such, made a statement before a revenue official, which was recorded by him, to the effect that she wished the property to go after her death to her nephew, and that S. the person entitled to succeed her, had no right to the property. This Court held that the statement was intended to operate, and would have operated, as a will in respect of the property *Kalian Singh* v. *Sanwal Singh* (2). This ruling was qnoted with approval by the Calcutta High Court in 1908 in *Din Tarini Devi* v. *Krishna Gopal Baghchi* (3). One of the indicia of a will mentioned by their Lordships of the Privy Council at p. 800 in the case of *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (4) was that the document should not purport to give to anybody any possessory or other interest until the death of the donor. The document is not a deed of transfer operating at once. In the present case Nandan Singh had no son and was entitled to make a will on the date of the document. On behalf of the respondent a Madras ruling in the case of *Rajammal* v. *Authiammal* (5) was quoted In that case their Lordships pointed out that there were clear provisions in the document having an immediate operation. They also held that the document was irrevocable. Only a portion of the document purported to operate as a will, and not the entire document. There were immediate gifts of jewels made to his wife and to his son's widow. He had promised to transfer the patta for the lands and the license for the salt-pans to the names of his wife and his son's widow during his life time. I hold that the document in the case before me is a will. I set aside the decree of the lower appellate Court and restore the decree of the trial Court with costs of all the Courts.

S.N./R.K. *Decree set aside.*

(1) A. I. R. 1923 All. 641 (F. B.).
(2) [1884] 7 All. 163=(1884) A. W. N. 337.
(3) [1909] 36 Cal. 149=1 I. C. 791=13 C. W. N. 291.
(4) [1884] 10 Cal. 792=11 I. A. 135=4 Sar. 528 (P. C.).
(5) [1910] 33 Mad. 304=7 I. C. 357=20 M. L. J. 519.

A. I. R. 1929 Allahabad 621

KING AND BENNET, JJ.

Ram Sarup and *others*—Plaintiffs—Appellants.

v.

Ram Richt pal and *others*—Defendants—Respondents.

Second Appeal No. 2145 of 1927, Decided on 26th April 1929, against decree of Addl. Sub-Judge, Bulandshahar, D/- 2nd June 1927.

Transfer of Property Act, S. 80—Subsequent mortgagee and subsequent purchaser together paying off entire prior mortgage—Subsequent mortgagee gets priority over intermediate mortgagee to the extent of money contributed by him.

Where a subsequent mortgagee and a subsequent purchaser of the same property contribute to pay off the entire prior mortgage, the subsequent mortgagee is entitled to priority over the intermediate mortgagee to the extent of the money contributed by him, although he alone did not pay off the entire prior mortgage : 35 *Mad.* 183, *Dist.* 38 *Mad.* 548, *Foll.* [P 623 C 1]

Peary Lal Banerji and *H. P. Sen*—for Appellants.

K. N. Katju and *Misri Lal Chaturvedi*—for Respondents.

Judgment.—This appeal arises out of a suit to recover the money due on a simple mortgage, dated 11th May 1910, executed by Husain Khan and Nawab Khan in favour of Koore Mal and Tulshi Ram as security for a sum of Rs. 800. Defendants 1 to 8 are heirs of the mortgagors. Plaintiffs 1 to 6 are heirs of the mortgagees. Bhup Singh, original defendant 11, was a subsequent mortgagee, who died during the pendency of the suit and whose heirs are now upon the record as defendants 11 to 14. Defendant 15 Chiranji Lal, was a subsequent purchaser. The suit was contested by Bhup Singh and Chiranji Lal mainly on the ground that the mortgaged property situated in the town of Gulauthi is not liable to sale, and that Bhup Singh and Chiranji

Lal had discharged a decree obtained on a prior mortgage, and therefore had priority to the extent of the amount paid by them in discharging the prior mortgage. The trial Court repelled the defendants' contentions and decreed the claim in full.

The lower appellate Court gave effect to the contention of Bhup Singh's representatives to the effect that they had priority to the extent of Rs. 3,063-9-0 which Bhup Singh had paid in satisfaction of the decree obtained by Faqir Chand on the basis of a mortgage dated 29th March 1904. It may be mentioned that the appeal of Chiranji Lal abated in the Court below as he died in November 1926, and no representatives had been brought upon the record within the prescribed period. The Court below, therefore, only had to consider the rights of Bhup Singh's representatives, and we also must leave out of account the claim made by Chiranji Lal. It has been found as a fact by the Court below that when Faqir Chand obtained his decree on the basis of his mortgage, dated 29th March 1904, the decretal amount was paid off by Bhup Singh and Chiranji Lal to the extent of Rs. 3,063-9-0 and Rs. 1,000-0-0 respectively, and thus the mortgage was redeemed in full.

The Court below held that Bhup Singh was entitled to priority to the extent of the sum which he had paid for the redemption of the prior mortgage together with interest at 6 per cent from the date of payment. The learned Subordinate Judge passed a decree allowing the plaintiffs' claim for Rs. 2,000 with costs and interest. He further directed that after the final decree is passed, first the property situated in the village of Faizabad be put up to sale and if its sale proceeds be sufficient to satisfy the amount of the decree, the other property of the town of Gulauthi should not be put to sale. But in case the property of the village of Faizabad be not sufficient to satisfy the decree, then he directed that the entire property of the town of Gulauthi, which was mortgaged in the mortgage of 29th March 1904, would be put to sale, and out of the entire sale proceeds of both the properties of Gulauthi and Faizabad the amount of Rs. 3,665-13-6 will first go to the defendants 11 to 14 and the remainder will go to satisfy the decree, and the surplus, if any, would go to the other defendants. It must be explained here that in the earlier mortgage of 29th March 1904, the whole 44 sihams of Gulauthi had been mortgaged. In the mortgage, which is the basis of the present suit, only 23 sihams out of the 44 had been mortgaged together with 23 sihams out of 44 in mauza Faizabad.

The first point taken by the learned advocate for the appellants is that Bhup Singh can have no priority in respect of the payment made by him in discharge of the prior mortgage, because he did not pay the full amount necessary to discharge that mortgage. As we have already mentioned, Bhup Singh paid Rs. 3,063-9-0, whereas the balance of Rs. 1,000 was paid by Chiranji Lal. Bhup Singh and Chiranji Lal between them, therefore, certainly did extinguish the prior mortgage, but Bhup Singh himself only paid a portion of the money necessary for discharging that mortgage. The ruling cited in *Hanumanthaiyan* v. *Meenakshi Naidu* (1), has been relied upon in support of the contention that payment of a portion only of the money required for the discharge of a prior mortgage cannot give the person who makes the payment any priority. In that ruling it was held that where there are two mortgages on a single property and a person advances money for the payment of the first mortgage, the claim of such person to priority over the second mortgage cannot be sustained unless the first mortgage is entirely discharged. This ruling does not help the appellants since it only lays stress upon the necessity for the entire discharge of the prior mortgage. In the present suit it is found that the prior mortgage has been entirely discharged. The other rulings cited by the learned advocate for the appellants are to the same effect that the entire discharge of the prior mortgage is necessary, but they do not go so far as to say that if the prior mortgage is discharged by two persons, each of whom contributes a share of the money, then neither person acquires any priority in respect such of discharge.

On the other hand, a ruling has been cited by the learned advocate for the respondents *Saminatha Pillai* v. *Krishna Ayyar* (2), in which it was held that

(1) [1912] 35 Mad. 183=22 M. L. J. 12=12 I. C. 412=(1912) M. W. N. 158.
(2) [1915] 38 Mad. 548=28 I. C 966=23 M. L. J. 484.

a subsequent mortgagee who advances money towards the discharge of a first mortgage on a property is entitled to priority over an intermediate mortgagee to the extent to which the money advanced by him went towards discharging the first mortgage. The facts of that case are very similar to the facts of the case before us. In that case a prior mortgage deed had been completely discharged. Rs. 300 had been advanced by a subsequent mortgagee, and the balance of Rs. 50 had been paid by the mortgagor himself. It was held that although the subsequent mortgagee did not advance the whole of the money required for discharge of the prior mortgage, he was entitled to priority over an intermediate mortgagee to the extent of the money advanced by him for discharge of the prior mortgage. This ruling is directly applicable to the facts of this case, and we see no reason for not following it. We find, therefore, that Bhup Singh was entitled to priority over the plaintiff, who was an intermediate mortgagee, to the extent of the sum which he paid towards the discharge of the prior mortgage dated 29th March 1904.

The next point is that the Court below was wrong in allowing defendants 11 to 14, i. e., the representatives of Baup Singh, any share in the sale proceeds of the village Faizabad. Here we must accept the appellants' contention. Baup Singh had no interest whatever in the village of Faizabad, and we see no reason why his representatives should be entitled to any share of the sale proceeds of that village. Another objection has been raised to the direction contained in the decree of the Court below, that after the sale of the property in village Faizabad the entire property of the town of Gulauthi, which was mortgaged in the mortgage of 29th March 1904, should be put to sale. Here again we think the Court below was clearly wrong. The plaintiff is a mortgagee of only 23 out of 44 sihams of the town of Gulauthi, and he only asked for sale of that share. We see no justification for ordering sale of property which is not included in the plaintiff's mortgage deed and which he never sought to put to sale. In our opinion, only the 23 out of 44 sihams included in the mortgage in suit can be put to sale.

The last point argued is that even if Bhup Singh is entitled to priority in respect of the sum which he paid towards the discharge of the prior mortgage, he is only entitled to an amount proportionte to the share of Gulauthi which is being sold, i. e., 23/44 of the sum which he paid. No authority has been cited before us by either party on this point. Bhup Singh is entitled to priority in respect of the sum which he paid towards the discharge of the prior mortgage which covered the whole 44 sihams of Gulauthi. Now the plaintiff is only seeking to put to sale 23 out of 44 sihams of Gulauthi, and in our opinion it would be just and equitable that Bhup Singh should get priority to the extent of 23/44 of the sum which he paid in discharge of the prior mortgage. We, therefore, vary the decree of the Court below on this point by declaring that Baup Singh's representatives, defendants 11 to 14, will be entitled to 23/44 out of Rs. 3,665-13-6 which was decreed to them by the Court below.

We accordingly allow the appeal in part and modify the decree of the Court below by ordering (1) that the property situated in village Faizabad be put to sale first, and the sale proceeds thereof shall be wholly paid to the decree-holder and shall in no circumstances be paid to the defendants, and (2) that in case the property of the village of Faizabad be not sufficient to satisfy the decree, then the 23 sihams out of 44 sihams of the town of Gulauthi, which were mortgaged in the mortgage deed in suit, shall be put to sale, and out of the sale proceeds of these sihams the amount of 23/44 of Rs. 3,665-13-6 will first go to defendants 11 to 14 and the remainder will go to satisfy the decree, and the surplus, if any, will go to the other defendants. Parties will bear their own costs is this Court.

S.N./R.K. *Decree modified.*

A. I. R. 1929 Allahabad 623

BANERJI AND KING, JJ.

Sundar Kunwar — Plaintiff — Appellant.

v.

Baldeo Prasad and *others* — Defendants — Respondents.

Second Appeal No. 1829, of 1926, Decided on 15th April 1929, against decree of Dist. Judge, Bareilly D/- 26th June 1927.

Hindu law—Debt—Necessity—Loan, taken by certain members of joint Hindu family for instituting suit for declaration that transfer by Hindu widow is not binding on them, cannot bind joint family property.

A suit instituted by certain members of a joint family for a declaration that a transfer by a Hindu widow was not binding on them is really one to enforce a personal right of the individual members and so a loan for the purpose of vindicating such a right cannot bind joint family property as it cannot be said that the famiiy was being benefited by the loan. [P 624 C 1]

Uma Shankar Bajpai—for Appellant.

P. L. Banerji, S. N. Gupta and *G. S. Pathak*—for Respondents.

Judgment.—This is a plaintiff's appeal in a suit for sale on foot of a mortgage. The only question before us is whether the payment of money by the mortgagee to the mortgagor for the purpose of the litigation was binding on the family and it was for the benefit of the family. It has been urged by the learned advocate for the appellant that as the mortgagor had instituted a suit for a declaration that a transfer by a Hindu widow was not binding on the plaintiffs in that suit as collaterals the loan was such that the joint family property was liable to repay as they were to be benefited by the transaction. The suit was a suit by certain members of a joint family for a declaration that a transfer by a Hindu widow was not binding on them. It was really to enforce a personal right of the individual members that the suit was brought and even if the suit had been decreed, and the widow had died, only one or two particular members of the family would succeed to the estate of the widow. A loan, therefore, for the purpose of vindicating such a right cannot, in our opinion, bind joint family property as it cannot be said that the family was being benefited by the loan. We are, therefore, of opinion that there is no force in this appeal and it is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 624

MUKERJI AND YOUNG, JJ.

Harbans Singh—Deft. — Applicant.

v.

Suresh Datta Tewari—Plaintiff—Opposite Party.

Civil Revn. No. 54 of 1928, Decided on 7th May 1929, against order of Munsif, Basti, D/- 12th October 1927.

Civil P. C., S. 151—Application.

The Court can under S. 151 restore an application made for the restoration of the suit : *A. I. R.* 1925 *All.* 773, *Rel. on. A. I. R.* 1924 *All.* 503, *Ref.* [P 624 C 2]

K. N. Malaviya—for Applicant.

Judgment.—This is an application by one who was the defendant in the suit in the Court below complaining against a Munsif's order dated 12th August 1927. The plaintiff's suit was dismissed for default on 25th June 1927. On 18th July 1927, he applied for the restoration of his suit. This application came up for hearing on 27th August 1927. On that date too, the plaintiff was absent, with the result that his application which was one for restoration of his suit was dismissed. Then he made a fresh application on 29th August 1927, for the purpose of his application dated 18th July 1927, being restored. The learned Munsif found, as a fact, that the plaintiff had sufficient cause for his absence on 27th August 1927. He therefore restored the application dated 18th July 1927, and proposed to investigate it. The defendant has come up in this Court and his contention is that the Court below had no jurisdiction to restore the application of 18th July 1927. The authority which partially supports the applicant's case is to be found in *Pitambar Lal* v. *Dodee Singh* (1). There being no counsel appearing for the respondent the learned counsel for the appellant has drawn our attention to the case in *Ganesh Prasad* v. *Bhagelu Ram* (2). The latter case which considered the earlier case in *Pitambar Lal* v. *Dodee Singh* (1) laid down that even if O. 9, R. 9, Civil P. C. had no application there was no bar to the application of S. 151, Civil P. C. We agree with this view, with the result that the application fails. The application is dismissed but without costs because the respondent is unrepresented.

P.N./R.K. *Revision dismissed.*

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(1) A. I. R. 1924 All. 503=46 All. 319.
(2) A. I. R. 1925 All. 773=47 All. 878.

** A. I. R. 1929 Allahabad 625
Full Bench

SULAIMAN, BANERJI, KING, NIAMATULLAH AND SEN, JJ.

Kayastha Co. Ltd. — Decree-holder—Appellant.

v.

Sita Ram Dubey—Judgment-debtor—Respondent.

Case No. 1650 of 1927, Decided on 26th June 1929 from decision of Second Addl. Sub-Judge, Gorakhpur, D/- 1st August 1927.

**** (a) Limitation Act, Art. 182 (5)—Application in accordance with law to proper Court is sufficient—Bona fide intention to execute need not be shown.**

For purposes of Art. 182 it is sufficient to show that an application was made in accordance with law to the proper Court for execution or to take some steps in aid of execution. It is not necessary to show that such application had been made with a bona fide intention to execute the decree or to take such step, and not merely to keep it alive. It is wrong to read in Cl. 5, Art. 182, requirements of good faith and due diligence : (1890) *A. W. N.* 77 and (1891) *A.W.N.* 148, *Appl.*; *A.I.R.* 1926 *All.* 95, *Expl.* and *Dist.*; *A. I. R.* 1928 *Oudh* 337, *Appr.* (*Case law referred*). [P 650 C 1]

(b) Precedent—Authority.

A case is only an authority for what it actually decides : *Quinn* v. *Leathem*, (1901) *A. C.* 495, *Foll.* [P 630 C 1]

*** (c) Interpretation of Statutes— Language, interpreted by decisions, reproduced in new Act—Judicial interpretation should be assumed to have been accepted.**

The legislature is presumed to know the current of the judicial pronouncements. When the language of a particular section of a statute has been interpreted in a particular way by the Courts and that language has been reproduced by the legislature in the new Act, Court is entitled to assume that the judicial interpretation has been accepted : *Jay* v. *Johnston*, (1892) 1 *Q. B.* 25, *Foll.* [P 630 C 1]

(d) Interpretation of Statutes—Words unambiguous—Words not found in Act should not be read into context.

If the words of the statute are in themselves precise and unambiguous, no more is necessary than to expound these words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature. It is not permissible to read into the context words which are not to be found there : *Income-tax Commissioner* v. *Pemsel*, (1891) *A. C.* 534, *Foll.* [P 641 C 2]

Haribans Sahai and *Sri Narain Sahai*—for Respondent.

Order of Reference

Sen and Weir, JJ.—This is an appeal in execution proceedings. The decree of which execution is sought was pronounced on 24th February 1916 against the respondent and in favour of the appellant company. On 6th August 1917, the decree was attached by a certain Miss Chatterji in execution of a decree which she had obtained against the appellant company; and on 23rd July 1918 the decree was on her request transferred to the Collector of the district in which the respondent resides for execution under Sch. 3, Civil P. C. On 9th December 1917, before the decree was so transferred, the appellant company assigned the decree to one Raghunath Prasad, who on 13th February 1919 applied to the Court which pronounced the decree to have his name recorded as the owner of the decree and to have personal execution against the respondent. This application for personal execution was rejected on 24th February 1919, and on 24th February 1921 Raghunath Prasad retransferred the decree to the appellant company. Meanwhile on 21st January 1919 the appellant company had deposited the process fee for execution of the decree by the Collector; but for some reason of which we are not informed the decree was not executed by the Collector, although the property of the respondent was advertised for sale; and on 23rd April 1920, the Collector returned the decree to the civil Court and the application for execution was struck off. The appellant company again applied for execution on 10th February 1922, and notice was issued under O. 21, R. 22, Civil P. C., but on 18th March of the same year, this application was struck off for default. The application out of which this appeal arises was made by the appellant company on 6th January 1925. The lower appellate Court held that the decree was barred by limitation as more than three years had elapsed between the date, namely 23rd July 1918, when Miss Chatterji applied for execution of it and the 10th February 1922 when the appellant company again applied for execution.

On behalf of the appellant company two points have been argued : (1) That the application by Raghunath Prasad was sufficient to keep the decree alive although the lower appellate Court has found as a fact that this application was "far from being bona fide," and "was a colourable application filed simply to

show that he was the assignee of the decree." (2) That in calculating the period of limitation under Art. 182, Lim. Act, the period during which the decree was with Collector for execution should be excluded: see R. 11 (3), Sch. 3, Civil P. C. We think that this contention must prevail. Under the words of R. 11 (3), Sch. 3:

"the same period (i. e. the period mentioned in Cl. (1) of the same rule) shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived."

The period mentioned in this clause is thus expressed in Cl. (1) :

"So long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property or any part thereof any of the powers or duties conferred or imposed on him by paras. 1-10 of the schedule. . . . . "

We think that as long as the decree remained with the Collector for execution, the Collector could exercise the powers conferred on him by R. 1 of the Schedule; and in fact he did so to a certain extent by advertising the property for sale. We therefore think that the period during which the decree was with the Collector for execution should be excluded, and that therefore the appellant company's application for execution on 10th February 1922 was within time. We express no opinion on this point whether the application made by Raghunath Prasad on 13th February 1919 would or would not have been sufficient to keep the decree alive. The reason given by the learned Judge for saying that it was merely a colourable application is that he i. e., Raghunath Prasad was told by the civil Court to which he had applied for execution that he could not do so as long as the decree was with the Collector for execution. Counsel for the respondent is, therefore, on the horns of a dilemma. If the period during which the decree was with the Collector is not to be excluded in reckoning the period of limitation allowed by Art. 182 then Raghunath Prasad was entitled to apply for execution and the reason given for refusing his application was wrong: see R. 11, Cl. (2), Sch. 3, Civil P. C., and therefore the reason given by the lower appellate Court for holding that Raghunath Prasad's application was not bona fide falls to the ground.

On the other hand, if the reason given for holding that Raghunath Prasad's application was not bona fide is right then the period during which the decree was with the Collector for execution must be excluded in calculating the period of limitation under Art. 182, of the Schedule the Lim. Act. We would, therefore, have allowed this appeal with costs, if counsel for the respondent had not strenuously contended on the authority of *Sheo Prasad* v. *Naraini Bai* (1), that we ought to remand the case to the lower appellate Court for a finding on the question, whether the application made by the appellant company on 10th February 1922, and the proceedings taken in consequence of it, were made and taken with a bona fide intention of executing the decree, if it was reasonably possible to do so. After considering all the cases cited in the judgment in *Sheo Prasad* v. *Naraini Bai* (1), we respectfully differ with the conclusion at which the learned Judges arrived in that case; and, as the question is of general importance, and has been raised before one of us several times, we think that we ought to ask the Chief Justice to refer the question which we shall formulate to a Full Bench.

It would not serve any useful purpose for us to attempt to review elaborately all the cases which were cited in the judgment in *Sheo Prasad* v. *Naraini Bai* (1); but we may say that in our opinon the expression, " bona fide," when used with reference to the proceedings taken by a decree-holder to execute a decree, is used, not with reference to his intention to obtain execution, if possible; but with reference to his belief that he is applying to a proper Court in a proper manner and is asking for execution against property which he believes could be sold in execution of his decree. This appears to have been the case in *Roy Dhunpat Singh* v. *Mudhomotee Dabia* (2), which came before their Lordships of the Privy Council and also in *Hira Lal* v. *Budri Das* (3). In the third case which came before their Lordships: *Mungul Prashad Dikshit* v. *Girjakant Lahiri* (4), their

(1) A. I. R. 1925 All. 95=48 All. 468=24 A. L. J. 137.
(2) 11 Beng. L. R. 23=18 W. R. 76.
(3) [1879] 2 All. 792=7 I. A. 167=4 Sar. 157 (P.C.).
(4) [1882] 8 Cal. 51=8 I. A. 123=4 Sar. 248 (P.C.).

Lordships observed at p. 62 of the report that there was not any finding of either of the Courts below that the several proceedings were not bona fide for the purpose of enforcing the decree or of keeping it in force. We emphasize the last words of this passage, which is also cited in *Sheo Prasad* v. *Naraini Bai* (1). These words seem to show that their Lordships contemplated the possibility of a case in which proceedings might be taken for the purpose of keeping a decree alive, as distinct from proceedings for the purpose of obtaining exeeution of the decree; whereas, as we understand the decision of the Court in *Sheo Prasad* v. *Naraini Bai* (1), execution proceedings will not be sufficient to keep a decree alive, unless they are taken and pursued with a genuine intention of obtaining execution of the decree, if it is reasonably possible to do so.

We might also point out that the argument, that the legislature could not have intended that an indefinite period could be added to the life of a decree by the decree-holder taking colourable steps to obtain execution when he only wanted to secure a further period, loses much, if not all, of its force in consequence of the provisions of S. 48, Civil P. C., by which, except in the case of force or fraud on the part of a judgment-debtor, an order for execution cannot be made after the expiration of 12 years from the date of the decree. It was this fear that the life of a decree might be indefinitely extended which led to the doctrine, which at one time prevailed in the Calcutta High Court, that a decree-holder was bound to show that he intended bona fide to execute a decree and that if he could not prove this, any steps taken by him were ineffectual to save limitation. That doctrine was emphatically though reluctantly repudiated by a Full Bench of that Court in *Eshan Chundra Bose* v. *Pran Nath Nag* (5). The case had been referred to a Full Bench by Jackson, J., who was in favour of upholding the doctrine of bona fides when applied to proceedings in execution; and, as it has been suggested in the judgment in *Sheo Prasad* v. *Naraini Bai* (1) that particular phrases used by Couch, C. J., should not be treated as governing a question not directly considered, we wish to quote the concluding passage in the judgment of Jackson, J., which shows quite clearly what that Court believed that it was deciding, and what it intended to decide. The passage runs as follows :

"I still think, and I think more strongly than ever, that the consequences to which I referred in my remarks, of removing absolutely all "checks" to applications to execute decrees are likely to follow but at the same time, I also think it is better that those consequences should be exposed by actual examples, and brought to notice in judgments of the Courts and the remedy left to the legislature which can properly and effectually deal with them, than that the Courts should by a forced construction endeavour to mitigate by their own authority the action and rigour of the law."

The hope expressed by Jackson, J., that the evil which he feared would be remedied by the legislature, has been fulfilled by S. 48, Civil P. C., and we agree with the judgment in that case. We, therefore, direct that the papers of this case should be sent to the Acting Chief Justice with the request that he will constitute a Full Bench to determine the following question :

"If a decree-holder makes any application or takes any step mentioned in Col. 3, Art. 182, Lim. Act, will such step be ineffectual to keep his decree alive and to save limitation, unless he can satisfy the Court that he took such step or instituted such proceedings with a genuine intention of obtaining execution of his decree, if reasonably possible and that he did not abandon such proceedings, except upon a genuine belief that it would not be reasonably possible to obtain execution."

Opinion.

Sulaiman, J.—The facts of this case are fully mentioned in the order of reference It is not necessary to recite them.

In the course of argument besides the point referred other points have also been raised, for instance that if an order for execution has once been passed on an application for execution without objection as to its being time barred it would not save limitation for purposes of a subsequent application. It has also been suggested that inasmuch as a notice was issued under O. 21, R. 22 on 1st February 1922, the case was covered by Art. 182, sub-Cl. 6 (6) and there was no necessity whatsoever to enquire into the bona fides of the application for execution. It has been further sought to be argued that steps taken by an attaching creditor to execute her decree would not justify the exclusion of time for the purposes of this

(5) 22 W. R. 512=14 Beng. L. R. 143 (F.B.).

application. These are matters which have not been referred to us and I do not wish to be understood that I am expressing any opinion on any one of them.

The purport of the question referred to us stated briefly is whether an application for execution of a decree or taking any steps in aid of it would be ineffectual without a bona fide intention in the mind of the decree-holder. That is to say whether for purposes of Art. 182, Lim. Act, it is sufficient to show that an application was made in accordance with law to the proper Court for execution or to take some steps in aid of execution, or whether it is further necessary to show that such application had been made with a bona fide intention to execute the decree or to take such step, and not merely to keep it alive.

Section 20, Act 14 of 1859, provided that no process of execution shall issue to enforce any judgment, decree or order unless some proceeding shall have been taken to enforce it or to keep the same in force within three years next preceding the application for execution. Under S. 14 the time spent in prosecuting any suit bona fide and with due diligence which failed from defect of jurisdiction or other cause was to be excluded but it did not apply to a previous application for execution. There was accordingly no express provision in the Act under which the time taken in prosecuting an application for execution in good faith in a Court which was not competent to grant the relief could be excluded except S. 20. Their Lordships of the Privy Council laid down in several cases that the principle of S. 14 applied to the application for execution and that good faith would help the decree-holder even in an application for execution under S. 20.

In *Roy Dhunpat Singh* v. *Mudhomotee Dabia* (2) it had been contended that the petition was to obtain execution of a sum of money which it was not possible that the execution could reach and could therefore not be held to be one to keep the judgment in force. Their Lordships thought that those circumstances really affected only the bona fides of the proceeding, and came to the conclusion that there had been a desire to obtain execution and that the proceeding though bona fide had failed in consequence of a mistake, and the mere fact that it was in the end abortive did not take from it the character of a proceeding to enforce the decree.

In *Hira Lal* v. *Budri Das* (3) the decree of the District Judge had been sent to the Subordinate Judge to be executed and the Subordinate Judge had struck the execution case off the file. Subsequent proccedings were taken from time to time by the decree-holder in the Court of the Subordinate Judge to enforce the decree. The High Court held that the Subordinate Judge had power merely to dispose of the application transferred to him and not to entertain the subsequent application, but, however, stated that there was no reason to think that the appellants had not exerted themselves bona fide to obtain their dues. On these facts their Lordships of the Privy Council held that, even if the Subordinate Judge had no jurisdiction, the proceedings taken in his Court were sufficient to prevent the operation of the statute of limitation and applied the principle underlying S. 14 to the application under S. 20.

The case of *Mungul Prasad Dichit* v. *Girijakant Lahiri* (4) was also a case governed by Act 14 of 1859 inasmuch as the suit out of which the execution proceeding arose had been instituted when that Act was in force. It was scarcely contended that that application was barred if the case was governed by the former Act. Their Lordships did remark that there was no finding of either of the Courts below that the several proceedings taken were not bona fide for the purpose of enforcing the decree or of keeping it in force.

These cases were under the Act of 1859 and can further be distinguished on facts. But they were undoubtedly taken to be authority for the proposition that the bona fides of a previous application for execution was a matter to be enquired into. A number of cases in Calcutta, which it is not necessary to enumerate, followed this line.

Then came Act 9 of 1871 in which Art. 167 altered the phraseology and 3 years were to be counted from :

"the date of applying to the Court to enforce, or keep in force, the decree or order."

The starting point of application was not the time when a proceeding shall have been taken but the date of applying. The former expression connotes the idea of completion whereas the latter

refers to an isolated act. The question naturally arose whether the change in the phraseology was the result of an intention of the legislature to alter the law. The Article itself allowed time from an application to keep the decree in force even though it was not one for enforcing it. The matter came up before a Full Bench of the Calcutta High Court in the case of *Eshan Chandra Bose* v. *Prannath Nag* (5). It was referred to the Full Bench because of a categorical expression of opinion expressed in *Rohinee Nundan Mitter* v. *Bhagwan Chunder Roy* (6) that there was no necessity to enquire whether the proceedings were taken for the purpose of enforcing the decree or were merely colourable for the purpose of keeping the decree alive. It is not necessary to examine the reasoning of the learned Chief Justice or Jackson, J. in the Full Bench case. But there can be no doubt that it was unanimously held that all that was necessary for a decree-holder was to take care that the application was within 3 years from the date of applying to enforce the decree or to keep it in force. This was followed by Act 25 of 1877 Article 179 introduced a new phraseology and time was to run from :

"the date of applying in accordance with law to the proper Court for execution or to take some steps in aid of execution of the decree or order."

I now come to the cases of this Court in which the point arose either directly or indirectly. In *Mahtab Kunwar* v. *Sham Sunder Lal* (7), Mahmood, J. was inclined to hold that consistently with the ratio decidendi adopted in the earlier rulings an application made ostensibly for executing the decree, not shown to have been made as a bona fide step, indicated not only by the omission to deposit the talbana fees but also by the express statement of the pleader withdrawing the application, was not a step in aid of execution. He, however, did not decide this point in that case. The case of *Chattar* v *Nawal Singh* (8) was a case where the Court was not competent to do the thing asked for. It is not directly in point. In *Halima Bibi* v. *Nishan Bibi* (9) Tyrrell, J., repelled the judgment-debtor's contention that an application for execution was a bad application because the previous motions displayed no bona fides or industry or diligence. He pointed out that the current of decisions of this Court for years had been to consider only whether the application was made in conformity with the procedure laid down and whether it was made to the proper Court, and not to import considerations derived from the subsequent conduct on the part of the decree-holder or of the Court. He pointed out that Mahmood, J., in the earlier case had declined to decide the point. In *Debi Das* v. *Umrao Singh* (10) when the question again came up before Mahmood J., and the Full Bench judgment of the Calcutta High Court and the judgment of Tyrrell, J., were cited before him he held that the questions of bona fides had no application to the case. In *Mangal Sen* v. *Baldeo Prasad* (11) the application for execution was not accompanied with a list of the properties sought to be attached and the following statement was entered in it :

"After notification by means of attachment of the immovable property of which a list will hereafter be filed the decretal money may be realized. At present for the purpose of saving limitation this application is made owing to the defendant having become insolvent."

The learned Judge held that the application was not in accordance with law and cited several rulings in support of the view. From the "very nature of the entries made by the decree-holder in the application" he concluded that the application was a nominal transaction and a fictitious ceremony for the purposes, as the application expressly stated, only of saving limitation. It seems to me that the cases of *Halima Bibi* (9) and *Debi Das* (10) are directly in point and lay down that the question of bona fides of the application is not to be gone into. The other two cases decided by Mahmood, J. are cases where the application was possibly not in accordance with law inasmuch as there was an admission on behalf of the decree-holder that the only purpose of it was to gain time.

Although there are passages in the judgments of various learned Judges which contain the word "bona fide" with reference to applications for exe-

(6) 22 W. R. 154=14 B L. R. 144 *n*.
(7) [1883] A. W. N. 272.
(8) [1889] 12 All. 64=(1889) A. W. N. 200.
(9) [1890] A. W. N. 77.
(10) [1891] A. W. N. 148.
(11) [1892] A. W. N. 70.

cution, there is not a single case which has been brought to our notice where an application for execution although made within three years of a previous application was dismissed as being time barred on the ground that the previous application though made to the proper Court and in accordance with law had not been made in good faith or was mala fide. The mere use of the word "bona fides" in judgments might either be due to loose speaking or to a continuance of the phraseology used when the old law was in force. At best, it can be taken to imply that the learned Judge was holding that a bona fide application was not time barred and did not want to commit himself to the view that a mala fide application would also not have been time barred. "A case is only an authority for what it actually decides. *Quinn* v. *Leathem* (12) (at p.506) None of these cases can therefore be taken to be an an authoritative pronouncement in support of the contention that an application for execution although apparently valid was bad in law because the secret intention of the decree-holder was not to pursue it, such intention being gathered from his subsequent conduct.

Such was the state of the rulings when the present Act (Act 9 of 1908) was passed. Article 182 of the new Act, reproduces the exact phraseology of Art. 179 of the Act of 1877 so far as the point before us is concerned. The legislature is presumed to know the current of the judicial pronouncements. When the language of a particular section of a statute has been interpreted in a particular way by the Courts and that language has been reproduced by the legislature in the new Act, we are entitled to assume that the judicial interpretation has been accepted, *Jay* v. *Johnston* (13). Between 1877 and 1908 there was no case which had expressly held that a mala fide application would be ineffectual. There were undoubtedly cases which had held that the question of mala fides did not arise. Even therefore if the language of the article be in any way ambiguous I would have no hesitation in saying that the view which prevailed previously should be adhered to.

Tyrrell, J. remarked in 1890 that the practice of this Court for years had been on the line suggested by him. I can say with confidence that the same practice continued till 1924. The case has had several hearings before several Benches and the parties are represented by experienced counsel. We also have tried to look up the various rulings, but no one had discovered any case up to 1924 which would make an enquiry into the bona fides of an application for execution necessary, even when it is made to the proper Court and is for all appearances in accordance with law. The first case in which stress was laid on the bona fides of the application is that of *Sheo Prasad* v. *Naraini Bai* (1). The full judgment is reported in 24 *A. L. J.* p. 137. That case has been sufficiently explained by my learned brother Banerji, J., who was a member of the Bench which decided it.

When it was shown that the relief asked for in the previous application, viz., to attach and sell property not situated within the jurisdiction of the Munsif, was such as the Court could not grant it, the application was not in accordance with law and the case could have been disposed of on that point alone. Whether in such a special case the question of bona fides or mala fides of the application arises is not a point before us and I need not express any opinion on it. But there are no doubt certain general principles laid down in the judgment and certain general observations made which if taken literally would indicate a wider scope of the pronouncements. This is further confirmed by the elaborate examination of the previous authorities and the quotation of passages where the word 'bona fides' occurs as well as the attempt to distinguish the Full Bench case of *Eshan Chandra Bose* (5). After considering the authorities conclusion is noted at p. 145 in the following words :

"We think that it is clear from the cases later in date that we have quoted, that the principle has been frequently recognized that the bona fides or mala fides of the earlier application is an important ingredient in determining whether that application is effective to save limitation for the later application ; though the bona fides or mala fides of the later application cannot be judged at the time that it is presented from anything that has gone before and, therefore, cannot at the time of presentation be entered into."

(12) [1901] A. C. 495=70 L. J. P. C. 76=17 T. L. R. 749=65 J. P. 708=50 W. R. 139 =85 L. T. 289.

(13) [1893] 1 Q. B. 25.

In my opinion if the previous application for execution is made to the proper Court and is in accordance with law and in the prescribed form and in that way fulfils the conditions required by the Civil Procedure Code, it is not proper for the execution Court to hold an enquiry as to the intention with which that application might have been filed and to disregard it after satisfying itself that the subsequent conduct of the decree-holder shows that he had no serious intention of prosecuting it The case where the application itself says or the decree-holder admits that he does not in reality want to execute the decree but merely files the application for the purpose of gaining time may be one in which the application is not in accordance with law.

The case of *Ram Bahadur Singh* v. *Rahat Ali Khan* (14) decided by Dalal, J., can also be treated as one where the application was not in accordance with law inasmuch as the particulars were wrongly entered. It has been brought to our notice that the Oudh Chief Court in *Ruqaya Bibi* v. *Prag Tewari* (15) has dissented from the view expressed in *Sheo Prasad* v. *Naraini Bai* (1).

My answer to the question referred to is in the negative.

Banerji, J.—The question which has been referred to a Full Bench is as follows :

"If a decree-holder makes any application or takes any step mentioned in Col. 3, Art. 182, Lim. Act, will such step be ineffectual to keep his decree alive and to save limitation, unless he can satisfy the Court that he took such step or instituted such proceeding with a genuine intention of obtaining execution of his decree, if reasonably possible, and that he did not abandon such proceedings, except upon a genuine belief that it would not be reasonably possible to obtain execution."

The Kayastha Trading and Banking Corporation of Gorakhpur Limited obtained a decree for money against Sita Ram Dubey on 14th February 1916. On 16th August 1927 Miss Chatterji, who had a decree against the Kayastha Trading Company, attached the decree against Sita Ram, and on 23rd July 1918 upon an application by her to execute the decree in favour of the Kayastha Company, it was transferred to the Collector of the district in which the respondent resided for execution of it under the provisions of Sch. 3, Civil P. C. Before the decree was transferred the company assigned the decree to one Raghunath Prasad, who applied to the Court which had passed the decree to have his name recorded as the transferee from the decree-holder and to obtain personal execution against Sita Ram respondent This application was presented on 13th February 1919 and on 24th February 1919 the Court rejected the application of Raghunath Prasad. On 14th February 1921 Raghunath Prasad retransferred the decree to the company. On 21st January 1919 the company had deposited process fee for execution of the decree by the Collector, but it appears that the decree was not executed by the Collector, who on 23rd April 1920 returned the decree to the civil Court and the application for execution was struck off. The company applied for execution of the decree on 10th January 1922, and a notice was duly issued under the provisions of O. 21, R. 22, Civil P. C., by an order of 7th February 1922. It appears, however, that on 18th March 1922 the application for execution was struck off for default in payment of the costs of attachment.

On 6th January 1925, the appellant company presented a fresh application for execution of the decree. Objections were taken by the judgment-debtor that the decree was time barred. The Court of first instance repelled the contention of the judgment-debtor, but the lower appellate Court held that the decree was barred by limitation on the ground that more than three years had elapsed between the date of the application for execution by Miss Chatterji (viz., 23rd July 1918) and on 10th January 1922 when the appellant company again applied for execution. The appellant company came in appeal before this Court and the case was heard by a Bench of two Judges. It was contended before that Bench that the application made by Raghunath Prasad was sufficient to keep the decree alive, though the Court below had held that this application was not bona fide and was a colourable application filed simply to show that Raghunath Prasad was the assignee of the decree. It was further contended by the appellant that in calculating the period of limitation

(14) A. I. R. 1926 All. 376.
(15) A. I. R. 1928 Oudh 237=3 Luck. 580.

under Art. 182, Limitation Act, the period during which the decree was with the Collector for execution should be excluded. The Bench hearing the appeal came to the conclusion that the period during which the decree was with the Collector should be excluded, and that therefore the appellant's application for execution on 10th January 1922 was within time.

The advocate for the respondent contended on the authority of the case of *Sheo Prasad* v. *Naraini Bai* (1) that the case should be remanded to the lower appellate Court for findings on the question whether the application made by the appellant company on 10th January 1922 was a bona fide application and also the proceedings taken in consequence thereof were made and taken with the bona fide intention of executing the decree if that was reasonably possible to do so. The Bench differing from the conclusion that was arrived at in the case of *Sheo Prasad* v. *Naraini Bai* (1) referred the question I have set out above for determination by a Full Bench.

In considering the question of law that arises in each case one has to ascertain the facts and without the ascertainment of the facts it is not possible in every case to lay down general propositions of law. I may refer to the observations of Lord Halsbury in *Quinn* v. *Leathem* (12) (at p. 506):

> "Now, before discussing the case of *Allen* v. *Flood* (15a) and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides."

The facts of the case of *Sheo Prasad* v. *Naraini Bai* (1) are to be found in detail in the judgment of this Court at p. 137 *of* 24 *A. L. J.* They are that Sheo Prasad obtained a simple money decree against Ishri Prasad, husband of the respondent, in the Court of the Munsif of East Budaun on 9th March 1915. On 4th March 1921 Sheo Prasad presented a second application for execution. The relief asked for in that application was that certain property be attached and brought to sale. There was a reference about the heirs of the deceased judgment-debtor, but it appears that there had been a previous application to bring the heirs on the record. On 19th April 1921 the attention of the decree-holder was drawn by an office report that all the property of which attachment and sale was sought was outside the jurisdiction of the Munsif of East Budaun, and the decree-holder was directed by the Court to explain how the Court of the Munsif of East Budaun had any power to proceed against the property entered in the application for execution. On 29th April 1921 the decree-holder not having furnished an explanation, the application was dismissed and on that date the decree-holder took back all the process fee that he had deposited in Court.

On 12th January 1923 Sheo Prasad applied for execution of the decree by sale of the property within the jurisdiction of the Munsif of East Budaun. The Munsif dismissed the application holding that it was barred by limitation, as the previous application of 14th January 1921 was not in accordance with law as the property sought to be sold was outside the jurisdiction of the Court. In appeal the Subordinate Judge held that the application was made to the proper Court but was not in accordance with law and did not save limitation.

The decree-holder appealed to this Court and it was contended by the counsel for the appellant in that case that the application of 4th March 1921 was made to a proper Court and that the fact that the property specified as liable to attachment was outside the jurisdiction of the Court did not make the application one not in accordance with law. I may mention that had the last application been filed in Court a few days before it was actually filed or if the time which had been spent by the decree-holder in prosecuting his application of 4th March 1921 could have been excluded, there could be no question of the right of Sheo Prasad to execute the decree which had been passed against Sheo Prasad. The only point which was for decision in that case was whether the proceedings on the application of 4th March 1921 constituted an applica-

(15a) [1898] A. C. 1=67 L. J. Q. B. 119=62 J. P. 595=46 W. R. 258=77 L. T. 717.

tion in accordance with law to the proper Court for execution or to take some step-in-aid of execution. It was decided that the application of 4th March was not an application in accordance with law, and, therefore, did not save limitation. The time taken by Sheo Prasad in executing the decree from 4th March 1921 to 19th April 1921 could not be excluded so as to bring the application of 12th January 1923 within time. At p. 140 *of* 24 *A. L. J.* will be found the following passage:

"At an early stage of the case counsel for the appellant was asked whether, if it were to be held in the circumstances that the application was not made with any bona fide intention of proceedings to execution but merely with the intention of saving limitation, it could rightly be held to be "an application for execution" or "a step-in-aid of execution."

This question naturally arose upon the facts of that particular case and in considering the question of the action of the decree-holder being in good faith or not all the cases on the subject were referred to. At p. 146 after reviewing the facts the conclusion arrived at was that under these circumstances it is impossible to hold that the application of 4th March 1921 was a bona fide application with the intention of obtaining execution :

"It was merely a colourable application intended to save limitation and with that intention only. Such applications made only with the intention of keeping the decree alive, have it may further be noted, since 1877 been dropped out of the appropriate Article of the Limitation Acts".

It was further held as to the second point that the application of 4th March 1921 was not in accordance with law in that it asked the Court to do something which it was not competent to do. As I have already pointed out the facts of the case must be borne in mind before it can be said that what was held in *Sheo Prasad* v. *Naraini Bai* (1) is applicable to the facts of the present case.

In the present case the application for execution dated 10th January 1922 fulfilled the requirements of O. 21, R. 10, Civil P. C., and was entertained by the Court on 7th February 1922. Upon this application which was accepted by the Court as a good application notice was directed to be issued to the respondent under O. 21, R. 22, and as a matter of fact a notice was issued. It could, therefore, not be said that the application was not an application in accordance with law to the proper Court, and under Cl. (6), Lim. Act of 1908, the time from which period begins to run is the date of issue of notice to the person against whom execution is applied for.

I am, therefore, of opinion that in the present case the answer to the reference to the Full Bench must be in the negative.

King, J.—The facts have been fully stated in the foregoing judgments of my learned brothers.

The question was whether an application made on 6th January 1925, for the execution of a decree, was barred by limitation. The decision depended upon the question whether a previous application made on 10th January 1922, to execute the same decree, was effectual to save limitation. The Division Bench which heard the appeal held that the previous application was within time, and held (not expressly but by implication) that it had been made in accordance with law and to the proper Court. Under Cl. 5, Col 3, Art. 182 Sch. 1, Lim. Act 1908 the previous application was prima facie effectual to save limitation. The learned Judges were prepared to decide accordingly, but they doubted whether they were justified in doing so in view of the ruling in *Sheo Prasad* v. *Naraini Bai* (1), without first coming to a further finding, viz., that the previous application had been made with the bona fide intention of obtaining execution of the decree, and not merely for the purpose of saving limitation.

So the question for our consideration is whether an application which purports to be an application for the execution of a decree, and which is made in accordance with law to the proper Court, is ineffectual to save limitation unless the decree-holder satisfies the Court that he prosecuted the application with due diligence, and thus proves that he made the application with the genuine intention of obtaining execution of the decree.

The answer depends upon the interpretation of Cl. 5, Art. 182. This gives a period of three years for an application for the execution of a decree from :

"the date of applying in accordance with law to the proper Court for execution ..... of the decree."

It appears, therefore, that three conditions must be fulfilled in order to attract the provisions of this Clause: (1) an application must be made for the execution of the decree; (2) in accordance with law; (3) to the proper Court.

In the present case conditions 2 and 3 were fulfilled and there is no controversy about them. The application was made to the proper Court. It was also made in accordance with law, and was accepted as such by the Court, which actually issued a notice to the judgment-debtor under O 21, R. 22, on 7th February 1922. I may here remark, in passing, that in my opinion the issue of this notice might well have been treated as decisive of the question of limitation, since under Cl. 6, Art. 182, a period of three years began to run from the date of issue of this notice. This point, however, was not considered by the Courts below or by the Bench which made this reference.

Now remains the question what is required to fulfil the first condition, or in other words what is meant by "an application for the execution of a decree." I accept the view expressed by the learned Judges in the ruling cited that the words "for execution" mean "for the purpose of obtaining execution." The application must no doubt purport to be for the purpose of obtaining execution, but I think the applicant's intention or purpose should be ascertained solely from the terms of his application and his conduct at the time of making the application. If the application purports to be for the execution of the decree and is in accordance with law, and is accompanied by such process fees as may be required—in short if the applicant does everything necessary to enable the Court to issue its process for the execution of the decree—then in my opinion the application is "an application for the execution of the decree" within the meaning of Cl. 5. I hold that the applicant's "genuine intention" and his subsequent conduct are alike immaterial. The legislature does not compel the Court to investigate the motive which prompted the decree-holder to make the application. It may be that he had no hope of obtaining satisfaction of his decree, and made his application with a view to harass the judgment-debtor, or to save limitation. It would be difficult in my opinion to ascertain his motive or "genuine intention."

Fortunately the Courts are not compelled to make the attempt. I am unable to read the words "for execution of the decree" as meaning more than "purporting to be for the purpose of obtaining execution of the decree." I see no justification for reading into the words any requirements of good faith or "genuine intention" on the part of the applicant. That would be putting a very strained interpretation upon simple words.

My view derives support from an examination of the language used to describe other suits, appeals or applications in Sch. 1, Lim. Act. They are nearly all described as being "for" something, e. g. "for money payable," "for possession," "for compensation," "for leave to appeal" and so forth. Now in every case the description of suits for the purpose of limitation will be determined by an examination of the plaint, i. e., by the alleged facts and cause of action and the reliefs sought. The Courts are never called upon to consider (for the purpose of deciding which article of the schedule is applicable) whether the suit was instituted in good faith and whether the plaintiff really wanted to get the relief claimed. In short, a suit is taken to be what it purports to be.

For instance, a suit is instituted purporting to be a suit for specific performance of a contract. The plaintiff may institute it in bad faith without really expecting or desiring to obtain the relief claimed. His real intention may be to compel the defendant to pay up a time barred debt as the price of getting the suit withdrawn. Nevertheless, if the suit is framed as one for specific performance of contract it will be held to be a suit of that description within the meaning of Art. 113. The plaintiff's good faith or "genuine intention" are quite immaterial. I conclude, therefore, that (for the purposes of Sch. 1, Limitation Act) a suit or appeal or application is to be taken to be what it purports to be, and I see no reason why an application for execution of a decree should form an exception to the general rule.

It should be noted also that where "good faith" and "due diligence" are material factors, as in S. 14, then we find express provisions to this effect. On this ground also I think it is wrong to read into Cl. 5, Art. 182, requirements of good faith and due diligence which have been omitted by the legislature.

The case law on this point has been exhaustively reviewed and discussed by my learned brothers and I feel it unnecessary to comment upon the cases in detail, I would, however, lay stress upon one salient point that emerges from the discussion. The clause which we are considering was enacted in its present form in Art. 179, Lim. Act of 1877. Ever since that date the language of the clause has remained unchanged, so its meaning has been the subject of judicial interpretation for over 50 years. Not a single case has been cited before us in which it has been held, upon an interpretation of this clause that an application for execution made in accordance with law to the proper Court was ineffectual to save limitation, upon the ground that it was not made with a bona fide intention of obtaining execution. It may fairly be argued therefore that the trend of a long series of judicial decisions is in accordance, and not in conflict, with the view that I take of the interpretation of the clause, viz, that the applicant's "good faith" and "genuine intention" in making an application for the execution of a decree are immaterial.

I answer the question referred to us in the negative.

Sen, J.—The point referred to the Full Bench arises out of certain execution proceeding initiated by the Kayastha Co. Ltd. in liquidation through Babu Narain Prasad Asthana, liquidator. The issue referred to is as follows :

"If a decree-holder makes any application or takes any step mentioned in column 2, Art. 182, Lim. Act, will such step be ineffectual to keep his decree alive and to save limitation, unless he can satisfy the Court that he took such step or instituted such proceedings with a genuine intention of obtaining execution of his decree, if reasonably possible, and that he did not abandon such proceedings, except upon a genuine belief that it would not be reasonably possible to obtain execution ?"

The Kayastha Co. Ltd. of Gorakhpur obtained a simple money decree against the respondent Pandit Sita Ram Dubey, on 24th February 1916. One Miss Chatterji in execution of her simple money decree against the Kayastha Co. Ltd. aforesaid attached this decree on 6th August 1917.

The first application for execution was made by the attaching creditor, on 23rd July 1918, in which she prayed for attachment and sale of some ancestral revenue-paying property belonging to Sita Ram Dubey. The talbana or process fee was duly deposited, and subsequently the execution of the decree was transferred to the Collector by order dated 10th December 1918. These proceedings proved infructuous and the case was sent back to the civil Court on 23rd April 1920.

During the continuance of the attachment at the instance of Miss Chatterji, the Kayastha Co. Ltd. assigned the decree to one Raghunath Prasad on 9th December 1917.

The second application for execution was made by Raghunath Prasad on 13th February 1919, while, as yet, the execution proceedings were pending before the Collector. In this application, Raghunath Prasad prayed for the substitution of his name in place of the original decree-holders and for the enforcement of the decree by the arrest of the judgment-debtor. This application was dismissed on 24th February 1919 in default of prosecution.

On 24th October 1921, Raghunath Prasad reconveyed the decree to the plaintiff firm.

The third application for execution was made by the Kayastha Co. Ltd. on 10th January 1922. This application was dismissed for default of prosecution on 18th March 1922.

The fourth and the last application for execution was made on 6th January 1925. The application prayed for the issue of the usual notice to the judgment-debtor and for the execution of the decree by attachment and sale of the property given in the inventory, the inventory to be filed hereafter.

The judgment-debtor resisted the application on the ground that the decree was time barred, and that no application had, in fact, been made on behalf of the decree-holder for execution of the decree on 13th February 1919. These objections, however, were traversed by the decree-holder by his application dated 21st August 1926.

The objections of the judgment-debtor were repelled by the primary Court and the execution was directed to proceed. The judgment-debtor appealed on the ground that the application for execution was time barred and that a limitation was not saved either by the fact of Miss Chatterji depositing talbana on 21st January 1919 or by the subsequent application for execution dated 10th January 1922.

The appeal was heard by the Second Additional Subordinate Judge of Gorakhpur, who reversed the decision of the trial Court and dismissed the application for execution as barred by time. He held that the payment of process fee, was not a step in aid of execution, that the application of Raghunath Prasad dated 13th February 1919 was not a step in aid of execution inasmuch as it was not "a bona fide application for putting the decree in execution" and was no more than :

"a colourable in a very thinly disguised pretence of a desire to obtain execution when he really did not want execution at all."

These words appear to have been adopted from a judgment of this Court, which I shall have to refer to later on. He also held that the sale of the decree to Raghunath Prasad was not a bona fide transaction and that the original decree having been transferred to the Collector for execution, the civil Court was not competent to entertain the application as the said Court had been asked to do something which it was not competent to do. The learned Additional Subordinate Judge wound up his judgment with the observation that

"the application of 10th January 1922, which was preceded by the application of 23rd July 1918 was clearly preferred after three years and as the payment of talbana and the application of Raghunath Prasad of 13th February 1919 are not considered to be steps-in-aid of execution, the decree is barred by time."

The view of the learned Subordinate Judge was that the application for execution dated 13th February 1919 should be brushed aside because it was an application made to a Court which could not entertain it, that it had been made mala fide merely to keep the decree alive and not with the bona fide intention of obtaining execution, that the period, which intervened between 10th December 1918, when the execution was transferred to the Collector and 23rd April 1920, when the case was returned to the civil Court could not be deducted and that the application, dated 10th January 1922, was beyond three years from the date of the first application for execution which was made on 23rd July 1918.

The learned Subordinate Judge in support of his view on the question of limitation relied upon a pronouncement of this Court, *In re Sheo Prasad* v. *Naraini Bai* (1). The judgment has been reproduced in full in the *Allahabad Law Journal Reports*.

The decree-holder appealed to this Court on the ground that the application dated 6th January 1925, was not barred by limitation:

"that the application dated 13th February 1919, saved limitation and was a step-in-aid of execution,"

that the said application was bona fide and was made to the proper Court and that there were other steps also which saved limitation.

The decree-holder appears to have raised the point for the first time in second appeal during the progress of the argument that a notice having been issued to the judgment-debtor under O. 21, R. 22, Civil P. C., on 7th February 1922, and that the present application for execution being within three years from the date of issue of notice to the person against whom execution was applied for to show cause why the decree should not be executed against him, the present application was within time under Art. 182 (6), Lim. Act. This point was not raised or argued either before the trial Court or the lower appellate Court. The question raised is not a pure question of law and for the determination of the question, it would be necessary to determine whether, as a matter of fact, a notice was issued to the judgment-debtor under O. 21, R. 22, Civil P. C. The judgment-debtor retorted by saying that the decree-holder was not entitled to the benefit of the issue of notice, unless an application for execution had been made in accordance with law. This matter, however, need not arrest our attention at the present stage of the appeal.

The lower appellate Court did not hold that the application, dated 10th February 1922, was not a bona fide application or was not in accordance with law. The decree-holder contended that as the present application was within three years of the aforesaid application, the execu-

tion of the decree was not time barred. The judgment-debtor contended that the application, dated 10th January 1922, was not a bona fide application nor was the previous one, dated 13th February 1919. The question was argued whether it was permissible to have a roving examination into all the previous applications in order to ascertain whether there might not be a weak link in the chain. There can be no question that there may be circumstances justifying an examination into the legality or propriety of previous applications in counting the period of limitation.

In *Sheo Prasad* v. *Naraini Bai* (1), the decree-holder, who had obtained a decree on 9th March 1915 from the Court of the Munsif of East Budaun, applied for execution on 12th February 1918. On 23rd January 1920, this application was struck off with the consent of the decree-holder. On 4th March 1921, he made a second application to the Munsif of East Budaun in which he prayed for attachment and sale of certain property which was outside the jurisdiction of the Munsif of Budaun. The application was dismissed on 29th April 1921, and the decree-holder took back all the process fee that he had deposited. On 12th January 1923, a fresh application was made for execution against property which was within the jurisdiction of the Munsif of East Budaun. The Courts below held that this application was time barred and limitation was not saved by the application dated 4th March 1921, which was not one in accordance with law. On appeal a Bench of this Court held that the application of 4th March 1921, was not an application for execution or a step in aid of execution and that the application of 12th January 1923, was barred by limitation. It further held that the application was not in accordance with law, because it was made to a Court which was not competent to grant the relief asked for.

It may be submitted with respect that on the facts found, the conclusion reached by this Court was the only possible conclusion.

The learned Judges made certain general observations which, it is submitted, were not necessary for the decision of the case. These observations, which have seriously influenced the judgment of the lower appellate Court may be reproduced:

"On general principles it would seem clear that the legislature where it used phrases "application for execution" and "steps in aid of execution" had in mind a bona fide intention on the part of the decree-holder to proceed with his right to have execution. It does not seem possible that the legislature should have ever contemplated an indefinite period being added to the life of a decree by permitting a decree-holder to take colourable steps in a very thinly disguised pretence of a decree to obtain execution when he really did not want execution at all, but only wanted to secure a further period of limitation during which the amount of his decree might go on increasing. It would, therefore, seem on the face of it a proper interpretation of the words "for execution" and "steps-in-aid of execution" that the decree-holder must really be desiring execution and that the words cannot be read as "an application made with the sole object of extending the period of limitation" and "a step taken with the sole object of extending limitation." The words "for execution" mean "for the purpose of obtaining execution" & the words "step in aid of execution" mean "step taken for the purpose of obtaining execution. This, which appeared upon a consideration of Art. 182 to be natural and proper interpretation. research has shown to have the support of weighty judicial authority, though the decisions would seem to have been, to some extent lost sight of, or, even if we may say so, misinterpreted."

A considerable mass of judicial pronouncements ranging over a long period of time has been placed under contribution in support of the view quoted above.

In Re, Roy Dhunput Singh v. *Mudhomotee*: (2), an application for execution was made on 24th April 1869 for execution of a decree. This application was preceded by an application dated 20th March 1866, in which the decree-holder alleged that the judgment-debtor had subsequently taken out a decree against a debtor of his own and sued out execution and caused some property to be sold and that the purchase money was received on deposit. The decree-holder prayed that the said amount be attached and be paid to his mukhtar. This petition was to obtain execution of a sum of money which it was not possible that the execution could reach. The question in this case was whether the application dated 20th March 1866 was a proceeding to keep the original decree in force, the question depending on S. 20, Act 14 of 1859, which provided that

"no process of execution shall issue from any Court not established by a Royal Charter to enforce any judgment, decree or order of such Court unless some proceeding shall have been taken to enforce such judgment, decree or order to keep the same in force within three

years next preceeding in a Court having jurisdiction."

Their Lordships of the Judicial Committee were considering the question as to whether the application dated 20th March 1866 was a proceeding within the meaning of S. 20, Act 14 of 1859, and their Lordships came to the conclusion that the proceeding, though abortive, was a proceeding within the meaning of the S. 20, Act 14 of 1859. Nothing beyond this was decided or intended to be decided in this case.

In *Hira Lal* v. *Budri Das* (3) the decree sought to be executed was one dated 14th January 1867. On 3rd December 1868, the Judge sent a decree to the Subordinate Judge to be executed by him. The Subordinate Judge struck out the execution proceedings off the file on 3rd April 1869. The decree-holder having reinstituted his application for execution on 9th April 1879 was met with a plea of limitation. The High Court held that the application for execution was time barred. The Privy Council reversed the decision upon the ground that :

"although S. 14, Act 14 of 1859, did in terms, apply to a claimant engaged in prosecuting a suit upon the same cause of action against the same defendant ..... bona fide and with due diligence in any Court of Judicature which from a defect of jurisdiction or other cause shall have been unable to decide upon it, etc., the principle underlying the said section could be extended to a proceeding taken under S. 20 of the aforesaid Act."

In Act 14 of 1859 there was no section corresponding to S. 14, Cl. (2), Lim. Act, now in force. Their Lordships observed :

" The Act does not say and their Lordships are of opinion that a proceeding taken bona fide and with due diligence before a Judge whom the party bona fide believes, though erroneously to have jurisdiction, specially when the Judge himself also supposes that he has jurisdiction and deals with the case accordingly, is a proceeding to enforce the decree within the meaning of S. 20."

In this case their Lordships quote with approval the decision of *Roy Dhunput Singh* v. *Mudhomotee Dabia* (2) which has already been referred to.

Although the words " bona fide " do not occur in S. 20, Act 14 of 1859, the words of this section were imperative so far that they insisted upon the existence of some previous proceeding taken to enforce such judgment, decree or order to keep the same in force within three years next preceding the application for such execution. This section was construed by the Calcutta High Court in a number of cases of which *Lakkhi Narain* v. *Ram Chand Sarkar* (16) may be cited as an example. It was held that :

" an application for execution of a decree, followed by the issue of notice, if made bona fide, (i. e,, with a real intention and desire on the part of the decree-holder to execute his decree) is a proceeding within the meaning of S. 20, Act 14 of 1859, to keep alive the decree."

It was observed by Jackson, J., in *Eshan Chundra Bose* v. *Pran Nath Nag* (5) that :

" under the law of limitation which governed these matters before Act 9 of 1871 came into force, the Courts were held to be bound to ascertain that within three years preceding such application, some proceedings, that is, some bona fide and not colourable proceedings had been taken to enforce the judgment."

Act 14 of 1859 was repealed by Act 9 of 1871. Art. 169, Sch. 2 of the latter Act provided that the period of limitation prescribed for execution of a decree or order of a civil Court is from the date of the decree or order or where there is an application made from the date of applying to the Court to enforce or keep in force the decree or order or where there is a notice issued, etc.

In *Rohineenandan Mitter* v. *Bhagwan Chandra Roy* (6) Markby and Mitra, JJ., ruled that by the new law of limitation it was intended that there should be two specific dates from which the three years should be computed without reference to any enquiry whether the proceedings were taken for the purpose of enforcing the decree or were merely colourable for the purpose of keeping the decree alive. In *Eshan Chandra Bose's* case their Lordships commented upon the undesirability of leaving the decree-holder without any check or restraint in the matter of executing his decree, but they observed that it was better that those consequences should be exposed by actual examples and brought to notice in judgments of the Courts and the remedy left to the legislature which can properly and effectually deal with them, than that the Courts should, by a forced construction, endeavour to mitigate by their own authority the action and rigour of the law.

In *Mangal Pershad Dicshit* v. *Girjakant Lahiri* (4) the decree was passed in 1851, when there was no legislative enactment of limitation for the execution

(16) 3 W. R. 63.

of decrees. A 12 year's bar of limitation was adopted by a rule of analogy derived from Regulation 3 of 1793. Before the expiry of the 12 years, Act 14 of 1859 was placed upon the Statute Book. The numerous applications which were made for execution or for steps in aid of execution are set out in detail in the judgment of the Privy Council. Their Lordships ruled that the case was governed by Act 14 of 1859 and not by Act 9 of 1871 and that the decree was within time for a variety of reasons (with which we are not concerned in the present appeal), including this reason that there was no finding of either of the Courts below that the several proceedings were not bona fide for the purpose of enforcing the decree or keeping it in force. It is clear, therefore, that any proceeding taken under Act 14 of 1859 which had the effect of keeping the decree in force and which might not have the effect of enforcing the decree was enough to save limitation.

In *Mahtab Kuar* v. *Shiam Sundar Lal* (7) a decree was passed by the Subordinate Judge of Agra on 24th February 1881, which was transferred for execution to the Court of the Subordinate Judge of Aligarh. Certain execution proceedings were taken on 29th April 1881. The execution case was struck off on 1st September 1881. An application was made on 22nd February 1883:

"The application was not prosecuted and no talbana fees were deposited to secure the due process of law but on 22nd August 1883, as the order endorsed upon the application shows, the decree-holder's pleaders stated that they did not wish to prosecute the application and then the order of the Court was that the execution case was to be struck off the file, in consequence of want of prosecution on the part of the decree-holder. The application for execution was made on 17th January 1885 and the previous application dated 22nd February 1883 was relied upon as affording a fresh starting point of limitation under Art. 179, Sch. 2, Lim. Act. Cl. (4), Art. 179, provided that the time was to run from the date of applying in accordance with law to the proper Court for execution or to take same step-in-aid of the execution of the decree or order."

It was argued in the aforesaid case that the application dated 22nd February 1883 was not for execution or to take some steps in aid of execution and that the decree-holder's expression of intention not to prosecute her application amounted to a withdrawal of it. The Court held that the decree-holder expressly withdrew the application without having obtained the permission of the Court to present a future application for execution of the decree and that the present application was barred by S. 373, Civil P. C. read with S. 647 of the Code. The judgment, however, contained the following observation:

"An application made ostensibly for executing the decree, which application is not shown to have been made as a bona fide step in aid of execution, such want of bona fides being indicated, not only by the omission to deposit the talbana fees, but also by the express statement of the pleaders withdrawing the application does not amount to a step in aid of execution such as Art. 179, Sch. 2, Lim. Act, contemplates. I, however, do not decide this point in this case."

It is submitted that when the application itself was withdrawn there was no application before the Court which could be treated as a step in aid of execution to give a fresh starting point of limitation. This case therefore is of no avail to the respondent. *Chhattar* v. *Newal Singh* (8) was a case in which the decree-holder had obtained a decree for possession of the property as usufructuary mortgagee and for mesne profits. The decree for mesne profits was sought to be executed by attachment and sale of the mortgaged property. On 7th December 1886, they sought to execute the decree by sale of the mortgaged property but the application was rejected on the ground that it offended against S. 99, T. P. Act. This was preceded by an application dated 21st August 1886, the nature of which is not clear from the report. The questions raised in the appeal were whether the application dated 21st August 1886 or the 7th December 1886 was in accordance with law? All that was ruled in this case was that the terms 'applying in accordance with law' connoted the making of an application to the Court to do something in execution which by law that Court was competent to do. In order that an application should be in accordance with law or a step in aid of execution it is necessary that the application should be to the proper Court, that it should fulfil the formalities required by law and should ask for such reliefs as the application was entitled to under the terms of the decree and was not opposed to any statutory enactment.

In *Mangal Sen* v. *Baldeo Prasad* (11) the respondents obtained a simple money decree on 24th July 1884 against Mangal Sen. An application dated 22nd Septem-

ber 1887 was relied upon as a step in aid of execution which had the effect of making the application dated 4th September 1890 within time. The application dated 22nd December 1887 contained the following prayer:

"After notification by means of attachment of the moveable property of which a list will hereafter be filed, the decretal money may be realized. At present for the purpose of saving limitation this application is made owing to the defendant having become insolvent.

Upon the very face of it, the application was not in accordance with law no inventory of the property sought to be attached having been detailed or set out in the application. The application moreover stated that it was not intended to be an application for execution at all but was merely an application for saving limitation. Now that Act 9 of 1871 had been repealed, this application could not be treated either as in accordance with law or as a step in aid of execution. Mahmood, J., observed :

"I conclude that the application was simply a nominal transaction and a fictitious ceremony for the purpose as the application expressly states only of saving limitation."

There was obviously no desire on the part of the decree-holder to enforce his rights by execution of the decree and the application dated 22nd December 1887 was no more than dropping a letter into a post office box as if such a ceremonial would answer the purpose of the law in relation to the execution of the decree. The application was not in accordance with S. 235, Civil P. C. No relief was claimed against the judgment-debtor. The learned Judge describes the character of the application as a nominal transaction and a fictitious ceremony in contradistinction to an application in accordance with law. In determining the question whether the application answered the requirements of law the Court was competent to take into consideration the purpose expressly stated in the application itself.

In *Adhar Chandar Das* v. *Lal Mohan Das* (17) the question which arose was whether the applications dated 6th June 1890 and 5th June 1893 were according to law. Maclean, C. J. ruled that "in accordance with law" did not mean that it must of necessity be a successful application. He further observed that the language of Art. 179 ought not to be strained in favour of a judgment-debtor who had not paid his debt. Banerji, J. in the concluding portion of his judgment observed :

"I do not think we should be doing right in straining the law and in holding that an application made bona fide with the object of obtaining statisfaction of a decree should be held to be not in accordance with law merely because the Court in which the application was made thought fit for some reason not to allow the same."

The bona fide nature of the transaction or otherwise was not an essential part of the issues, which called for determination-issues-which have been set out by the learned Judge at p. 782. All that was probably meant by the use of the word "bona fide" in the passage quoted above was that the application was in due accord with the legal formalities and that the relief claimed was such as the applicant was legally entitled to. It is not improbable that the word "bona fide" crept into the judgment unguardedly without any seriousness of purpose.

In *Gopal Chunder Manna* v. *Goshain Das Kale* (18) the case hinged upon the determination of the question whether an application dated 7th July 1891 was in accordance with law within the meaning of Art. 179 (4), Sch. 2, Lim. Act. It was conceded that the decree-holder was entitled to the exclusion of a certain period of time against some judgment-debtors under S. 14, Lim. Act. Whether an application was or was not in accordance with law had to be determined with reference to the circumstances of each case, and while on the one hand an application must be in substantial compliance with law in order that it may be regarded as one coming within the meaning of Cl. (4) on the other hand, it is not every informality that would vitiate an application and would take it out of that clause. Were it otherwise, bona fide applications for execution would fail to save limitation owing to trivial defects of form, a result which I do not think the legislature could have intended. The term "bona fide application" evidently does not mean an application which is made with intent to immediate execution of the decree. What is intended to be laid down in this case is a proposition of law well settled and well understood that an application which is in substantial compliance with law ought not to be treated as

(17) [1897] 24 Cal. 778=1 C. W. N. 676.

(18) [1898] 25 Cal. 594=2 C. W. N. 556 (F.B.).

a nullity if it contains certain errors or omissions, due to accident, inadvertence or hasty judgment. Maclean, C. J. insists upon the rule that the Article of Sch. 2 should be read according to the ordinary significance of the words used. The language of the Article is reasonably clear and in my opinion, the safer course is to construe it according to the ordinary meaning of the words used.

In *Jawahar* v. *Kamini Debi* (19) all that the Court held was that a proceeding to enforce a decree taken in a Court which was erroneously believed by the decree-holder to have jurisdiction was a bona fide proceeding within the terms of S. 14, Lim. Act.

The aforesaid cases fall under the following four groups:(1) Cases in which the decree-holder sought to exclude the time occupied in execution proceedings in a Court without jurisdiction on the ground that he had prosecuted in good faith and with due diligence These are cases in which S. 14, Lim. Act, has been either applied or the principle of the section been extended to execution proceedings.

(2) Cases in which the application for execution was not in strict conformity with law either owing to the omission of certain particulars in the application for execution itself, or to the omission on the part of the decree-holder to take some necessary steps where the defects were immaterial and not attributable to any mala fides on the part of the decree-holder. In such cases the defects were condoned and the application treated as in accordance with law

(3) Cases in which the decree-holder applied to a Court which had no jurisdiction and asked for a relief to which he was not entitled either under the terms of the decree. or under some statutory enactment or the application omitted some essential particulars as was required by the Code of Civil Procedure or by any other enactment in force. In such cases it has been held that the application is not in accordance with law and (4) cases in which the decree-holder after applying for execution either failed to take some necessary step in furtherance of his application or to rectify an error or omission which he had been ordered to amend or intimated to the Court that the object of his application was not to execute the decree but simply to save time. In such cases it was held that such an application was not in accordance with law and did not save limitation.

The aforesaid cases therefore do not support the view for which they were cited. The only section of the Limitation Act in which due diligence or prosecution in good faith has been prescribed by the legislature is S. 14. In none of the Articles of the Limitation Act, the presence of bona fides or of a good faith has been required by the legislature as one of the necessary ingredients for either the right of suit or the right of application. It ought not to be forgotten that the right to sue or the right to apply for execution is a substantive right. It cannot be hampered, restricted or taken away by a procedural statute like the law of limitation without any express provision being made by the legislature.

Article 182 prescribes a period of three years with reference to certain decrees and is not confined to decrees for money which carry interest. There is absolutely no ambiguity in the text. As was held in *Re Income-Tax Commissioners* v. *Pemsel* (20) (at p. 543):

"If the words of the statute are in themselves precise and unambiguous, no more is necessary than to expound these words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature."

It is not permissible to read into the context words which are not to be found there Where the application purporting to be for execution of a decree in terms of the relief available to the decree-holder under his decree has been made in proper form and to the proper Court, the requirements of Art 182, sub-S. (5), have been fully complied with. An application for execution evidently means an application which purports to be an application for the execution of a decree. The preposition 'for' in Cl. (5) is descriptive of the nature of the applications and governs the word 'execution.' Applying to take step-in-aid of execution' does not connote any intention on the part of the applicant to take a step in aid of execution. It is submitted therefore that the words 'for execution' in Art. 182, Cl. (5), do not mean 'for the purpose of obtaining execution' nor the words 'step-in-aid of execution' mean

(19) [1901] 28 Cal. 238=5 C. W. N. 150.

(20) [1891] A. C. 534.

'step' taken for the purpose of obtaining execution.' No duty is cast upon the Court to apply itself to the extremely difficult if not the impossible task of examining the mind of the decree-holder to find out whether his intention was to obtain an immediate execution of his decree or to obtain a mere extension of time. In *Halima Bibi* v. *Nishan Bibi* (9). Tyrrell, J. in construing Art. 179 (4), Sch. 2, Lim. Act of 1877, made the following remarks:

"Each application is within three years from the preceding one. The present application is dated 27th November 1888. The judgment-debtors plead that though it is in accordance with law and made to the proper Court, still it is a bad application because all the previous motions displayed no bona fides or industry or diligence. I cannot entertain this contention. The current of decisions of this Court for years has been to read the provisions of Art. 179 (4), Sch. 2. Lim. Act, as they stand in the Act, that is to say, to consider only whether the application was made in conformity with the procedure laid down for such application in the Civil Procedure Code, and whether it was made to the proper Court and not to import into the consideration of the question whether it is an application according to law or not, considerations derived from subsequent conduct on the part of the decree-holder or of the Court."

In *Debi Das* v. *Umrao Singh* (10) Mahmood, J. held that:

in computing the period of limitation prescribed by Cl. (4), Art, 179, Sch, 2, Lim. Act, no question of the bona fides of the previous application for execution arises."

I respectfully endorse the opinions indicated above, and hold that the aforesaid decision lay down the correct rule of construction.

In *Ruqaya Bibi* v *Prag Tewari* (15) Sir Louis Stuart, C. J. and Raza, J remarked as follows:

"We are unable to understand that the words 'application in accordance with law to the proper Court for execution' can be held to refer to anything more than what they state. In this case the decree-holder certainly made the applications. He made them to the proper Court. He made them for execution of the decrees. The applications were in proper form and demanded the remedy to which he was entitled. We fail to understand why the Court should examine the decree-holder's mind to know whether he really wished in his heart to obtain the satisfaction for which he asked or whether he did not so wish."

It is not necessarily an act of bad faith on the part of the decree-holder if at the time of applying for execution, his sole intention was merely to keep his decree alive. Where the judgment-debtor has no property and no funds and has no expectations in the near future, the decree-holder cannot be expected to obtain an immediate fruit of his decree. All that he can do under the circumstances is to keep the decree alive in the hope of something more favourable turning up in future. A decree-holder may succeed in allowing his interest to accumulate against the judgment-debtor. This, again, is not necessarily an act of bad faith on the part of the decree-holder. The judgment-debtor has all this time the use of the money; and the decree-holder, in law and equity is entitled to claim his interest. If the terms relating to the payment of the interest are harsh, it is open to the judgment-debtor to put an end to this trouble, by paying up the decretal amount. The interpretation which has been put upon Art. 182, cannot have the effect of indefinitely prolonging the life of the decree. Indeed, the legislature has provided ample safe-guards. The language of Art. 182 (5) is similar to that of Art. 179 (4), Act. 15 of 1877. Col 1 Art. 179 describes the nature of the application as being one for the execution of a decree or order of any civil Court not provided for by Art. 180 or by the Code of Civil Procedure S. 230. S. 230, Act. 10 of 1877, provided that the maximum time for the execution of a decree was 12 years. The above condition has been maintained in Art. 182, Lim. Act (9 of 1908) and S. 48 Civil P. C. (Act 5 of 1908).

My answer to the reference is therefore in the negative. If therefore a decree-holder makes any application or takes a step mentioned in Col. 1, Art. 182, Lim. Act, this is legally sufficient to keep his decree alive and to save limitation, no enquiry into the question whether the decree-holder had a bona fide intention to proceed with his right to have execution being either necessary or permissible.

Niamatullah, J.—The question referred to this Full Bench is as follows:

"If a decree-holder makes any application or takes any step mentioned in Col. 3, Art. 182, Lim. Act, will such step be ineffectual to keep his decree alive and to save limitation, unless he can satisfy the Court that he took such step or instituted such proceedings with a genuine intention of obtaining execution of his decree if reasonably possible, and that he did not abandon such proceedings, except upon a genuine be-

lief that it would not be reasonably possible to obtain execution."

The circumstances which led to the reference may be briefly recapitulated. The appellant before the Division Bench was the decree-holder, Kayastha Co. Ltd. whose application dated 6th January 1925 for execution of a decree passed as far back as 24th February 1916 was dismissed as time barred by the Subordinate Judge of Gorakhpur on appeal from the order of a Munsif of that district. The decree-holder avoids the bar of limitation by relying in the alternative, on two proceedings that were taken subsequent to the date of the decree and a previous application for execution by the decree-holder to be referred to hereafter. The first was taken by one Miss Chatterji, an attaching creditor, who applied on 23rd July 1918 for execution of the decree by sale of ancestral and revenue paying property of the judgment-debtor. Execution proceedings had to be transferred to the Collector under Sch. 3, Civil P. C., which was accordingly done by an order dated 10th December 1918. The Collector continued the execution proceedings till 23rd April 1920 when he returned the case to the civil Court. Why the proceedings before him were infructutous does not appear and is not material for the purposes of this case. The second was taken by one Raghunath Prasad to whom the decree-holder assigned his rights under the decree on 9th December 1917, subsequent to the attachment of the decree by Miss Chatterji. Raghunath Prasad applied on 13th February 1919 to the Court which passed the decree, for execution thereof, but the application was dismissed in default of appearance. Raghunath Prasad retransferred to the Kayastha Co. Ltd., the original decree-holders the rights that had passed to him by assignment. The decree-holder once more appeared on the scene and applied on 10th January 1921 for execution of his decree. Notice required by S. 48, Civil P. C., was ordered to be issued on 7th February 1921 but the application for execution was dismissed on 18th March 1922 for want of prosecution. The last application for execution was made on 6th January 1925 as to which the question is whether it is barred by limitation. The Division Bench has held that Miss Chatterji's application dated 23rd July 1918 gives a fresh start of limitation and that the period during which the execution proceedings were pending before the Collector should be excluded under para. 11 (3), Sch. 3, Civil P. C. This being so the application for execution dated 10th January 1922 was held to be within three years from the application (Miss Chatterji's) dated 23rd July 1918 and would save limitation for the last application, dated 6th January 1925, provided it be regarded as one 'in accordance with law' and made 'for execution of decree'. It was contended by the respondent that it should not be regarded as such, because it was not a bona fide application made for the purpose of obtaining satisfaction of the decree but was made only to obtain an extension of time. The second and the alternative case of the decree-holder, based on the proceedings taken by Raghunath Prasad, had the same complication, as the respondent urged that his application, dated 13th February 1919, like the decree-holder's application, dated 10th January 1922, was not a bona fide application. The contention was sought to be supported on the authority of *Sheo Prasad* v. *Naraini Bai* (1). On the facts of that case, the actual decision arrived at may be correct and could have been based on the ground that the application, from which limitation was to be computed, was not made to a proper Court ; but, as it stands, it rests on the wider ground, viz., that such application was not proved to have been made in good faith and could not for that reason, give a fresh start to limitation. The learned Judges who have made the present reference were not disposed to agree with this view of Art. 182 (5), Lim. Act. They have accordingly referred the question already mentioned for decision by a Full Bench.

The period of three years provided for by Art. 182 can be computed (inter alia) from

"the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree."

The language employed by the legislature in enacting Art. 182 (5) quoted above does not ex facie require any enquiry relating to the motive or intention of the person applying for execution or for some step-in-aid of execution and requires merely that it should be in con-

formity with the law governing such applications, contain a prayer for the decree being executed and be presented to a proper Court. The learned Judges who decided the case *Sheo Prasad* v. *Naraini Bai* (1) however, seem to think that no application, otherwise in accordance with law and presented to a proper Court can be regarded as such to save limitation unless the object behind the application was to obtain satisfaction of the decree. The observation (at *p.* 470 *of* 48 *All.*) that:

"on general principles it would seem clear that the legislature when it used the phrases "application for execution" and "step-in-aid of execution" had in mind a bona fide intention on the part of the decree-holder to proceed with his right to have execution. It does not seem possible that the legislature should have ever contemplated an indefinite period being added to the life of a decree by permitting a decree-holder to take colourable steps in a very thinly disguised pretence of a desire to obtain execution when he really did not want execution at all, but only wanted to secure a further period of limitation during which the amount of decree might go on increasing."

They founded their view, to a large extent, on the words "for execution" which, they think, signify that the application should have for its object a genuine desire to obtain satisfaction of the decree and should not be a mere device to obtain an extension of time for a future application. With the utmost respect, I would point out that the words, "for execution" or "to take a step in aid of execution" are merely descriptive of the application with reference to its contents especially the relief asked for therein. Sch 1, Lim. Act, abounds in expressions of that kind, e,g., "suit for possession," "suit for redemption," "suit for declaration" etc., and "application for rehearing" (Art. 169), "application for leave to appeal" (Art. 170), "application for review (Art. 173) etc." A suit for declaration is none the less a suit for declaration because the plaintiff's object in instituting it is to obtain stay of an auction sale of the property in dispute, case of common occurrence nor does an application for review of a judgment cease to be such if the applicant had some ulterior object in making it. Similarly an application can be described only as one for execution if it prays for execution. Its description or name cannot be different if the underlying object is different from what appears on the face of it It is clear to me that the word "for" in Art. 182 (5) as in many other articles is indicative, not of the real intention of the person making the application, but of that declared in the application.

As for the general principle to which reference has been made in the passage quoted I need only refer to S. 48, Civil P. C., which limits the life of a decree to twelve years:

"It is not now possible for a decree-holder to have, by making successive applications for execution indefinite period being added to the life of a decree,"

as was the case when Jackson, J., referred to it (at p. 513) in making reference to a Full Bench in *Eshan Chander Bose* v. *Prannath Nag* (5). The legislature has since minimised the possible abuse of fresh start being given by successive applications for execution by enacting S. 230, Civil P. C. Act 10 of 1877, which was replaced by S. 230, Civil P. C. of 1882 corresponding to which we now have S. 48, Civil P. C. of 1908. It will be remembered that cases decided under the Civil Procedure Code of 1882 enabled the decree-holders in certain cases to obtain a longer period than 12 years when an application for execution and attachment of property in pursuance thereof had been made before the expiry of 12 years but the application was dismissed, attachment being maintained expressly or impliedly In such cases it was repeatedly held that an application made after the expiry of 12 years from the date of decree for sale of property under a subsisting attachment was not barred by S. 230 (now S. 48), Civil P. C. This practice has been put an end to by enactment in 1908 of O 21, R 57, corresponding to which there was no provision in earlier cases and under which attachment is automatically withdrawn with the dismissal of application for execution, and the 12 years' rule contained in S. 48, Civil P. C., can be rigorously enforced against a decree-holder. Apart from the possibility of a decree-holder abusing the power to obtain extension of time by making successive infructuous applications to pile up interest on the principal decretal amount no other objection on the score of "general principles" has been suggested. The period of 12 years within which he must obtain satisfaction of his decree is not unduly

long. Interest subsequent to the decree is, in generality of cases, fixed at a low rate and is seldom compoundable. It is always open to a judgment-debtor to checkmate the desire of the decree-holder to swell his decretal amount by making payment. There is no reason why "on general principles" the decree-holder is to be penalised in the interests of a defaulting judgment-debtor and should not be allowed to wait for a more favourable future occasion to recover his money In many cases it is to the benefit of the latter that drastic steps should not be taken by a decree-holder to obtain prompt satisfaction of the decree.

The history of the enactment contained in Art. 182 (5) and the case law bearing on it do not, in my opinion, support the view implied in the passage already quoted from the judgment in the case of *Sheo Prasad* v. *Naraini Bai* (1) and I shall proceed to notice the authorities relied on therein.

Section 20, Act 14 of 1859, which contains the earliest law on the subject is in the following terms :

"No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree or order or to keep the same in force within three years next preceding the application for such execution."

While this enactment was in force, no question could possibly arise as to whether proceedings ostensibly taken to enforce the decree or order were in reality taken to obtain a fresh start of limitation as the section itself made it permissible for the holder of a decree to obtain extension of time by avowedly taking proceedings "to keep the same in force." In cases decided under this statute the bona fides of a decree-holder were referred to in condonation of an error on his part in taking certain proceedings and to invoke the aid of S. 14 which, as the corresponding section of the present Limitation Act does, excluded the time during which

"the claimant ..... shall have been engaged in prosecuting a suit upon the same cause of action ..... bona fide and with due diligence."

It should be noted that the section last quoted applies, in terms, only to suits but their Lordships of the Privy Council extended its principle to execution proceedings presumably on general equitable grounds.

The first case decided by that tribunal is *Mahtab Chand Bahadur* v *Bulram Singh Baboo* (21) in which it was held that :

"so long as an actual bona fide contest is going on in Court between a decree-holder and the judgment-debtor as to the judgment, there is a pending" "proceeding" "within S. 20, Act 14 of 1859, and the period of limitation must be computed from the Court's decision."

This was followed in *Roy Dhunput Singh* v *Mudhomotee Dabia* (2) where

"an execution sale was stayed by consent for two months, and the execution suit was struck off the file. During such period the execution creditor applied to the Court to restore his execution suit, and to pay to him certain monyes in deposit in Court to the credit of the judgment-debtors in another suit, alleged that he (the execution creditor) had attached them ; but it turned out that he had attached them in another suit. Held, the application being bona fide, the period of limitation began to run from the date of the disposal of the application by the Court."

The ratio decidendi of these cases clearly is that even mistaken but bona fide proceedings to enforce the decree saved limitation They can be no authority for the converse proposition that proceedings in conformity with law in every respect are of no avail if the intention of the applicant was merely to give a fresh lease of life to his decree and in that sense not bona fide. Their Lordships observed at p 32 :

"Then assuming it to be a bona fide proceeding, which fell in consequence of that mistake, their Lordships think that the original petition was a proceeding to enforce the judgment, and to have execution of it; that it was a continuing proceeding duly prosecuted by the appellant, up to the time of the report, and further up to the time when the judgment was finally given, and that during the whole of such pendency, the decree-holder must be considered as going on with one and the same proceeding. Their Lordships do not consider that the fact that it was in the end abortive, takes from it the character of a proceeding to enforce the decree. The consequence will be that 12th May 1866, when the petition was dismissed, is the date from which the three years ought to commence to run."

Section 14 is not referred to in any of these cases but in a later case *Hira Lal* v. *Badri Das* (3) which follows the second, S. 14 was expressly referred to and the principle uuderlying it was ap-

(21) 5 Beng. L. R. 611=13 M. I. A. 479=14 W. R. 21 (P.C.).

plied to execution proceedings. Their Lordships say at p. 796:

"There can be no doubt that the applications to and orders of the Subordinate Judge if he bad had jurisdiction would have been sufficient to prevent the operation of the statute of limitations, and their Lordships are of opinion that, under the circumstances of the case, they had that effect, even if he had no jurisdiction. S. 14, Act 14 of 1859, enacts,"

Section 14 is quoted in full. Their Lordships proceed (p. 797.):

"It was, therefore, the object of the legislature, at least with regard to the limitation for the commencement of a suit, to excluds the time during which a party to the suit may have been litigating, bona fide and with due diligence, before a Judge whom he may suppose to have had jurisdiction. The question is, whether the same principle may not be applied to the coustruction of S. 20, Act 14 of 1859, with regard to executione."

After quoting S. 20 they continue to lay down that:

"The Act does not say some proceeding in a Court having jurisdiction, and their Lordships are of opinion that a procceding taken bona fide and with due diligence before a Judge whom the party bona fide believes, though erroneously, to have jurisdiction, specially when the Judge himself also supposes that he has jurisdiction, deals with the case accordingly, is a proceeding to enforce the decree within the meaning of S. 20. In this case the Subordinate Judge did believe he had jurisdiction. Applications were made to him and he made orders which would, if had had jurisdiction, have been proceedings within the period of limitation. If the judgment-debtors had appeared before the Subordinate Judge, and had objected to his jurisdiction, he must have decided whether he had jurisdiction or not; and if had decided that he had jurisdiction, even though he had not, the proceedings would have been proceedings within the meaning of S. 20. They ought equally to be so, though the judgment-debtors did not appear or object to the jurisdiction."

Apart from S. 14, S. 20, Lim. Act 14 of 1859, is so differently worded from the corresponding provisions in Acts of 1871, 1877 and 1908 that the question of bona fides might well have arisen in cases governed by the former enactment, according to which, limitation could be counted from any point of time, during the whole procceding, beginning with the application of the decree-holder and ending with the final order of the Court terminating them, and was not to run only from the date of the "application for execution" or "for some step in aid of execution" as now. In the former case the whole period of pendency of the proceedings was to be excluded from the computation of limitation. The "proceeding" contemplated by S. 20, Act 14 of 1859, included not only the action of the applicant but also of the Court. S. 20, Act 14 of 1859, was interpreted by their Lordships as providing for execution proceedings what S. 14 of that Act did for suits. It is highly significant that S. 14, Lim. Act 14 of 1877, made its provisions applicable to execution proceedings inasmuch as it provided that:

"In computing the period of limitation prescribed for any application, the time during which the applicant has been making another application for the same relief, shall be excluded, where the last mentioned application is made in good faith to a Court which from defect of jurisdiction, or other cause of a like nature, is unable to grant it."

It should be mentioned here that Art. 179 of this Act allows limitation to be reckoned only from the date of the application and not from any stage of the proceedings.

In Act 9 of 1871 the schedule of limitation follows the same arrangement as the Act of 1877 or the present Act. Art. 167 runs thus:

"For execution of a decree of any civil Court not provided for by Art. 169 . . . . . ."

"The date of applying to the Court to enforce or keep in force, the decree or order, or " . . . . . " the date of issuing a notice under the Civil Procedure Code, S. 216."

It is to be observed that it was possible while that Act was in force, to apply merely for keeping the decree in force.

In an illuminating judgment delivered by Markby, J., a Bench of the Calcutta High Court interpreted, in *Rohinee Nundan Mitter* v. *Bhugwan Chunder Roy* (6), Art. 169, Act 9 of 1871, as excluding an inquiry into the bona fides of the applicant. Referring to that part of the Art. 167 which allows limitation to be reckoned from the date of notice issued under S. 216, Civil P. C. the learned Judges argue:

"Now we think it is clear from that paragraph that the date of issuing a notice is an absolute date from which the time is to be reckoned without any reference to the question of bona fides. There is not a single word in that paragraph upon which the consideration of the (so called) bona fides of the application are possibly to be imported. If that is so, we think (reverting to the paragraph which we have to interpret) that it must be so in this case also. It is pointed out in the Full Bench decision of Sir Barnes Peacock that issue of the notice is a proceeding, which would be sufficient to keep the decree alive, if it follows

upon a bona fide application, for it will then be a proceeding in furtherance of the application previously made to enforce the decree. But on the other hand, if it only follows upon an application which is merely colourable, then within the principle of that decision it would be no proceeding at all. It would be hardly possible, however, to suppose that the legislature should have intended that an application which was merely colourable should not keep alive the decree and that a notice following that application, which would be in no way better, should keep the decree alive."

Not long afterwards, a reference was made to a Full Bench of the Calcutta High Court by two other learned Judges of that Court who entertained doubts regarding the correctness of the view propounded by Markby, J. In his referring order Jackson, J., commenting on the case *Rohinee Nundan Mitter* v. *Bhugwan Chunder Roy* (6) pointed out that:

"If that be a true construction of the Act, it would follow that a plaintiff who obtains a decree for a sum of money with interest, perhaps at a larger rate, say, on 1st January 1870, may put. in an application on 1st January 1873; another, on 1st January 1876; and so on but taking care only to renew applications once in three years without taking any further step whatever, without any intention to obtain satisfaction of his decree at the end of three years, and he would be entitled to recover the principal sum and the accumulated interest thereon at that larger rate after the lapse of, say, 20 or 30 years."

The ruling of the Full Bench is reported in *Eshan Chunder Bose* v. *Prannath Nag* (5) and upheld the view of Markby, J. After quoting Art. 167, Couch, C. J., who delivered the judgment of the Court remarked:

"These words clearly give to the person who has a decree the power, so far as regards the law of limitation, of applying for the execution of it within three years from its date, or within three years from the date of the application to the Court to enforce or keep it in force. There is no restriction as to the second or third, or any subsequent application. So far then as regards this Act the decree-holder is not restricted. All that appears necessary for him to do is to take care that the application is within three years from the date of applying to enforce the decree or to keep it in force; and he is at liberty within three years from that date to apply again for execution."

In concluding his remarks the learned Chief Justice, expressed the opinion that "this was not a satisfactory state of law . . . . . because it may enable a decree-holder to keep the decree alive for very many years, when he ought not to be allowed to do so."

Due note of these judicial dicta was aken by the legislature three years later when in 1877 the Civil Procedure Code and the Limitation Act were recast and resulted in the passing of Act 10 of 1877, (Civil P. C.) and Act 15 of 1877 (Limitation Act). They throw a flood of light on the question which we have to consider On the one hand the following new provision was inserted in S. 230, Civil P. C. (Act 10 of 1877), viz:

"Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted no subsequent application to execute the same decree shall be granted unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree; and the order of the Court granting any such subsequeut application shall be conclusive evidence that due diligence was used to procure such satisfaction.

And no such subsequent application shall be granted after the expiration of 12 years from any of the following dates (viz).

(a) the date of the decree ought to be enforced or of the decree (if any) on appeal affirming the same or,

(b) where the decree or any subsequent order directs the payment of money or the delivery of property by instalments, the date of the default in paying or delivering the instalment in respect of which the applicant seeks to enforce the decree."

On the other hand the language which had been employed by the Limitation Act 9 of 1871 was somewhat altered to clarify the intention of the legislature without introducing any expression like "good faith" or "bona fide" as would otherwise be expected in view of the previous judicial decisions. The relevant part of Art. 179, Act 15 of 1877, is as follows:

"For the execution of a decree or order of any civil Court not provided for by No. 180 or by the Civil Procedure Code, S. 230.

(4) . . . the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order; or

(5) . . . . the date of issuing a notice under the Civil Procedure Code, S. 248."

Unlike S. 20, Act 14 of 1859, under which the whole period occupied by the proceeding for execution could be excluded, the Limitation Act 15 of 1877 made time to run from the date of the initial application and the time occupied by proceedings that followed it could not be excluded under the article itself. It is noteworthy that S. 14 was by this Act extended to applications to which the corresponding S. 14, Act 14 of 1859, did not extend and therefore the whole period subsequent to the date of the application till

its dismissal could be excluded only under S..14 on proof of due diligence and good faith.

Placing S. 230, Civil P. C., (Act 10 of 1877) and Art. 179, Lim. Act (Act 15 of 1877) (the former received the sanction of the Governor-General in Council on 30th March 1877 and the latter less than six months afterwards on 19th July 1877) in juxtaposition, it is proved to demonstration that the requirement of "bona fides" or "due diligence" was not implied in Art. 179, Lim. Act, 15 of 1877) and was meant to be covered only by S. 230, Civil P. C. (Act 9 of 1877) While these enactments were in force it could not possibly be contended that the words "in accordance with law" "application for execution" "application for some step-in-aid of execution" meant that such application should have been made with a genuine intention of obtaining satisfaction of the decree. It should be noted that "an application merely to keep the decree in force" could no longer give a fresh start to limitation. Nothing short of an application praying for execution or for some step in aid of execution would be efficacious. As to whether such application was "bona fide" was not part of the rule of limitation contained in Art. 179, Act 15 of 1877, but was to be established in terms of the rule contained in S. 230, Civil P. C. (Act 10 of 1877).

When Act 14 of 1882 was passed the rule contained in S. 230, Civil P C. (Act 10 of 1877) was materially altered and made to run in the new Act as follows:

"Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent application execute the same decree shall be granted after the expiration of 12 years from any of the following dates. (viz):

(a) the date of the decree sought to be enforced or of the decree (if any) on appeal affirming the same; or

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property, to be made at a certain date the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree."

Article 179, Lim. Act (15 of 1877), was left intact. In spite of the amendment of the rule in S. 230, Criminal P. C., the former could have no other meaning than what it previously did the wording of Art. 179 remaining as before. It is clear to my mind that on the one hand the Limitation Act conferred an unqualified right on the decree-holder to apply for execution within three years from the date of a previous application for execution or for step-in-aid of execution it was made the province of the Code of Civil Procedure to prescribe limitations and conditions to which the right was subject, such limitations and conditions were more stringent under the Civil Procedure Code of 1877 than under that of 1882.

In 1908 the Code of Civil Procedure and Limitation Act were taken in hand by the legislature together and the law in this respect as it was in 1882 was retained in its entirety.

From what has been shown above it follows that whatever could be said of S. 20, Lim. Act (14 of 1859)of which the language was different and was not qualified or controlled by any provision in the Code of Civil Procedure that could overlap the Limitation Act, if Art. 20 was interpreted to imply the requirement of proof of good faith in making a previous application for execution. Since the enactment of the Civil Procedure Code and the Limitation Act in 1877, S. 230 of the former would overlap the latter if Art 179 were taken to imply the requirement of proof of good faith in making a previous application for execution or step in aid of execution.

Turning to the case law which followed the repeal of the Limitation Act 14 of 1859 we can find no decision, before the case of *Sheo Prasad* v. *Naraini Bai* (1) in which it might have been held that the decree-holder should establish that the previous application from which he desires to reckon his limitation was made bona fide with the real intention of obtaining satisfaction of his decree and not with the sole purpose of obtaining extension of time in which case it could not be considered as an application 'in accordance with law.' I have already commented on the two cases reported in 22 *W. R.* and need not repeat in this connexion what I have already said about them. I have also referred to the case of *Hira Lal* v. *Badri Das* (3) pointing out that the question there was complicated by the application of S. 14, Act 14 of 1859. In other later cases likewise wherever proof of 'good faith', "bona fide," or 'due diligence' was insisted on, the aid of S. 14, Lim. Act, had been invoked for obtaining the exclusion of the

whcle period during which certain proceedings remained pending before a Court not having jurisdiction and wherever the case was free from such complication no objection as to good faith was raised, and if raised, it was repelled.

In *Mungul Pershad Dichit* v. *Girija Kant Lahiri* (4) their Lordships cleared the ground by ruling at the cutset that the case was governed by the Limitation Act 14 of 1859 and not by that of 1871 (p. 61). Then they proceeded to hold that :

"It was scarcely contended in the argument before their Lordships, that the application of 2nd September 1877 was barred, if the case is governed by S. 20, Act 14 of 1859. It was within three years from the date of the service of the notice on 23rd September 1874, which was a proceeding within the meaning of the last mentioned section, also within three years from the date of the petition of 8th October 1874, and of the order of the same date made thereon."

Then follows the passage that :

"In the face of the application of the judgment-debtor made from time to time to stay the sale of property which had been attached, it cannot be presumed that the decree was ever satisfied, nor was there any finding of either of the Courts below that the several proceedings were not bona fide for the purpose of enforcing the decree or of keeping it in force."

This case is of the same category as the three Privy Council cases already noted by me and can be no authority on questions arising after Act 14 of 1859 ceased to be law.

The case of *Chattar* v. *Newal Singh* (8) decided that where an application asks for what the Court had no jurisdiction to grant, it is not one in accordance with law. No question as to good faith was either raised or decided. In fact no such words occur in the judgment.

In *Halima Bibi* v. *Nishan Bibi* (9), Tyrrell, J , held that :

"In applying Art. 179, S. 11, Lim. Act (15 of 1877), the only questions are whether the former application for execution or for a step in aid of execution was in accordance with law and made to the proper Court has not to consider whether such application displayed bona fides or industry or diligence, as by payment of the necessary process fee."

In *Debi Das* v. *Umrao Singh* (10) Mahmood, J., held that in computing the period of limitation presented by Cl. (4), Art. 179, Sch. 2, Lim. Act, no question of the bona fides of the previous application for execution arises.

In *Mangul Sen* v. *Baldeo Prasad* (11) the application from which time was sought to be reckoned contained the prayer :

"After notification by means of attachment of the moveable property, of which a list will hereafter be filed, the decretal money may be realized. At present for the purpose of saving limitation this application is made owing to the defendant having become insolvent."

It should be borne in mind that since the passing of Act 15 of 1877 an application praying not for execution of decree but for keeping it in force could not give a fresh start of limitation. The decision, therefore, was in perfect accord with the law, in holding that the application could not be interpreted as one containing a prayer for execution.

In *Adhar Chandra Dass* v. *Lal Mohan Das* (18) the application from which limitation was sought to be reckoned was one for execution and for substitution of names of the heirs of the deceasad judgment-debtor and had been made when the decree was under attachment in execution of another decree It was dismissed on the ground that no execution could issue while the attachment of the decree subsisted. It was held that the application was one in accordance with law to take a step in aid of execution, even thcugh it could not be entertained as an application for execution because it also prayed for substitution which was a step in aid of execution After discussing certain cases Banerji. J., concluded that:

"None of those cases is in point ; and I do not think we should be doing right in straining the law and inholding that an application made bona fide with the object of obtaining satisfaction of a decree should be held to be not in accordance with the law merely because the Court in which the application was made thought fit, for some reason, not to allow the same."

The words 'good faith' occurring in this passage were used in passing and were not intended to be part of any rule there recognized. The case of *Gopal Chunder Manna* v. *Gosain Das Kalay* (19) and that of *Jahar* v *Kamini Debi* (20) in which S. 14, Lim. Act, was pleaded do not lay down anything relevant to the subject with which we are concerned.

I have discussed most of the cases, including those referred to in the judgment of *Sheo Prasad* v. *Naraini Bai* (1) decided before it, some of which do not find a mention in it. During the last three years that it has held the field in these provinces, it has not remained unchallenged and was expressly dissented from by a Bench of the Oudh Chief Court in

Rugaya Bibi v. *Prag Tewari* (15) in which Stuart, C. J. and Raza, J., held that an application to be "in accordance with law" need only comply with the formalities laid down by Civil Procedure Code and no inquiry as to the bona fides of the applicant is contemplated by Art. 182, Lim. Act.

For the reasons stated above I would answer the reference in the negative as follows :

A decree-holder or a person applying for execution of a decree is not called upon to satisfy the Court that a previous application for execution or for some step in aid of execution, from which he seeks to reckon the period of limitation for his next application, had been made : with a genuine intention of obtaining execution of his decree if reasonably possible and that he did not abandon the proceedings except upon a genuine belief that it would not be reasonably possible to obtain execution.

R.K. *Reference answered in negative.*

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* A. I. R. 1929 Allahabad 650

ASHWORTH AND KING, JJ.

Emperor

v.

Kumera and *others*—Accused.

Criminal Revn. No. 765 of 1928, Decided on 18th December 1928, against judgment of Addl. Sess. Judge, Aligarh, D/- 16th July 1928.

*** (a) Criminal P.C., S.110—Evidence—Admissibility—General repute — Merely saying person is "bad character" does not suffice—Nature of the character should be given.**

A witness should not be allowed to state merely that an accused person is a " bad character" if he does not explain more precisely what he means by that expression. But when a witness starts by saying that a person is a "bad character" and immediately follows this up by saying that the person habitually commits theft, then there is no ambiguity about his meaning and his deposition is then relevant and admissible as evidence of general repute: *A.I.R.* 1928 *All.* 357, *Ref.* [P 651 C 2]

*** (b) Criminal Trial — Evidence—Admissibility—A witness can be permitted to say that he himself suspected an accused person of having committed a certain offence.**

Although evidence cannot be given that an accused person has been suspected by persons other than the witness of having committed a certain offence, there is no authority for the proposition that a witness cannot be allowed to state that he personally suspected the accused of having committed a certain offence. [P 652 C 1]

*** (c) Criminal P. C., S. 117 (4)—Evidence of general repute though necessarily consisting largely of hearsay evidence is admissible.**

The fact that a person is a habitual offender may be proved by evidence of general repute or otherwise. That evidence of general repute must necessarily consist largely of "hearsay" evidence. The reputation of a person means what is generally said or believed about his character. A witness may depose " I believe the accused to be a habitual thief, and that is what persons of the neighbourhood generally say about him." Such evidence is admissible as evidence of general repute. So far as the witness gives the opinions or the statements of other persons, his evidence must, in a sense be "hearsay". [P 652 C 2]

*** (d) Criminal P. C., S. 117 — Evidence that accused is suspected though not evidence of general repute within the meaning of S. 117, is admissible to support opinion of the witness.**

It is open to question, whether evidence that the accused has been suspected by persons other than the witness is inadmissible for all purposes in an inquiry under S. 117. It has no doubt been held in several cases that evidence of cases in which the accused is suspected is not evidence of general repute within the meaning of S. 117, but it does not necessarily follow that such evidence is not admissible for other purposes. When a witness gives evidence of general repute he is undoubtedly entitled to give his personal opinion of the person concerned. As his opinion is undoubtedly relevant then the grounds of his opinion must also be relevant. The value to be attached to such evidence is another matter. [P 653 C 1]

(e) Criminal P. C., S. 110 — Order under S. 118, can be proved against a person proceeded against under S. 110, though the order is not a conviction under Evidence Act, S. 54, Expln. 2.

The fact that a person has been bound over previously under S. 110, may be stated and proved as one of the grounds on which the witnesses to general repute believe the accused to be a habitual offender. The value to be attached to the proof of a previous order under S. 110, is of course, a question for the Court to consider. [P 653 C 2]

Government-Advocate—for the Crown.

M. A. Aziz—for Accused.

King, J.—This is an application by the Local Government against an order made by the learned Additional Sessions Judge of Aligarh setting aside an order made by a Magistrate of the First Class requiring four persons to give security for good behaviour in consequence of proceedings under S. 110, Criminal P. C.

Twenty witnesses were produced for the prosecution including both Hindus and Mahomedans who are respectable

zamindars and mahajans. The evidence for the prosecution was to the effect that the accused are habitual thieves and burglars and that they belong to one gang and commit thefts together and that the people of Jalali, where they reside, are constantly complaining about their committing thefts. The Magistrate came to the following conclusion :

"I have considered and weighed the evidence on both sides carefully and I am perfectly satisfied with the prosecution evidence that all the accused belong to one and the same gang and habitually commit theft and burglary and that the whole town of Jalali and the people in the neighbourhood are tired of them and live in terror of them."

He accordingly ordered them to furnish security for good behaviour and they appealed.

The Additional Sessions Judge in his appellate order referred to a decision of a Division Bench of this Court in the case of *Emperor* v. *Kurwa* (1) and found that, in accordance with that ruling, nearly all the evidence produced for the prosecution was inadmissible.

It will be convenient to consider the evidence of one witness in detail and to note how that evidence has been dealt with by the Court below. I take the evidence of the first witness, Musahib Khan of Jalali, as set forth in the Magistrate's memorandum of evidence :

"I pay about Rs. 1,000 as rent. I know the accused present in Court. They live in my village. Their character is bad. They habitually commit theft. They belong to one and the same gang and commit theft together. Their general repute is bad. People say that they are thieves. Kishori, Parma, Thakuri Ram, Musi Raza, Aziz Ul Hasan, Mehdi Hasan and others had told me so. Ten months ago a theft was committed from my house and property worth Rs. 1,400 was stolen away. I had suspected the accused."

(According to the Judge, who probably referred to the vernacular record, the last sentence should be read) :

"I had suspected all the badmashes in the village and also the accused persons."

There was no cross-examination of this witness, although other witnesses were cross-examined.

The Additional Sessions Judge, after setting forth the substance of the above evidence, proceeds as follows :

"I have given the evidence of this witness in full in order to show that it is all hearsay and the only tenable point in his evidence is that a burglary took place in his house ten months ago and he suspected all the badmashes of the village. The learned Judges pointed out in the above ruling that a witness should not be allowed to state that the accused is a bad character or has the reputation of being a bad character, but in this deposition it will be seen that the witness is allowed to say that the accused's character is not good. I do not think that his evidence comes within the defination of general repute."

It appears, therefore, that the Court below has swept away the whole of this witness's evidence, in so far as it implicates the accused, on the ground that it is inadmissible.

I think that the Additional Sessions Judge has misunderstood and misinterpreted the ruling cited. He takes exception to the witness's statement that the character of the persons concerned is bad. It is true that in the ruling the learned Judges remarked :

"A witness should be allowed to depose, if he can in fact give that evidence, that the accused has a general reputation as a habitual thief (or robber etc : as the case may be) but he should not be allowed to state that the accused is a bad character or has the reputation of being a bad character."

I understand this to mean that a witness should not be allowed to state merely that the accused is a "bad character" simply because that expression is too vague. The expression "bad character" (badmash) is undoubtedly vague and susceptible of many different meanings. It may mean that the person concerned is a drunkard or a gambler or an adulterer. When the prosecution sets out to prove that the accused is a habitual thief and burglar, as in the present case, it is obviously insufficient to prove merely that he is a "bad character", as that expression may not mean that he is a thief or burglar. I quite agree that a witness should not be allowed to state merely that an accused person is a "bad character" if he does not explain more precisely what he means by that expression. But when a witness starts by saying that a person is a "bad character" and immediately follows this up by saying that the person habitually commits theft (as in the present case), then there is no ambiguity about his meaning and in my opinion his deposition is then relevant and admissible as evidence of general repute. The Court below seems to treat the statement in the ruling, that a witness should not be allowed to state that the accused is a bad character or has the reputation of being a bad charac-

(1) A. I. R. 1928 All. 357.

ter, as meaning that a witness should not be allowed to state, anything tending to show that the accused is a bad character, for example, that the accused is a habitual thief, which is the fact in issue. I do no for a moment believe that the learned Judges of this Court meant anything of this kind. Such a view would obviously reduce proceedings under S. 110, to a mere absurdity. I hold that the Court below was wrong in rejecting the statement " they habitually commit theft" as inadmissible.

The witness also deposed that he suspected the accused of having committed the burglary in his own house. The Court below has also treated this evidence as inadmissible. Here again I think the Additional Sessions Judge has misunderstood the ruling. Part of the headnote runs as follows :

"In a case under S. 112, Criminal P. C., evidence cannot be led under S. 110, Criminal P. C.. that an accused person has been suspected of committing such and such offences."

This does not mean, in my opinion, that a witness cannot be permitted to say that he himself suspected an accused person or having committed a certain offence. Such evidence would in no sense of the word be hearsay evidence and would clearly be admissible as forming one of the grounds for his belief that the accused is a habitual offender. The ruling, as I understand it, goes no further than to lay down that evidence cannot be given that an accused person has been suspected by persons other than the witness of having committed a certain offence. The ruling there is no authority for the proposition that a witness cannot be allowed to state that he personally suspected the accused of having committed a certain offence, and I hold that the learned Additional Sessions Judge was wrong in rejecting such evidence as inadmissible.

There is one passage in the ruling cited:

" But evidence of general repute is evidence of a definite fact and is in no sense hearsay evidence."

which suggests that hearsay evidence is admissible for proving general repute. I doubt whether this is what the learned Judges really mant, but the Court below seems to have interpreted their ruling in this sense, as he rejected the evidence, that people say that the accused are thieves and certain specified persons have told the witness, so, as being " all hearsay." I think the learned Additional Judge was wrong, and if he has correctly interpreted the ruling, then I must respectfully express my dissent. S 117 (4) expressly lays down that the fact that a person is a habitual offender may be proved by evidence of general repute or otherwise. I venture to think that evidence of general repute must necessarily consist largely of "hearsay" evidence. The reputation of a person means what is generally said or believed about his character. A witness may depose :

"I believe the accused to be a habitual thief, and that is what persons of the neighbourhood generally say about him."

Such evidence is admissible as evidence of general repute. So far as the witness gives his personal opinion, the evidence is not hearsay. So far as the witness gives the opinions or the statements of other persons, his evidence must, in a sense, be " hearsay". A witness can only know the opinion of other persons by hearing them say that what they think. For this reason I think evidence of general repute necessarily consists largely of " hearsay evidence", i. e., of statements of what persons other than the witness say or believe about the character of the accused. When a witness deposes that an accused person is generally reputed to be a habitual thief he may be examined and cross-examined as to his means of knowledge. He may be asked who told him that the accused was a thief. In the present case the witness mentioned the names of six persons who gave him this information and I would hold that this evidence is admissible as evidence of general repute although it is undoubtedly " hearsay" evidence of the alleged fact that the accused are habitual thieves.

In my opinion there is nothing in the deposition of this witness which would be ruled out as inadmissible in evidence and the Judge was wrong in rejecting it. The value to be attached to the evidence is, of course, a matter for the Court to determine, but the Court below has rejected the evidence not because he discredits the witnesses but because he holds that the statements made by them are not admissible in evidence.

It is unnecessary to consider the evidence of all the other witnesses in detail. Their evidence is much to the same effect and the Additional Sessions Judge has

accordingly rejected it on the ground of its inadmissibility.

There is one further point worth considering. Evidence was led to show that the accused persons were suspected of certain specified thefts or burglaries. In some cases the persons who suspected the accused have themselves given a evidence to this effect and I think the Court below was clearly wrong in rejecting such evidence as inadmissible. It is open to question, however, whether evidence that the accused has been suspected by persons other than the witness is inadmissible for all purposes in an inquiry under S. 117. It has no doubt been held in several cases as for instance *Raham Ali* v. *Emperor* (2); *Rajnarain Pande* v. *Emperor* (3)that evidence of cases in which the accused is suspected is not evidence of general repute within the meaning of S 117, Criminal P C. I am not prepared to challenge this proposition but it does not necessarily follow that such evidence is not admissible for other purposes. When a witness gives evidence of general repute he is undoubtedly entitled to give his personal opinion of the person concerned. As his opinion is undoubtedly relevant then the grounds of his opinion must also be relevant under S. 51, Evidence Act. A witness may say:

"I believe the accused to be a habitual thief. The grounds for my opinion are, firstly, that he has no honest means of livelihood; secondly, that he associates with persons convicted of theft or burglary; thirdly, that he is frequently absent from his house at night for reasons which he refuses to disclose, and fourthly, because *A*, *B*, *C* and *D* have severally and on different occasions told me that they suspected him of having stolen their property."

The last statement is inadmissible for proving that the accused committed the alleged thefts, and it may be inadmissible for proving general repute but I think it would nevertheless be admissible as showing one of the grounds for the witness's opinion. The value to be attached to such evidence is another matter.

Another question arises, whether the fact that a man has been previously bound over to be of good behaviour as a habitual offender can be proved against him in proceedings under S. 110. In the present case one of the persons with whom we are concerned in this application was convicted of burglary. Such conviction can unquestionably be proved as tending to show that he is a burglar. The other three persons have not been convicted of any specific offence but they have all been previously bound over under S. 110. There are certain remarks in the ruling: *Emperor* v. *Kurwa* (1), which suggest that an order passed under S. 118 cannot be proved against a person proceeded against under S. 110 as evidence of his being a habitual offender on the ground that such an order is not a "conviction." Expln. 2, S. 54, Evidence Act, only speaks of a previous conviction as being relevant as evidence of bad character. The previous order under S. 118 is not admissible under the explanation mentioned because it undoubtedly is not technically a "conviction," but I am clearly of opinion that it can be proved and is admissible on other grounds. The mere fact that a person has been bound over as a habitual offender certainly tends to injure his reputation. It makes people inclined to believe that he is a habitual offender whether he is so or not. Hence the fact that a person has been bound over previously under S. 110 may be stated and proved as one of the grounds on which the witnesses to general repute believe the accused to be a habitual offender. Then again if a Court has once held that a person is a habitual thief there is some presumption that he was a habitual thief at the time that the order was passed This renders it more probable that the accused remains a habitual thief even after an interval of some years, since habits are not easily discarded. The value to be attached to the proof of a previous order under S. 110 is, of course, a question for the Court to consider but I cannot see that evidence of the previous order could be held inadmissible

The Court below has remarked that if the accused are such notcrious thieves then the police must be quite incompetent because they did not succeed in catching them redhanded. The failure of the police to catch the accused redhanded may reflect upon their competency, but I cannot see that it is any reason for refusing to bind over to the accused to be of good behaviour, if it is

(2) [1913] 11 A. L. J. 461=20 I. C. 231 = 14 Cr. L. J. 407.
(3) A. I. R. 1927 All. 394.

proved that they are habitual thieves and burglars. Security for good behaviour is required in the interests of the public, who are not less entitled to protection if the police are incompetent.

In the present case I think the evidence upon the record is ample to prove that the accused are habitual thieves and burglars and the Magistrate was justified in passing his order. Even the Court below has not set aside the order upon its merits but owing to an error of law in holding that practically all the evidence for the prosecution was inadmissible.

I would accordingly accept the application, set aside the order of the Additional Sessions Judge and restore the order of the Magistrate.

Ashworth, J.—I concur. The provision of S. 117 (4), Criminal P. C., that the fact that a person is a habitual offender (i. e. a habitual doer of certain criminal acts) may be proved by evidence or "general repute or otherwise" appears to me to render the Evidence Act inapplicable to the proceedings under S. 110, Criminal P. C. Any evidence which supports or explains the fact that a person has acquired a certain reputation appears to me to be admissible. A Court is not bound to bind over a person because he has a certain reputation but is bound further to consider whether he deserves such a reputation. I deprecate reference to general observations as to the evidence admissible in cases under S 110, because such observations should only be construed with reference to the particular facts of each case. The Evidence Act offers little or no assistance for the hearing of such cases, which depend on a common-sense view of the evidence. It may generally be stated that any evidence which enables a Court to come to a decision that a person is or is not a habitual offender is admissible.

P.R/R.K. *Application accepted.*

A.I.R 1929 Allahabad 654

DALAL, J.

Bal Kishan—Plaintiff—Appellant.

v.

Chhidda and *others* — Defendants—Respondents.

Second Appeal No. 176 of 1928, Decided on 14th June 1929, from decree of Addl. Dist. Judge, Aligarh, D/-21st October 1927.

Contract Act S. 43—Joint decree for costs against defendants—Defendants not taking interest in suit are exempt from contribution.

Prima facie defendants inter se are liable for contribution where a joint decree for costs has been passed against them. But the defendants who did not defend the suit or took no interest therein are equitably entitled to exemption : 24 *A. L. J.* 720, *Foll. A. I. R.* 1921 *All.* 372 ; *A. I. R.* 1923 *All.* 67, *Dist.* [P 655 C 1]

G. Agarwala—for Appellant.

K. D. Malaviya—for Respondents.

Judgment.—There was a certain suit in which there were eleven defendants and a decree for costs was passed in favour of the plaintiff Baburam of that suit. The decree for costs was recovered entirely from the plaintiff of the present suit Bal Kishan, so he sued the other defendants of the former suit for reteable contribution. The amount recovered from him alone was Rs. 115-4-0 and he desires interest Rs. 37-0 0 thereon. The total would be Rs. 152 and odd. It appears that only four persons Bal Kishan, his wife Mt. Neta, Kundan and Mt. Janki, defended the suit and only three of them, excepting Mt. Janki, appealed and their appeal was dismissed. The learned Judge of the lower appellate Court has made some elaborate observations as to the respective liability of the defendants. He has missed the point completely. In the present suit a defendant has not come to recover rateable contribution of the expenses incurred by him and money expended in defence of a suit brought jointly against him and others. He is suing to recover the amount of a decree which was passed jointly against himself and others. All the observations of the learned Judge therefore and the rulings on which he has relied are beside the point. Both the cases quoted by him, *Ramsarup* v. *Baij Nath* (1) and *Parsotam Das* v. *Lachmi Narain* (2), were brought by some of the plaintiffs to a suit against the other plaintiffs and have no application to the present suit. Observations made therein as to the liability of defendants inter se were merely obiter. The question as to the liability of defendants between themselves was examined with great care by a learned Judge of this Court in *Babu Ram* v. *Badri Das* (3). All the relevant rulings have been col-

(1) A. 1. R. 1921 All. 372=43 All. 77.
(2) A. I. R. 1923 All. 67=45 All. 99.
(3) [1926] 24 A. L. J. 720.

lected therein. I accept the observation of the learned Judge in that case :

"The true rule is that prima facie a right of contribution exists between persons against whom a joint decree for costs has been passed and that it is for a defendant seeking to avoid liability to show some equity which entitles him to exemption."

The question for decision here therefore is which of the defendant respondants have shown any reason of equity for exemption. In my opinion these who did not defend the suit and took no interest therein are equitably entitled to exemption. The sum of Rs. 152 should be divided between Bal Kishan, his wife Mt. Neta, Kundan and Mt. Janki. Mt. Janki is the only defendant-respondent represented here besides the others whom I have declared to be entitled to exemption on equitable grounds. On her behalf it was argued that as she did not take part in filing the appeal she was not liable to pay Babu Ram's costs of appeal. Such costs cannot be separately determined and at all events it could be nothing more than pleader's fee as Babu Ram was respondent and not an appellant in the appeal. I think that every one of the four persons must pay Rs. 38.

In the result, I set aside the decree of the two subordinate Courts and decree the suit separately for Rs. 38 against every one of the three defendants Mt. Neta, Mt. Janki and Kundan with proportionate costs of all the Courts. The suit against the rest of the defendants is dismissed. The defendants other than Mt Janki who were represented here shall receive from the plaintiff costs of this appeal only.

V.B /R.K. *Order accordingly.*

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* A. I. R. 1929 Allahabad 655
Full Bench

SEN, NIAMATULLAH AND IQBAL AHMAD, JJ.

In the matter of a Muhhtar of Banares.

Misc. Case No 599 of 1929, Decided on 18th July 1929, Reference made by Dist Mag., Benares.

*** Legal Practitioners Act, S. 14—Formalities under S. 14 not observed—Reference is not valid.**

For a proper reference to the High Court the formalities roquired by S. 14 ought to be fulfilled and in the absence of those formalities being strictly complied with the reference is no valid reference.

A report made by a Magistrate subordinate to the Magistrate of the District was not made also through the Sessions Judge and hence no opinion of the Sessions Judge was before the High Court. The reference was held to be invalid. [P 655 C 2]

Shailanath Mukherji—for the Petitioner.

U. S. Bajpai—for the Crown.

Opinion.—This case has been initiated against Babu Manni Lal, a mukhtar, practising in the criminal Courts at Benares on a referance by the District Makistrate of Benares under S. 14, Legal Practitioners Act (Act 18 of 1879). Notice was duly served upon Babu Manni Lal to show cause why he should not be either suspended or disbarred for misconduct in the discharge of his professional duties. A preliminary objection has been raised by Mr. Saila Nath Mukherji, the learned advocate for the mukhtar that the reference to this Court is not competent.

Certain enquiries appear to have been made in the Court of a Magistrate of the First Class as regards the conduct of the mukhtar on the complaint of one Ambar Misra. He submitted a report to the District Magistrate and the latter officer has made this reference by his order dated 14th May 1929. Certain provisions contained in S. 14, Legal Practitioners Act have escaped the notice of the learned District Magistrate. That section provides that :

"every report made to the High Court under this section shall . . . . . when made by a Magistrate subordinate to the Magistrate of the District be made through the Magistrate of the District and the Sessions Judge."

The report in the present case has been made through the Magistrate of the District alone and not also through the Sessions Judge. S. 14 further provides :

"every such report shall be accompanied by the opinion of each Judge, Magistrate or revenue authority through whom or which it is made."

We have not got before us any opinion of the learned Sessions Judge of Benares. We are entitled to have the benefit of his opinion. For a proper reference to this Court, the formalities required by S. 14 ought to be fulfilled and in the absence of those formalities being strictly complied with, the reference is no valid reference. We must, therefore, uphold the preliminary objection.

We are of opinion that the reference made to the Court is not in accordance with law. Accordingly we return the re-

ference to the learned District Magistrate to enable him to make a proper submission thereof to this Court through the proper channel.

R.K. *Reference returned*

A. I. R. 1929 Allahabad 656

DALAL, J

Subedar Singh—Plaintiff—Appellant.

v.

Komal Singh and *another*—Defendant and Plaintiff—Respondents.

Second Appeal No 296 of 1928, Decided on 27th June 1929, from a decree of Sub-Judge, Mainpuri, D/- 17th November 1927.

Agra Tenancy Act (1926), S. 99—Defendant on basis of document of relinquishment claiming as landholder right to eject plaintiff and ejecting him—Plaintiff's remedy lies under S, 99.

The Act applies even where ejectment is made by any perron claiming as landholder to have a right to eject another. It is not necessary that only the landholder, that is, all the proprietors of a mahal should eject a tenant in order to give jurisdiction to the revenue Court. Thus where a defendant on the basis of the document of relinquishment claimed as landholder a right to eject the plaintiff and ejected him accordingly, the remedy of the plaintiff lies under S. 99 and the period of limitation for bringing a suit by the plaintiff is six months. [P 656 C 2]

N. P. Asthana and *Ambika Prasad*—for Appellant.

Panna Lal—for Respondents.

Judgment.—There is no force in this appeal. The plaintiff's father sold a certain 5 biswas share of the family property to the defendant Komal Singh and also relinquished *sir* plots. In accordance with the relinquishment Komal Singh was put in possession. The plaintiff did not attack the sale itself as a member of a joint Hindu family who had not joined in the sale but took the line of claiming the *sir* plots which were relinquished by his father. Both the subordinate Courts held that once relinquishment was given effect to the plaintiff could not succeed. The difference in their opinion consisted of this that while the trial Court was of opinion that Komal Singh had obtained possession over plots in group A only the lower appellate Court held that Komal Singh had obtained possession over plots in all the three groups narrated in the plaint. Admittedly the plaintiff came to Court more than six months after the ejectment. It was argued here that the period of limitation of 12 years will apply and not six months: (1) because there was no wrongful ejectment but a voluntary making over of possession by the manager of the joint family to Komal Singh and (2) that the ejectment not having been made by the entire body of the proprietors of the mahal, the ejectment by Komal Singh alone was in the nature of an ejectment by a trespaser, as held in *Chedda* v. *Achu Singh* (1). In para. 11 of the plaint the plaintiff himself alleged forcible ejectment. What he said was:

"after the decision of the appellate revenue Court mentioned above defendant 1 with the help of a large number of his partisans forcibly entered into possession of the plots mentioned in list *A* in the month of December 1921."

The lower appellate Court has recorded a finding of fact that Komal Singh entered into possession of all the plots at that time. Clearly therefore wrongful possession is alleged.

As to the second ground the wording of S. 99 of the present Agra Tenancy Act is different from the wording of the corresponding S. 79, Tenancy Act of 1901. The Tenancy Act will apply now even where ejectment was made by any person claiming as landholder, to have a right to eject the plaintiff. It is not necessary that only the landholder. that is, all the proprietors of a mahal should eject a tenant in order to give jurisdiction to the revenue Court. It is sufficient if any person claimed to have the right to eject as landholder and ejected the plaintiff In such a case also a suit will lie in the revenue Court and the shorter period of limitation will apply. The defendant on the basis of the document of relinquishment claimed as landholder a right to eject the plaintiff and ejected him accordingly. The remedy of the plaintiff therefore lay under S 99, Tenancy Act. I dismiss this appeal with costs.

P.N /R.K. *Appeal dismissed.*

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(1) **A. I. R. 1924 All. 572=46 All. 690.**

A. I. R. 1929 Allahabad 657

NIAMATULLAH AND BENNET, JJ.

Nathu Singh and *another*—Plaintiffs—Appellants.

v.

Girwar Singh and *another*—Defendants—Respondents.

First Appeal No. 337 of 1926, Decided on 4th June 1929, against decree of Addl. Sub-Judge, Meerut, D/- 31st March 1926.

(a) Contract Act, S. 2 (d)—Time barred debt can be good consideration.

A time barred debt can form a good consideration because the debt is not extinguished although the remedy is lost: *A. I. R.* 1924 *All.* 551, *Rel. on.* [P 657 C 2]

(b) Practice—Pleadings—Point not alleged in pleadings but argument addressed on it—Defect in pleadings is not remedied.

If a particular point is not alleged in the pleadings and consequently no issue is framed on it, the mere fact that argument is addressed to the Court on that point will not remedy the defect in pleadings. [P 657 C 2]

G. Agarwala—for Appellants.

Panna Lal—for Respondents.

Judgment.—This is an appeal by the plaintiffs against a decree of a Subordinate Judge dismissing their suit for a declaration which was asked for to the effect that a sale-deed, dated 25th April 1924, by defendant 2 to defendant 1, was void against the plaintiff-appellants and that the property which the said sale-deed purported to transfer might be attached and sold in execution of a decree of the appellants. The suit is really between rival decree-holders, the plaintiffs and defendant 1, Sardar Girwar Singh. The plaintiffs had a mortgage-decree No. 550 of 1912 against Ude Singh, defendant 2. The property which was mortgaged was sold on that decree but was insufficient to satisfy the decree; and on 4th September 1920, the plaintiffs obtained a decree under O. 34, R. 6, Civil P. C. On 18th April 1921, defendant 1, Risaldar Major Girwar Singh, who is remotely connected with defendant 2, obtained a simple money-decree No. 119 of 1921 against Ude Singh on the basis of two promissory-notes.

It is now argued that Girwar Singh did not take out execution of his decree; but we may point out that, at the time his decree was passed, the property in suit, which is the only property of his judgment-debtor Ude Singh, was under attachment on a decree of the appellants and that that attachment remained in force until 10th March 1924, when the execution case of the appellants was struck off the file. There was an order of 9th June 1919, restraining Ude Singh from transferring his property, and this forms the first ground of appeal before us; but we hold that that injunction terminated when the execution case was struck off on 10th March 1924. It was under these circumstances that the sale-deed was executed by defendant 2 in favour of defendant 1 on 25th April 1924 and the consideration in that deed is expressed as Rs. 2,384. It was set off by the debt due from defendant 2 to defendant 1 on decree No. 119 of 1921.

The appeal before us has been mainly argued on ground 2, that this sale-deed was collusive and without consideration inasmuch as the decree which is mentioned as consideration was timebarred and not enforcible in law. Assuming that the decree of defendant 1 against defendant 2 was, in fact, timebarred at the date of execution of the sale-deed, we consider that it would still form a good consideration for the sale-deed; and in this connexion we would refer to *Gajadhar* v. *Jagannath* (1), where it was held that a time barred debt can constitute a valid antecedent debt as consideration for a sale-deed executed by a father of a joint Hindu family alienating joint and ancestral family property. The reason for this is that such a debt is not extinguished when the remedy becomes barred by limitation, and it is only in the case mentioned in S. 28, Lim. Act, that the right as well as the remedy is extinguished. There is nothing whatever in the definition of "consideration" in S. 2 (d), Contract Act, to indicate that a time barred debt does not form a good consideration.

We consider, however, that the appellants have failed to prove in the present case that this decree was time barred at the date of the sale-deed in question. In para 4 of the plaint the appellants attack this sale-deed on various grounds, but they do not allege that the decree in question was time barred at the date of the sale-deed. Consequently, no issue on this point was framed. The mere fact that argument was addressed to the lower Court on this point is not sufficient to remedy this defect in pleadings. Further, although defendant 1 gave evi-

(1) A. I. R. 1924 All. 551=46 All. 775 (F.B.)

dence yet no question whatever was put to him in cross-examination on this point. Under these circumstances, we find that it is not proved that the decree No. 119 of 1921 was time barred at the date of the sale deed of 18th April 1921. We agree with the lower Court that there is no evidence of collusion. Accordingly, we dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 658

SULAIMAN AND BANERJI, JJ.

Mohammad Najaf and *others*—Appellants.

v.

Badri Narain Prasad and *others*—Respondents.

First Appeal No. 93 of 1925, Decided on 5th April 1929, against decree of Sub-Judge, Azamgarh, D/- 29th November 1924.

Practice—Suit for pre-emption brought by brother of vendor—It is necessary to determine question if two brothers were joint or separate at execution of sale-deed as member of joint family cannot institute suit for pre-emption on sale of joint-family property—Pre-emption.

Where certain property is sold and a suit for pre-emption is brought by the brother of the vendor, it is absolutely necessary to determine the question whether the two brothers were joint or separate at the time when the sale-deed was executed, for a member of a joint family cannot institute a suit for pre-emption on the sale of joint family property : 42 *All.* 264, *Rel. on.* [P 658 C 2 ; P 659 C 1]

Mukhtar Ahmad—for Appellant.

P. L. Banerji, N. Upadhiya, N. P. Asthana and *Kumuda Prasad*—for Respondents.

Order.—These three appeals arise out of three suits brought for pre-empting the same sale. The first suit was instituted by the vendor's own brother, Badri Narain. He did not specially allege in the plaint that he was separate from his brother, though he brought a suit to pre-empt the share transferred by his brother. In the second suit brought by Najaf it was alleged in the plaint that the family was joint but this allegation was generally denied by Badri Narain in his written statement. The question of the jointness of the vendor and Badri Narain was in dispute but the learned Subordinate Judge did not frame any issue on this point. Apparently he has considered this question to be immaterial and he has held that the suit by Badri Narain is maintainable and he has the preferential right. He has tried to distinguish the case of *Partap Narain* v. *Shyam Lal* (1), on the ground that there the sale-deed had been executed by the father for legal necessity and not by his brother. In our opinion the ratio decidendi of that case, to quote the words of the learned Judges themselves, was that when the interest of all were joint to allow the plaintiffs to pre-empt would be tantamount to allowing a man to be both a vendor and a pre-emptor one after the other. If the family is joint then the plaintiff has a proprietary interest in the share sought to be pre-empted. Thus his claim is to pre-empt property which belongs to him and is still undivided. In our opinion therefore it was absolutely necessary to determine the question whether the two brothers were joint or separate.

Mr. Upadhiya on behalf of Bhawani Prasad requested that his client should be given an opportunity to produce further evidence in the Court below and have the question of his proprietary title decided afresh. We do not think that he has made out any case for an opportunity to produce fresh evidence. We accordingly send down the following issue essential to the Court below for a finding, and report :—

Were Badri Narain and Radha Rawan joint or separate at the time when the sale-deed was executed ? As no specific issue was framed by the Court below the parties will be at liberty to produce fresh evidence on this new issue. The findings should be returned within two months from this date. (On receipt of the finding the following judgment was delivered) :

Judgment.—This is an appeal by Mohammad Najaf and others, defendants, in a suit for pre-emption instituted by Badri Narain Prasad. Badri Narain is the brother of Radha Rawan the vendor and claimed a right of pre-emption. His claim was accepted by the Court below. The Court below held that Badri Narain and his brother were joint and Badri Narain was the elder brother and the karta of the family. The Court below in spite of those findings gave a decree for pre-emption to Badri Narain. In our

(1) [1920] 42 All. 264=55 I.C. 37=18 A.L.J. 116.

order of remand dated 5th June 1926 we pointed out that no specific issue had been framed by the Court below as to whether Badri Narain and Radha Rawan were joint or separate. Our attention was not drawn to the statement made by the pleader for Badri Narain before the Court below on 5th November 1923, (paper 36A) that Badri Narain and Radha Rawan the vendor were joint. We have, however, now a clear finding by the learned Subordinate Judge that Badri Narain and Radha Rawan were joint. Objections have been taken to the finding by Badri Narain but we are of opinion that in this case Badri Narain is bound by the statement of his pleader referred to above. We pointed out that as held in *Partap Narain* v. *Shyam Lal* (1) a person who is the owner of the property sold cannot sue for pre-emption inasmuch as a man cannot be a vendor and a pre-emptor with respect to the same sale. A member of a joint family cannot therefore institute a suit for pre-emption on the sale of joint family property. We are therefore of opinion that this appeal must be allowed and Badri Narain's suit dismissed with costs throughout.

P.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 659

SULAIMAN AND PULLAN, JJ.

Mukat Nath and *others*— Defendants —Appellants.

v.

Shyam Sundar Lal and *others* — Plaintiffs and Defendant—Respondents.

First Appeal No. 239 of 1926, Decided on 15th April 1929, against decree of Addl. Sub-Judge, Gorakhpur, D/- 2nd March 1926.

(a) Registration Act, S. 28—Property included in sale-deed only to give jurisdiction to Sub-Registrar—No valid transfer is effected.

Where certain property is included in a registered sale-deed simply in order to give jurisdiction to the Sub-Registrar who registered it, there is no valid transfer of property because of the fraud on the law of registration : *A. I. R.* 1921 *P. C.* 8, *Foll.*

[P 661 C 1]

(b) Contract Act, Ss. 65 and 70 — Some members of joint Hindu family selling property to *M*—Part of consideration applied to repayment of antecedent simple money debts and rest to repayment of antecedent debt under usufructuary mortgage — Other members challenging sale and Court finding that no valid transfer of property was made under sale-deed—*M* is not entitled to repayment of consideration money applied to payment of simple money debts but he must be allowed repayment of that part of consideration money which was applied to payment of debt under usufructuary mortgage.

Certain members of a joint Hindu family property including the father sold certain family property to *M*. Part of the consideration money was applied to the payment of certain antecedent simple money debts and the rest was applied to the payment of another antecedent debt secured by a usufructuary mortgage of the family property. The sale was challenged by the sons and it was found that the sale was invalid and there was no valid transfer of property under it.

Held : that *M* could not be allowed the repayment from the sons who were not parties to the sale of that part of the consideration money which was applied to the payment of the simple money debts because having paid such debts *M* stepped into the shoes of those creditors who have no right to claim possession of the family property. But in the interests of justice and equity *M* ought to be allowed repayment of the rest of consideration money having paid which he stepped into the shoes of the mortgagee. He must therefore be allowed to retain possession of the mortgage property so long as the mortgage debt, which was a charge on the property remains unpaid by the sons.

[P 661 C 1, 2]

M. Waliullah—for Appellants.

K. N. Katju—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit brought by three sons of Lallan Lal who along with two of his nephews executed a sale-deed on 9th February 1917, for Rs. 12,500 purporting to transfer two annas share in village Parsauni in the district of Gorakhpur along with a mango tree and one dhur of land in the city of Gorakhpur. This document was presented for registration on 17th February 1917, at the office of the Sub-Registrar of Gorakhpur and inasmuch as on the face of it the deed covered property situated within his jurisdiction he registered it. The plaintiffs claimed that the transfer was without legal necessity and being of ancestral joint family property was not binding on the family. They further alleged that the sale of the mango tree and one dhur of land was wholly fictitious and was never intended to be operative and accordingly the Sub-Registrar of Gorakhpur had no jurisdiction to register the decument and the document does not effect a valid transfer. The claim was contested by the defendants. The

Court below has found that the property sought to be transferred is joint ancestral property but the sale consideration was all for legal necessity. He has, however, held that the inclusion of the mango tree and the one dhur of land in the sale-deed was entirely fictitious and was merely a device to enable the executants to present the document for registration at Gorakhpur and that it was never the intention of the parties that the interest in that property should pass. As a matter of fact he has gone further and held that the alleged tree probably does not exist at all. The learned Judge has decreed the suit for possession without calling upon the plaintiffs to pay any amount to the defendants. The defendants have appealed and challenge the findings of the learned Subordinate Judge.

So far as the questions of fact go we are in agreement with his view. There can be no doubt that the entire sale consideration was for legal necessity. Rs. 6,000 had been left with the vendee for payment to one Ram Sewak Upadhia on account of an usufructuary mortgage dated 7th June 1910, executed by the grandfather of the plaintiffs. There is is no suggestion that this debt was tainted with immorality. It was an antecedent debt and therefore binding on the family. Another sum of Rs. 4,400 which was paid in cash before the Sub-Registrar had really been borrowed for payment to certain prior creditors who were named in the sale-deed. It is not suggested that these creditors were fictitious. The debts being antecedent debts of Lallan Lal are binding on his sons the present plaintiffs. Similarly the remaining sum of Rs. 2,100 had been set off on account of the amount due on two promissory notes dated 1st February 1916, in favour of the vendee. One of these was executed by the father of the plaintiffs and was an antecedent debt. Out of the property sought to be transferred only half belonged to Lallan Lal and his family and to that extent the consideration was undoubtedly good. The learned Judge has further pointed out that the sum of Rs. 6,000 which had been left with the vendee for redemption of the previous usufructuary mortgage was paid in Court and constituted a valid debt.

There can also be no doubt that the inclusion of the mango tree and one dhur of land in the sale-deed was a mere device and there was no real intention to transfer this property. The learned Judge has gone further and remarked that probably no tree exists now. There was no such specific allegation in the plaint and it is therefore not necessary for us to uphold this finding. But there can be no doubt that the whole object of including this bit of property was to justify the presentation of the document before the Sub-Registrar of Gorakhpur. The document was executed on 9th February 1917 and on that date admittedly even this mango tree and one dhur of land did not belong to Lallan Lal. There is no suggestion or evidence on the record that in reality a sale of this property had taken place in his favour before that date. On the 16th February i. e., two days before the registration a sale-deed was executed by Mahabir Prasad the scribe of the document in favour of Lallan Lal purporting to transfer this bit of property in favour of Lallan Lal. Mahabir Prasad was examined in this case and stated in favour of the vendee that this property belonged to him. In proof of this assertion the khatauni for 1325-F was filed by the defendants in which the name of one Mahabir Prasad was entered as the owner of a grove. On behalf of the plaintiffs the register from the Collector's office was sent for in order to establish that this Mahabir Prasad was an altogether different person.

As soon as this register was summoned the defendants' vakil had to admit that Mahabir Prasad whose name was entered in the khatauni was a different person. The scribe when examined could not state the number of the plot on which the tree stood or of one dhur of land which he had sought to transfer. He frankly admitted that he could not give any clear description. It is a curious fact that on the very date, viz., on 15th February 1917 another similar deed for a similar purpose was executed by the same Mahabir Prasad in favour of another person in which also a mango tree and one dhur of land were sought to be sold. The oral evidence produced on behalf of the defendants was heard by the learned Sub-

ordinate Judge and he was not satisfied that there was a bona fide transfer of this bit of property. It seems to us that the scribe executed this fictitious document in order to satisfy the Sub-Registrar that he had jurisdiction to register the document. There was really never any intention of transferring the property. This amounted to a fraud on registration and the Sub-Registrar had in reality no jurisdiction to register the document. The result, therefore, is that there has been no valid transfer of any property as recognized by law vide: *Mathura Prasad* v. *Chandra Narayan Chowdhury* (1).

Although the point was not taken in the grounds of appeal in express terms it has been argued before us that in justice and equity the defendants should be allowed the payment of the amounts which have been found to have been advanced for legal necessity. Rs. 4,400 and Rs. 2,100 were simple money debts which were outstanding. There was no charge on the family property created by these debts nor were the creditors concerned entitled to claim any lien on this property. We, therefore, fail to see how the defendants can call upon the plaintiffs to make good these amounts before they can recover possession of this property. We do not wish to suggest that the defendants have necessarily no remedy against Lallan Lal and and other executants but if they have any remedy their remedy would be exclusively as against the executants and not against the plaintiffs who were no parties to the transaction. By merely paying off the creditors the defendants cannot claim to retain this property so long as their debts have not been satisfied, as by having made the payment they have merely stepped into the shoes of these creditors who have no right to claim possession of this property.

The position of the vendee with regard to the sum of Rs. 6,000 paid to redeem the previous usufructuary mortgage of 1910 is different. On the date when the sale-deed was executed Lallan Lal and his family were not in possession of the property at all. The property had been validly put in possession of the usufructuary mortgagees. The present plaintiffs had no right to recover this property without redeeming that mortgage and their claim would have to be made against the mortgagees themselves. The present defendants on the strength of the invalidly registered document have obtained possession of the property not from Lallan Lal but from the usufructuary mortgagees who have put them in possession because their mortgage debt was discharged by the defendants. The defendants have thus stepped into the shoes of the usufructuary mortgagees with their consent and were not necessarily trespassers. The present plaintiffs have no right to recover possession of the property so long as they have not redeemed the mortgage. It therefore, seems to us that even though the equity of redemption has not been validly transferred to the defendants the latter are entitled to retain possession of the property so long as the mortgage debt which was a charge on this property remains unpaid by the plaintiffs.

We have not been able to find any direct authority in support of this view but we may refer to the provisions of Ss. 65 and 70, Contract Act, under which when an agreement is discovered to be void, any person who has received any advantage under such agreement is bound to restore it or to make compensation for it to the person from whom he received it and when a person lawfully does anything for another person not intending to do so gratuitously and such other person enjoys the benefit thereof the latter is bound to make compensation to the former in respect of the thing so done. The defendants have paid off the previcus mortgage on the plaintiffs' property and have obviously not done so gratuitously. The plaintiffs have received the advantage inasmuch as the mortgage debts would be discharged if they were put in possession of the property. It therefore seems only just and equitable that the plaintiffs should be called upon to make compensation to the defendants to the extent to which the defendants have benefited the plaintiffs and the other members of the family.

We accordingly allow this appeal in part modifying the decree of the Court below: (a) declare that the sale-deed dated 9th February 1917 executed by Lallan Lal and others

(1) A. I. R. 1921 P. C. 8=48 Cal. 509=48 I. A. 127 (P.C.).

in favour of the defendants' father is invalid for want of proper registration and (b) decree the plaintiffs' suit on conditions of their depositing in the Court below to the credit of the defendants the sum of Rs. 6,000 within six months from this date. If the amount is so deposited the parties will bear their own costs in both Courts If they fail to deposit the amount within the time allowed the suit will stand dismissed with costs in both Courts.

S.N./R.K. *Decree modified.*

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* A. I. R. 1929 Allahabad 662

SULAIMAN AND PULLAN, JJ.

(*Kunwar*) *Pratap Singh*—Defendant—Appellant.

v.

Mt. Sumitra and *others*—Plaintiffs—Respondents.

Second Appeal No. 862 of 1927, Decided on 2nd May 1929, against decree of Dist. Judge, Mainpuri, D/- 29th January 1927.

*** Pre-emption — Custom of pre-emption having once come to end cannot be revived.**

A custom of pre-emption which exists in a particular mahal (whether co-extensive with mauza or not) comes to an end when the mahal comes into the sole possession of a single proprietor and the subsequent acquisition of the mahal by several cosharers does not recreate it : 39 *All.* 480; *A. I. R.* 1921 *All.* 238; *A. I. R.* 1921 *All.* 53, *Rel. on.*; *A. I. R.* 1925 *All.* 362, *not Foll.* [P 663 C 1]

K. N. Katju—for Appellant.

Baleshwari Prasad and *Kedar Nath Sinha*—for Respondents.

Judgment.—The main point raised in this appeal is whether prior to the passing of the Pre-emption Act a custom of pre-emption can be held to revive in a mahal in which the custom has previously prevailed, but has subsequently come to an end owing to the acquisition of the mahal by a single proprietor. At the preparation of the wajib-ul-arz in 1872-73 there was a custom of pre-emption in this village, and it applied to the mahal which is now in dispute. But subsequently in or about the year 1902 the mahal became the single zamindari of one Mt Jasoda Kunwar. At that time there was a fresh settlement and according to the rules in force no custom of pre-emption was recorded by the settlement officer. Subsequently the mahal again came into the possession of several proprietors, and one of them has now set up a right of pre-emption in the case of a sale. The Courts below have held that the custom of pre-emption revived when the mahal ceased to belong exclusively to a single proprietor, and they have based their decision on a judgment of this Court reported in *Dalip* v. *Khazan Singh* (1). That judgment takes a view contrary to the one which has previously been expressed by the Pre-emption Bench of this Court, in particular the case reported in *Kamr-un-nissa* v. *Sughra Bibi* (2) which is discussed at length in the later ruling. That case has been followed many times, and has never as far as we know been distinguished in any other ruling. The point taken is that the mahal is a separate entity and when fresh mahal is created which belongs to a single proprietor, any custom of pre-emption which may have existed when there were several proprietors, dies. The learned Judges who decided the case in *Dalip* v. *Khazan Singh* (1), make a distinction between a case where the mahal is co-extensive with the mauza, as appears to have been the case in that reported in *Kamr-un-nissa* v. *Sughra Bibi* (2) and where the mahal is is not co-extensive with the mauza. Their view was that the custom means a practice prevailing among a certain community. And they infer that if the community continues to exist the fact that a portion of the village inhabited by that community comes into the possession of a single person will not affect a right which belongs to the community as such. But this view is not in accordance with other decisions of this Court, in particular the case of *Makund Singh* v. *Gopi Prasad* (3) and in another ruling reported in *Karimullah* v. *Atma Ram* (4), is is definitely held that even if a single proprietor declared that if there were a plurality of cosharers the right of pre-emption would accrue, such a declaration on the part of a proprietor will have no effect, and that the custom having once come to an end, could not be revived although no doubt in the course of time a new custom might come into existence. In our opinion this is the

(1) A. I. R. 1925 All. 362.
(2) [1917] 39 All. 480=40 I. C. 427=15 A. L. J. 422.
(3) A. I. R. 1921 All. 238.
(4) A. I. R. 1921 All. 53.

correct view of the law. We consider that the custom of pre-emption came to an end when this mahal came into the sole possession of Mt. Jasoda and that its subsequent acquisition by several co-sharers did not recreate the custom of of pre-emption. On this point this appeal depends and it is not necessary to consider the other questions raised. Holding that the custom of pre-emption did not any longer subsist in this mahal we allow this appeal with costs and dismiss this suit with costs including in this Court fees on the higher scale.

P.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 663

SULAIMAN AND PULLAN, JJ.

Ram Raj Tewari—Plaintiff—Appellant.

v.

Sheoraj Saithwar and *others*—Defendants—Respondents.

Second Appeal No. 698 of 1927, Decided on 1st May 1929, against decree of Addl. Sub-Judge, Gorakhpur, D/- 8th January 1927.

Agra Pre-emption Act, S. 19—Pre-emptor having preferential right at sale—All pre-emptors equally entitled on date of decree—Property must be divided equally.

In pre-emption suits the crucial date is the date of the decree of the first Court and so if on that date all the rival pre-emptors are equally entitled to pre-empt there cannot be any preference inter se and the property must be divided equally among them although one of them had preferential rights at the date of sale: *A. I. R.* 1923 *All.* 53, *Ref.* [P 663 C 2]

P. L Banerji—for Appellant.

Judgment.—This is a plaintiff's appeal arising out of a suit for pre-emption. It is connected with second appeal No. 753 of 1927 arising out of a rival suit. On 14th November 1924, two sale-deeds were executed of shares in khata No. 3 in the mahal in favour of strangers. Suit No. 770 was instituted by Sheoraj and others for pre-emption. These plaintiffs were cosharers in the mahal but not cosharers in khata No. 3. Subsequently one more suit No. 800 was filed by Ram Raj Tewari to pre-empt the same properties. This plaintiff was a cosharer in khata No. 3, also. Both these suits were connected and the plaintiffs in one suit were impleaded as pro forma defendants in the other suit. Thus at the time when the sale-deeds were executed as well as at the time when the suits were filed Ram Raj Tewari had a preferential right as against Sheoraj and others to pre-empt this property. But during the pendency of these consolidated suits Sheoraj and others acquired a share in khata No. 3 also by virtue of a decree of a civil suit dated 26th February 1926. On that date they all became equally entitled to pre-empt the property.

The Court of first instance passed its decree on 27th March 1926 and held that Ram Raj Tewari had a superior right to pre-empt the entire property in prefrence to Sheoraj and others. It accordingly gave Ram Raj Tewari a decree for the whole of the property in the first instance. On appeal the learned District Judge has taken a contrary view and has held that the crucial date in such cases is the date of the first Court's decree and that inasmuch as on that date all the rival claimants had equal rights there was no preference inter se. He has accordingly divided the property equally among all the pre-emptors.

It seems to us that the view taken by the lower appellate Court is correct. As has been held by a Full Bench of this Court in the case of *Ram Saran Das* v. *Bhagwat Prasad* (1), no decree for pre-emption can be passed in favour of any person unless he has a subsisting right of pre-emption at the time of the decree. So that if either by loss of his own right or by an acquisition of a right by the defendant the preference is destroyed by the time the decree comes to be passed the plaintiff ceases to be entitled to such a decree. In the present case no doubt all the rival pre-emptors had a subsisting right of pre-emption as against the vendees. But the rival pre-emptors are also impleaded as pro forma defendants and no decree for pre-emption can be passed in favour of Ram Raj Tewari unless the Court is satisfied that he has a subsisting right to obtain the decree at the date when that decree is to be passed. Inasmuch as Ram Raj Tewari has lost his preference as against Sheoraj and others it seems to us impossible to pass a decree in favour of Ram Raj Tewari and others for a share as regards which he has no preference compared with Sheoraj and others. Although S. 19 does

(1) A. I. R. 1929 All. 53 (S.B.).

not in express terms apply to the case of rival pre-emptors the interpretation which has been put upon it and which requires that the right of preference of the plaintiff should subsist till the time of the decree makes this view consistent with the ruling in the Full Bench case.

It may further be pointed out that S. 13 which lays down that where two or more persons claiming (pre-emption) are equally entitled to pre-emption, the property shall be equally divided between them, uses a present tense and not a past tense. That section cannot be interpreted to mean that they must have been equally entitled to pre-emption on the date of the sale-deed. That the date of the sale-deed is not the absolute crucial date in suits for pre-emption is apparent from the provisions of S. 20 in which a subsequent acquisition by the purchaser places him on the same footing as the pre-emptor. Although the case is not free from difficulty we hold that the view taken by the lower appellate Court is correct. Ram Raj Tewari not having any preferential right as against Sheoraj and others at the time of the decree is only entitled to share the property equally, and not to claim the whole. We, therefore, dismiss this appeal.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 664

NIAMATULLAH AND BENNET, JJ.

(*Lal*) *Behari Lal*—Defendant—Appellant.

v,

Allahabad Bank, Ltd., Cawnpore and *another*—Plaintiff and Defendant—Respondents.

First Appeal No. 285 of 1926, Decided on 31st May 1929, against decree of First Sub-Judge, Cawnpore, D/- 4th March 1926.

(a) Contract Act, S. 135 — Defence of giving time contemplates subsequent contract between creditor and debtor to extend original contract time.

Defence, made by surety to the effect that creditor gave time to the principal debtor without his consent, based on S. 135 contemplates a subsequent contract between a creditor and the principal debtor whereby time originally fixed is subsequently extended. [P 665 C 1]

(b) Negotiable Instruments Act, S. 4—Person executing promissory note cannot be held in law to have position of surety—Contract Act, S. 132, Illustration.

There is an essential antithesis between the legal position of a surety and that of the executant of a promissory note and so a person who executes a promissory note cannot be held in law to have the position of a surety :. *A. I. R.* 1924 *Rang.* 360, *Dist.* [P 665 C 2].

Peary Lal Banerji, Indu Bhushan Banerji and *Narain Prasad Asthana*—for Appellant.

Kailas Nath Katju—for Respondents.

Judgment.—This is an appeal by one of the defendants, L. Behari Lal, against the decree passed by the learned Subordinate Judge of Cawnpore, awarding to the plaintiff-respondent, the Allahabad Bank, Ltd., the balance due on a promissory note. It is admitted that this promissory note for Rs. 25,000, dated 5th February 1923, was executed both by the defendant-appellant, L. Behari Lal, and by the other defendant Jagan Nath. Subsequently to the execution of this promissory note, Jagan Nath paid a sum of Rs. 5,000 to the Bank on 2nd August 1923, and after that date he disappeared; and on the application of the appellant insolvency proceedings were taken against Jagan Nath. The appellant has made a number of payments to the Bank subsequently, and the present suit was instituted after these payments had been made by the appellant.

The chief point argued before us on behalf of the appellant is that his liability was only that of a surety and not of a principal. If this proposition were conceded, it was argued for the appellant that the Bank had given time to Jagan Nath without the consent of the appellant and that, therefore, the appellant would be discharged from liability. The learned counsel relied on the fact that the appellant had signed the promissory note and the receipt for Rs. 25,000 on 24th January 1923, and that it was not until 5th February 1923, that a period was fixed for the repayment of the loan in a letter (Ex. E) which was written by Jagan Nath alone to the Bank. That letter states that Rs. 5,000 would be repaid in six months, and the balance within one year from date. The case for the appellant now put forward is that the appellant was not aware of the period fixed in this letter, and, therefore, that the appellant intended that the loan should be payable on demand. We find, however, that this

point has not been supported by any statement to that effect by the appellant in the evidence which he gave before the lower Court. Nor is there any evidence to that effect on the record. In fact, the appellant admits that on a date subsequent to 16th February 1925, he initialled the alteration of the date of the promissory note from 5th January, to 5th February, that is, 11 days subsequent to the letter of 5th February, and the natural presumption is that the appellant was fully aware of the period fixed for repayment in that letter.

We may also refer to the fact that the promissory note states that interest is to be at 9 per cent per annum on the half-yearly rests. Accordingly it is clear that the promissory note contemplated that the loan would be for a period of more than one half year, and, therefore, the argument that the appellant was under the impression that the promissory note was only intended to be on demand is an unsound argument. We may also allude to the fact that in a letter, dated 23rd January 1923, Ex. G, the Allahabad Bank in Cawnpore wrote to the head office stating that the period for which the loan was required was 18 months. Subsequently the head office decided that the period of loan should not be more than one year. We consider that these facts could not have been hidden from the knowledge of the appellant ; and the appellant has not given evidence that he was unaware of these facts.

We may also note that the case, as put forward in the written statement, is "that the plaintiffs Bank gave time to defendant 2, the principal debtor, without obtaining answering defendant's assent to it: para. 19 of the written statement."

Such a defence, based on S. 135, Contract Act, contemplates a subsequent contract between the creditor and the principal debtor, whereby the time originally fixed is subsequently extended. In the present case there was no subsequent contract between the creditor and defendant 2 by which the period was extended, and, therefore, S. 135, Contract Act, has no application. We next examine the question as to whether, under the circumstances of the present case, the appellant can be held to be a surety only. Reliance is placed on a passage in Ameer Ali and Woodroffe's Evidence Act, Edn. 8, p. 626, in which it is stated, without any authority whatever, that evidence might be admissible to show that one of the several obligors of a bond or a bill-of-exchange was a surety only. Even in the text reference is not made to a promissory note, and the case of a bond or a bill-of-exchange may conceivably be different ; but for the proposition as laid down in the text no authority whatever is produced.

Reference is also made to the ruling of a single Judge, reported in *A. I. R.* 1924 *Rangoon*, p. 360, in which it was held that where a promisee knew that one co-executant was a surety for another co-executant, evidence might be admitted to prove this fact. In this ruling the only question considered was the effect of S. 92, Evidence Act, and no question was raised as to the legal affect of a person signing a promissory note as an executant. We consider, therefore, that the ruling is no authority whatever for the legal effect of the action of the appellant in signing this promissory note as an executant. Under S. 4, Negotiable Instrument Act, a promissory note is an instrument in writing containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument. The chief point about this definition is that the undertaking to pay must be unconditional. On the other hand, the definition of surety in Ss. 124 and 126, Contract Act, is that a surety is a person who undertakes a liability which is conditional on the failure of another person to discharge his liability. There is, therefore, an essential antithesis between the legal position of a surety and that of the executant of a promissory note. We consider, therefore, that as the appellant executed this promissory note, he cannot be held in law to have the position of a surety. In this connexion we would also refer to S. 132, Contract Act, and to the illustration attached to it. That illustration is similar to the present case, and it is laid down that, where two persons jointly execute a promissory note, they are jointly liable on that promissory note in spite of the fact that they may have made a contract between themselves by which one of them only would be liable on default of the other. We consider that the decree of the lower Court is

correct, and we dismiss this appeal with costs.

S.N /R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 666

MUKERJI AND NIAMATULLAH, JJ.

Shiam Lal—Plaintiff—Applicant.

v.

Moti Ram and *others* — Defendants—Opposite Parties.

Civil Revn. No. 216 of 1927, Decided on 25th April 1929, against order of First Addl. Munsiff, Meerut, D/- 12th August 1927.

Civil P. C., S. 47—Consent decree on condition that if defendant deposited certain amount within certain time suit shall stand dismissed or else it shall stand decreed—Defendant depositing amount but after period fixed—Court declaring deposit to have retrospective effect dismissed suit—Court's order not being in discharge or satisfaction of decree was not appealable—Court had no power to extend time for making deposit—Civil P. C., S. 148.

Court first passed an incomplete decree by consent of parties that in case defendant deposited certain amount within certain time the suit shall stand dismissed, or else if no deposit was made within that time the suit shall stand decreed. Defendant deposited the amount but after the period fixed was over and the Court declared that the deposit should have retrospective effect and the suit consequently was dismissed.

Held ; that the order of the Court, not being in satisfaction or discharge of a decree, was not appealable. [P 666 C 2]

Held further : that the Court had no power to extend the period of time fixed for making the deposit because, although, where in the progress of the suit something has to be done, Court granting time can extend it under S. 148, still where the decree finally settles the rights of the parties, the Court cannot extend time so as to interfere with the rights of the parties : 40 *All.* 579 and 42 *All.* 639, *Appr.* [P 667 C 1]

N. C. Vaish—for Applicant.

Panna Lal—for Opposite Parties.

Judgment.—This application in revision must be allowed. The plaintiff Shyam Lal sued for recovery of possession over certain properties. The parties agreed that they would abide by a statement made by a certain gentleman, Khem Chand. Mr. Khem Chand made a statement to the effect that if defendant 1 paid the sum of Rs. 2,100 within two months of the date of his making the statement, which was 10th June 1927, the suit would stand dismissed, and if defendant 1 failed to pay, the suit would stand decreed. The learned Munsif before whom the case was, passed a decree in those terms. Defendant 1 on 10th August 1927, on which day, the two months' period expired, paid into Court the sum of Rs. 1,150. He, further, made an application to the Court for granting three months' further time to him, to pay up the balance. On 12th August 1927, the learned Munsiff, after hearing the parties, refused that application. On the same date, defendant 1 deposited the balance of the money. On the deposit being made, the learned Munsiff made a declaration that this payment would have a retrospective effect, as if the money had been paid on 10th August 1927. The effect of this declaration was that the decree which should have been in plaintiff's favour, went against him and the plaintiff's suit stood dismissed. The plaintiff has come up in revision and his contention is that the Court below had no jurisdiction to extend the time and his order dated 12th August 1927, should be set aside.

Mr. Panna Lal, the learned advocate for the respondents, has taken the objection that the order was appealable and no application in revision lay. His contention is that the order was virtually one under S. 47, Civil P. C., and, therefore, being a decree, was appealable. We do not accept this contention as correct. The decree that was passed on 10th June 1927 was an incomplete decree, which was to take its final shape on certain things happening or not happening, within two months. If a deposit was made within two months, the decree was to take this shape, namely, the suit of the plaintiff was to stand dismissed. If, on the other hand, no deposit was made, the decree was to be in favour of the plaintiff, allowing him to recover possession of property. The question, that arose before the learned Munsiff, was, what shape the decree should take in consequence of the deposit made by the defendant. The question that arose, was not, therefore, a question of the satisfaction or discharge of a decree. On the merits, we are of opinion, that the Court below had no jurisdiction to extend time. We agree with the cases decided in this Court, namely, *Sajjadi Begam* v. *Dila-*

war Husain (1) and *Kandhaiya Singh* v. *Mt. Kundan* (2). The power given to the Court under S. 148, Civil P. C., is a power to extend time where any period is fixed or granted by the Court to do an act prescribed or allowed by the Code of Civil Procedure, i. e., where, in the progress of the suit, something has to be done by a party, the Court granting the time may extend the time. But where the decree settles the rights of the parties finally, the Court cannot extend time so as to interfere with the rights of the parties. The result is that we allow the application and set aside the order of 12th August 1927, passed by the learned Munsiff. The result is that the deposit of 12th August 1927 will not be treated as deposit made on 10th August 1927 The opposite parties will pay the costs of the application in this Court.

S.N./R.K. *Order set aside.*

(1) [1819] 40 All. 579 = 47 I. C. 4 = 16 A. L. J. 625.
(2) [1920] 42 All. 630 = 57 I. C. 16 = 18 A. L. J. 826.

A. I. R. 1929 Allahabad 667

SULAIMAN AND PULLAN, JJ.

Debi Dayal—Defendant—Appellant.

v.

Ghasita and *others* — Plaintiffs and Defendants—Respondents.

Second Appeal No. 960 of 1927, Decided on 2nd May 1929, against decree of Addl. Sub-Judge, Banda, D/- 7th March 1927.

Specific Relief Act, S. 27 (b)—*A* selling his house to *B* for Rs. 175 and *B* agreeing to sell it back to *A* in case he sells at all, for Rs. 175 only and to another only if *A* declines to purchase it to that price—*B* then selling it to *C*, who had notice of that agreement for Rs. 300 notwithstanding *A's* offer for Rs. 175—Agreement was not void but personal contract, which could be enforced against *C* who purchased having notice of it—*A's* suit to enforce that agreement would not amount to claim for pre-emption—Agra Pre-emption Act, S. 3.

A sold his house to *B* for Rs. 175 and *B* made an agreement that in case he would transfer the house he would sell it back to *A* for the same price of Rs. 175 and to nobody else unless *A* declines to purchase it for that price. *B* then sold the house to *C* who had notice of the agreement between *A* and *B*, for Rs. 300 disregarding *A's* offer for Rs. 175. A then sued for enforcement of the contract.

Held: that the agreement in question was not void on account of ambiguity or as offending against the rule of perpetuity or as being an absolute restraint on alienation. It was merely a personal contract between *A* and *B* and as such *A* could enforce it against the purchaser *C* who had notice of the contract. [P 667 C 2]

Held further: that *A's* suit did not amount to a claim for pre-emption and hence was not unentertainable by the provisions of S. 3 Agra Pre-emption Act. [P 668 C 2]

K. N. Laghate—for Appellant.

Shiva Prasad Sinha—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for the enforcement of a contract embodied in an unregistered agreement dated 5th March 1923. On that date the plaintiffs sold this house to defendant 1 for Rs. 175 and the latter agreed by that agreement to sell the house back to them for the same price Rs. 175 when he wanted to transfer it and that only if they declined to repurchase the house he would sell it to other persons. Abdul Ghafur defendant 1 sent notice to the plaintiffs and asked them to purchase the house for Rs. 300. They declined to purchase it on that price but offered to repurchase it for Rs. 175. Ignoring this offer Abdul Ghafur sold this house to the vendee appellant. The finding of the lower appellate Court is that before the appellant took the sale-deed he was warned by the plaintiffs of their right to take it back and he took the sale-deed with full knowledge of the agreement between the parties. The Court of first instance held that the agreement was void and dismissed the suit. The lower appellate Court has held that it is in force and has decreed the claim but on payment of Rs. 300 and not Rs. 175. The purchaser Debi Dayal has appealed to this Court but the plaintiffs have not filed any cross-objections.

In our opinion the agreement in question cannot be deemed to be void on account of any ambiguity or on account of its offending against the rule of perpetuity. This was a special personal contract between the parties which was binding on them and could be enforced against the transferees with notice but not otherwise. The parties to the agreement are still alive and it is quite clear that defendant 1 was bound by the contract to re-transfer the house to the plaintiffs on the price mentioned therein and could not sell it to other persons unless they refused to take it. The appellant having purchased the house with notice of this agreement the contract can be en-

forced against him under S. 27, sub-Cl. (b) Specific Relief Act.

It is next contended that the plaintiffs' claim is really one for pre-emption and such a claim on a private contract cannot be entertained in view of the provisions of S. 3, Agra Pre-emption Act. The right of pre-emption under S. 4, sub-Cl. 9 is defined to be a right to be substituted in place of the transferee. The plaintiffs in this case did not want to be substituted in place of Debi Dayal. In fact they did not want to pay the price which Debi Dayal paid. Their whole claim was to enforce the contract to resell the house to them on the fixed price of Rs. 175. This is therefore not a suit for pre-emption governed by the Act but for the enforcement of a special contract between the parties.

The learned advocate for the appellant has contended that inasmuch as the plaintiffs have acquiesced in the decree for the payment of Rs. 300 by them, they must be taken to have treated the suit as one for pre-emption. We think that no estoppel can arise on that account. The defendants suggested that there had been improvements made in the house and the plaintiffs might well have acquiesced in the decree for the payment of a large amount on account of these improvements. Under the agreement there was no absolute restraint on alienation and S. 10, T. P. Act, is obviously inapplicable. The respondents have not made good the deficiency in the amount of the court-fee paid by them in the Court below. In view of a previous order passed by a learned Judge of this Court we have not allowed their counsel to be heard. The appeal is accordingly dismissed without any order as to costs but no decree will be prepared by this Court's office unless the amount of the court-fee is made good.

S.N./R K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 668

BOYS AND YOUNG, JJ.

Piare Lal and *others*—Plaintiffs—Appellants.

v.

Jhabba Lal—Defendant—Respondent.

Second Appeal No. 700 of 1926, Decided on 17th May 1929, against decree of Dist. Judge, Bulandshahr, D/- 12th January 1926.

Agra Tenancy Act (1901), Ss. 163 and 164—Cosharers suing lambardar for profits can join in same suit—Civil P. C., O. 1, R. 1.

Cosharers suing lambardar for their respective share of profits under S. 164 can join in the same suit because their several rights arise out of the same act, viz., the lambardar's failure to divide profits among cosharers on the date on which they are divisible which it is the duty of the lambardar to do. [P 668 C 2]

Peary Lal Banerji—for Appellants.

Panna Lal—for Respondent.

Judgment.—This is a plaintiffs' appeal arising out of a suit for profits under S. 164 of the old Tenancy Act brought against the lambardar. Three plaintiffs sued in the one suit, and it is immaterial whether their shares were equal or unequal. The question was raised whether the three plaintiffs could join their separate claims for relief in one suit. They relied primarily upon O. 1, R. 1. Both Courts have repelled their contention and have dismissed the suit. The only question then that we have to decide is, whether or no, by the provisions of O. 1, R. 1, the three plaintiffs were entitled to join together in the one suit. O. 1, R. 1, declares that

"all persons may be joined in one suit as plaintiffs in whom any right to relief.....arising out of the same act.....is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise."

It is not necessary to consider the other phrases occurring in the rule. We are satisfied that the plaintiffs' several rights to relief arose out of the same act. By S. 163, Tenancy Act, it is laid down that

"in the absence of any determination of the date by the settlement officer or of an express agreement among the cosharers, profits shall be divisible on such dates as the Local Government may by rules made under the Act prescribe."

Dates have been prescribed and no question arises in this case in regard to this point. The section itself only says "shall be divisible," and the phrase is open to the construction that it is not therein laid down that it is the lambardar's duty to proceed to a division of the profits on the date on which they become divisible. It is open to the construction that all that is laid down is that from the date fixed it is open to cosharers to come and claim their share of the profits. The real meaning, however, of these words, as laying down an express duty on the lambardar is made clear by the

rules framed by the Board of Revenue in virtue of their powers under S. 234 (f), Land Revenue Act. The material rule is to be found at para. 18 (b) of the Circular No. 8-III sanctioned by the Local Government on 24th February 1902. The rule reads as follows:

"The duties of a lambardar are..... (c) "to divide at the appointed time such profits as may be divisible among the cosharers whom he represents."

We quote from the most recent edition of the Manual of the Revenue Department for the United Provinces, at p. 63 This, in our view, removes the only possible doubt that might have existed as to the effect of S. 163. In our opinion, therefore, the lower Courts were wrong in dismissing the plaintiffs' suit on the ground that the three plaintiffs could not join in the one suit. We set aside the decrees of both Courts and direct the trial Court to restore the case to its register of pending suits and to proceed with the determination of the case according to law. The appellant will have the costs of this appeal and the appeal in the lower appellate Court. Other costs will abide the result.

S.N./R.K. *Case remanded.*

A. I. R. 1929 Allahabad 669

NIAMATULLAH AND BENNET, JJ.

Johari Mal and *another*—Plaintiffs—Appellants.

v.

Balmakund and *others*—Defendants—Respondents.

Second Appeal No. 1391 of 1927, Decided on 30th April 1929, against the decree of Sub-Judge, Bulandshahr, D/- 21st April 1927.

(a) Practice — Jurisdiction — Civil Court holding suit non-entertainable by it but entertainable by revenue Court cannot dismiss suit but must return plaint for presentation to proper Court.

Where a civil Court holds that a suit is not entertainable by it being one within the exclusive jurisdiction of the revenue Court, it cannot dismiss the suit on the ground that it is barred by limitation but must return the plaint for presentation to the proper Court. [P 670 C 1]

(b) Agra Tenancy Act (1901), S. 146, para. (3)—Plaintiffs suing for value of crops and alleging that crops were misappropriated shortly after distraint and that some time afterwards decree for arrears of rent was obtained, execution of which was applied for by plaintiffs' arrest.—S. 146 does not apply so as to bring suit within revenue Court's exclusive jurisdiction.

Section 146, para. 3, provides for a case where the property is under distraint, and continues to be so when it ought to be withdrawn. But in the case where the plaintiffs suing for value of crops allege that the crops were misappropriated shortly after distraint, that sometime afterwards a decree for arrears of rent was obtained and execution of that decree was applied for by arrest of the plaintiffs, S. 146 does not apply so as to make the case exclusively cognizable by revenue Court. [P 671 C 1]

(c) Practice — Jurisdiction—Court cannot disown jurisdiction by assigning to suit character which plaintiff did not intend it to have.

It is not permissible for a Court to disown jurisdiction by assigning to the suit a character which was not intended by the plaintiffs to have and which cannot be assigned to it without resorting to a far-fetched theory not based on the allegations contained in the plaint and on a proper consideration of the entire frame of the suit. [P 671 C 1]

(d) Jurisdiction—Civil and revenue Courts—Question of tort included — Suit can be tried by civil Court — Agra Tenancy Act, S. 146.

Any irregularity in following the procedure laid down by the Tenancy Act regarding distraint of crops and the injury resulting from such irregularity may well be left to be dealt with by the revenue Court; but the broader questions arising in actions based on tort are not excluded from the jurisdiction of the civil Court, which is more competent to deal with them. [P 671 C 1, 2]

M. L. Agarwala—for Appellants.

N. C. Vaish—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiff appellants in the Court of the Munsif of Khurja for recovery of Rs. 1,600, being the value of the crops which the defendants first party (defendants 1 and 2) are alleged to have misappropriated. Defendant 1 is the landlord of the holding of which one Lahori is the occupancy tenant. Plaintiff 1 (Johari Mal) is the sub-tenant holding it from the latter. Plaintiff 2 and defendant second party (defendants 3 and 4) cultivated the land in 1332F. under a batai arrangement with plaintiff 1. Rent having fallen in arrears in 1332F., the defendant 1 distrained the rabi crops on 19th March 1925, and appointed his servant, defendant 2, as the shehna. The plaintiffs' case is that on 7th April 1925, the crops were taken away by the defendants first party, who misappropriated the same, and that sometime afterwards defendant 1 obtained a decree for arrears

of rent which the plaintiff 1 had to satisfy to avoid a threatened arrest in execution of that decree. It is also mentioned in the plaint that plaintiff 1 filed a complaint in the criminal Court, presumably, charging the defendants first party with the offence of criminal misappropriation ; but it was unsuccessful. The defence so far as it is material to notice was that plaintiff 2 and the defendants second party in collusion with plaintiff 1, dishonestly carried away the crops in spite of distraint, that the suit is cognizable only by the revenue Court and that it is barred by limitation. The suit has been thrown out by both the lower Courts on the ground that it is within the exclusive jurisdiction of the revenue Court. The plaintiffs appeal to this Court.

It should be noticed that the lower Courts dismissed the suit instead of returning the plaint for presentation to the revenue Court, as should have been done. The reason assigned by the lower appellate Court for this course is that the suit, if instituted in a revenue Court, would be time barred. If the civil Court has no jurisdiction to entertain the suit, it has none to decide the question of limitation, nor is it open to the civil Court to decide the question of limitation for the revenue Court in anticipation. The plaint should have been returned for presentation to the proper Court, leaving it to the plaintiffs to present it before the revenue Court or not, as they may be advised. The order of the lower Court must be modified to that extent in any view of the case.

On the main question arising between the parties, viz., whether the civil Court has jurisdiction to entertain a suit of this character, it cannot be disputed that a civil Court has such jurisdiction, unless it is excluded by some rule of law. The lower Courts have held that the present suit is one of those which are declared by S. 167 read with Sch. 4 (6) and S. 146, Tenancy Act 2 of 1901 to be exclusively cognizable by the revenue Court. If it is a suit of the description given in S. 146, there can be no doubt that the Courts below were right. Bearing in mind the allegations contained in the plaint which attribute to the defendants first party a criminal misappropriation of the crops—I interpret it in that sense—it will be found that the suit is not within the purview of S. 146. That section runs as follows:

"If any person under colour of this Act distrains or sells, or causes to be sold, any property otherwise than according to the provisions of this Act,

"or if any distrained property is lost, damaged or destroyed by reason of the distrainer not having taken proper precautions for the keeping and preservation thereof,

"or if the distraint is not immediately withdrawn when it is required to be withdrawn by any provisions of this Act,

"the owner of the property may institute a suit against the distrainer for compensation for any injury which he has thereby sustained.

"If the distrainer is an agent or servant, his principal may be joined as a defendant in the suit."

The sale referred to in the section is what must follow every distraint and should be made in the manner laid down by the Act: see S. 128 et se qua . If the distrainer sells it in any other manner, he can be sued before the revenue Court for damages arising out of such an irregular sale. The present suit does not complain of any sale, and is obviously not covered by the first paragraph of the section. The plaintiffs do not likewise complain that the crops were "lost, damaged or destroyed by reason of distrainer not having taken proper precaution." The second para which clearly contemplates a case of negligence on the part of the distrainer, and the damages arising therefrom cannot be so construed as to include the case of deliberate misappropriation, as is alleged in the present case. That part of the section, therefore, does not apply. The lower appellate Court considers the third paragraph to be applicable, because subsequently a decree for rent was obtained and satisfied by the plaintiffs. It argues that:

"there is a provision that if a distraint is not immediately withdrawn when it ought to be legally withdrawn then a suit for compensation for any injury sustained by the owner of the property against the distrainer is covered by this section. When a distraint is legally withdrawn the distrainer is bound to place the distrained property in the custody of its owner and if he fails to do that, i. e. if he fails to restore the property, the owner of the property can sue under this section."

I cannot accept this reasoning, which is based on a distorted view of the plain language employed in the section. It provides for a case where the property is under distraint, and continues to be so when it ought to be withdrawn. In the

case before us, the plaintiffs allege—and we must accept their allegation in determining the question of jurisdiction that the crops were misappropriated shortly after distraint—that sometime afterwards a decree for arrears of rent was obtained and execution of that decree was applied for by arrest of the plaintiffs: see para. 9 of the plaint. If their case is true, there was no property left and no subsisting distraint which could be withdrawn at the time the decree was satisfied It should be remembered that the crops under distraint are to be stored by the cultivator or, if he neglects, by the distrainer, in some convenient place in the neighbourhood': see S. 124, so that, when the distraint is withdrawn, the crops can be physically available to the cultivator It is also relevant to refer to S. 128, which requires the distrainer to take steps for sale through the sale officer within five days after distraint. It is clear to my mind that the plaintiffs' suit is not for compensation for injury sustained by them in consequence of the distraint not having been withdrawn when the law required it to be withdrawn. It is not permissible for a Court to disown jurisdiction by assigning to the suit a character which was not intended by the plaintiffs to have and which cannot be assigned to it without resorting to a farfetched theory not based on the allegations contained in the plaint and on a proper consideration of the entire frame of the suit. There is no other provision in S. 146 which gives jurisdiction to the revenue Court in respect of a suit of this character.

We must give effect to the law according to the plain meaning of the language employed, and should not consider whether it would be more expedient to have a suit of this kind tried by a revenue Court. It is not difficult to discern the line of demarcation between the jurisdictions of civil and revenue Courts in this respect. The Tenancy Act premits distraint under the supervision of the revenue Court. Any irregularity in following the procedure laid down by the Act in that behalf and the injury resulting from such irregularity may well be left to be dealt with by the revenue Court ; but the broader questions arising in sections based on tort are not excluded from the jurisdiction of the civil Court, which is more competent to deal with them For the reasons stated above, we are of opinion that the suit of the plaintiffs as framed was rightly instituted in the civil Court. We set aside the orders of the Courts below and direct the Court of first instance to entertain the suit instituted by the plaintiffs and proceed to try it according to law.

S.N./R.K. *Case remanded.*

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* A.I.R. 1929 Allahabad 671

DALAL, J.

Brij Kumar Lal Sahu—Purchaser—Appellant.

v.

Jagdamba Prasad and *others*—Judgment-debtors—Respondents.

Execution Second Appeal No. 1060 of 1928, Decided on 18th February 1929 from decree of Sub-Judge, Jaunpur, D/- 5th March 1928.

*** (a) Civil P. C., O. 21, R. 92, does not apply to confirmation of irregular sale.**

A sale, in which the judgment-debtors had no opportunity of objection as they were entitled to do under R. 90 or of paying up certain items and getting the sale set aside as laid down in R. 89, was an irregular sale. To such a confirmation R. 92 could not be applied, there being material irregularity in the sale as it did not comply with the provisions of the Code. [P 672 C 1]

(b) Civil P. C., O. 21, R. 90—Scope—Sustaining substantial injury by material irregularity is sufficient.

Rule 90 requires no previous condition of deposit which is necessary under R. 89. The proviso is satisfied if the judgment-debtors have sustained substantial injury by reason of the material irregularity, being deprived of their proper remedy and getting a low price in the sale. [P 672 C 1]

(c) Civil P. C., O. 43, R. 1 (j)—Scope.

An appeal does not lie when no objection has been specifically allowed or dismissed by the executing Court. [P 672 C 2]

S. N. Seth—for Appellant.

Ambika Prasad—for Respondents.

Judgment.—Mr. Seth has explained the facts in his usual clear manner. I am afraid that I am not in agreement with him on the question of law. The facts are somewhat singular. A simple money decree was put into execution by sale of the property of the judgment-debtors. The property was put up to sale on 20th April 1927, and purchased by the decree-holder Bhagwan Das for Rs. 255-6-6. The judgment-debtors were

B. N. Das
Advocate High Court
Jammu & Kashmir

seven, of whom three objected on 19th May 1927. The objection was heard on 2nd July 1927, and time was given to the objectors either to deposit the decree money, or to discover another purchaser who would pay more. These three judgment-debtors out of seven produced one Brij Kumar Lal on 2nd August 1927. This purchaser paid a sum of Rs. 300 on 6th August 1927, and the sale was settled with him and at once confirmed. On 25th August 1927 two of the other judgment-debtors appeared and submitted to the Court that the sale in favour of Brij Kumar Lal was a collusive transaction between the three objecting judgment-debtors and Brij Kumar Lal, and that the sale should, therefore, be set aside. This objection was dismissed by the executing Court, but allowed by the lower Court of appeal. This is a second appeal by Brij Kumar Lal. Before hearing it I took the precaution of having Rs. 300 deposited in Court by the judgment-debtors, so that the purchaser whose money has been removed from the trial Court may not suffer. Mr. Seth desired this Court to hold that the confirmation of 6th August 1927 was confirmation of the sale of 20th April 1927, and that after such confirmation no judgment-debtor can object. He argued that under O. 21, R. 92, the sale of 20th April 1927 had become absolute. This argument overlooks the fact that the sale confirmed was not the sale held on 20th April 1927 but it was a sale confirmed in favour of a new purchaser for a new sale price. No fresh sale had taken place on non-confirmation of sale in favour of the decree-holder. As the facts stand, a new irregular sale of 6th August was confirmed on that very date. To such a confirmation R. 92 cannot be applied. To the sale of 6th August the other judgment-debtors had no opportunity of objecting as they were entitled to do under R. 90, or of paying up of certain items and getting the sale set aside as laid down in R. 89. The objection made on 25th August was within thirty days of this new sale of 6th August. There cannot be the slightest doubt of material irregularity in the sale of 6th August as it did not comply with the provisions of the Code.

It was next argued that the items required to be deposited under R. 89 were not deposited by the objectors of 25th August 1927, and, therefore, the sale could not be set aside under that rule. There is, however, R. 90 which requires no previous condition of a deposit, and, as I have already pointed out, there was material irregularity. The proviso is satisfied as the applicants have sustained substantial injury by reason of such irregularity because they were thereby deprived of their proper remedy, and the price fetched must have been considerably less than the value of the property, when it is considered that the judgment-debtors have undertaken such great expense of litigation and have promptly deposited a sum of Rs. 300 at the direction of this Court.

There was also another argument advanced by Mr. Seth. He pointed out that the remedy after the confirmation lay in an appeal under O. 43, R. 1 (j). In my opinion such an appeal could not lie as no objection had been specifically allowed or dismissed by the executing Court.

An irregular proceeding is certain to cause injustice to some person or other, and this Court can only decide on a balance of such injustice. In the present case I am of opinion that there will be less injustice in paying off Brij Kumar Lal and setting aside the sale than in permitting the irregular sale of 6th August 1927 to have operation.

In the result I dismiss this appeal and direct the sum of Rs. 300 deposited in this Court to be paid over to Brij Kumar Lal Sahu on proper application.

Having regard to the facts of the case I direct that all parties shall bear their own costs throughout.

Permission is granted to file a Letters Patent appeal.

Mr. Ambika Prasad desires me to say that according to him no appeal lies, and that the point has not been decided above. This may be held to be important in a Letters Patent appeal, though not here. This Court, as a question of jurisdiction has been raised, could have interfered by way of revision because the allegation was that the trial Court had acted without jurisdiction. This observation is made to permit Mr. Ambika Prasad to raise the same argument over again in case a Letters Patent appeal is filed.

P.N./R.K. *Appeal dismissed.*

* A. I. R. 1929 Allahabad 673

PULLAN, J.

Natha Ram—Defendant—Appellant.

v.

Ram Gir and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1692 of 1927, Decided on 15th May 1929, against decree of Addl. Sub-Judge, Aligarh, D/- 17th June 1927.

*** Civil P. C., O. 21, R. 92—In execution sale, property not mortgaged wrongly included—Judgment-debtor ignorant of it—Suit to recover possession of property thus sold in excess—Purchaser is not entitled to recover money for the property—Suit is not barred either by O. 21, R. 92 or by Lim. Act. Art. 12.**

Where in execution of a decree for sale of the mortgaged property certain property of the judgment-debtor (other than the mortgaged property) was wrongly included in the auction sale, and the judgment-debtor knew nothing of the sale, his suit to recover possession of the property sold in excess of the decree would not be barred by O. 21, R. 92, nor would it be barred by limitation since the sale being a nullity, as it was not justified by the decree, no question of limitation under Art. 12 would arise. Further as the judgment debtor knew nothing of the sale, and as such was not in fault in not objecting when the sale was proclaimed, the purchaser would not be entitled to get back the portion of his purchase money: *A. I. R.* 1928 *All.* 363, *Foll.*; *A. I. R.* 1925 *All.* 236, *Dist.* [P 673 C 2]

Panna Lal—for Appellant.

R. K. Malaviya—for Respondents.

Judgment. — The plaintiffs in this suit were judgment-debtors in a mortgage decree. The property which was mortgaged was 3/4th biswas in certain khatas, and a decree for sale was passed against that share. By mistake in the sale proclamation the property was stated to be 1¼ biswas in accordance with the claim previously made by the mortgagee and successfully contested in the Court. In accordance with the sale proclamation a share of 1¼ biswas was sold and purchased by a third party. No objection was made at the time by the judgment-debtors, and they subsequently filed this suit. The object of the suit is to recover that portion of the property which was sold in excess of the 3/4th biswas included in the mortgage. The plaintiffs have been successful in two Courts, and the auction-purchasers come before this Court in second appeal, alleging that the suit was barred by O. 21, R. 92, Civil P. C., and that it was further barred by limitation. The cases on which the appellant relies are not of the Allahabad High Court with the exception of one reported in *Imtiaz-un-nissa* v. *Chuttan Lal* (1). In that case, as in the others relied upon by the appellant, it is taken for granted that the judgment-debtors could and should have made an objection when the property was wrongly proclaimed for sale. In this case there is a finding of the first Court that the judgment-debtors had no notice, and no knowledge of the sale, and this finding was not challenged in first appeal. It is too late for the appellant now to argue in this Court that the sale must be presumed to have taken place with the plaintiffs' knowledge and that they are estopped from questioning its validity. On the finding of the first Court, acquiesced in by the appellant in first appeal, there can be no question of estoppel.

It was held by a Bench of this Court in the case of *Bulaki Das* v. *Kesri*, *A. I. R.* 1928 *All.* 363, that where a judgment-debtor brings a suit to recover possession of a certain property (other than mortgaged property) wrongly included in the auction-sale by the mortgagee in execution of his mortgage-decree, and purchased by the mortgagee himself, the suit is not barred under O. 21, R. 92. A fortiori the same finding applies to the case where the purchaser is not the mortgagee. In the same ruling it was held that the sale of the property which had not been mortgaged was a nullity, as it was not justified by the decree, and as such no question of limitation under Art. 12, Lim. Act, arises. The case reported appears to me to be exactly parallel to the case before me so far as these findings are concerned.

In my opinion the plaintiffs' suit is barred neither by limitation nor by O. 21, R. 92, Civil P. C. The last point raised is that the purchaser should be entitled to get back a portion of his purchase money. But I am not aware of any provision of law which could justify me in passing such an order. Such a plea could only be raised where the judgment-debtor was in some way in fault. Here there is a clear finding that the judgment-debtor knew nothing of the sale and he has taken the only means open to him to recover a portion of his property

(1) A. I. R. 1925 All. 236=47 All. 304.

which has been wrongly sold. There is no question of laying blame on either side; but the rule which must decide a case of this sort is caveat emptor. I dismiss this appeal with costs.

S.N./R K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 674

SEN, J.

Frank Coowbs—Judgment-debtor.

v.

Mufassil Bank, Ltd., Gorakhpur—Decree-holder.

Execution Second Appeal No. 89 of 1928, Decided on 3rd July 1928, against decree of Addl. Sub-Judge, Gorakhpur, D/- 18th October 1927.

Civil P. C., O. 21, R. 2 (2)—Payment out of Court — Application for recording subsequent payment made six months after previous payment attaching receipt for previous payment and endorsement by decree-holder's pleader about acceptance of subsequent payment is not application for recording and certifying previous payment and is barred—Limitation Act, Art. 174.

Application by the judgment-debtor made six months after a payment, applying for deposit of balance and attaching a receipt for the previous payment and containing an endorsement of the subsequent payment by the decree-holder's pleader is not an application for recording and certifying the previous payment under O. 21, R. 2 (2) and even if it can be so regarded it is barred by limitation under Lim. Act, Art. 174. [P 675 C 1]

K. Verma—for Appellant.

N. Upadhya—for Respondent.

Judgment.—This is a judgment-debtor's appeal. On 12th of October 1923, the appellant had borrowed Rs. 1,000 faom the Mufassil Bank Ltd, Gorakhpur, on a promissory note. On 15th December 1925, the Bank instituted a suit for recovery of the principal amount together with interest. As a result of certain negotiations an instalment decree was passed against the appellant on 25th January 1926. It was agreed that Rs. 250 should be paid by the debtor to the creditor on 25th January 1926 and that the balance, namely, Rs. 1,005 was payable in two equal instalments of Rs. 502-8-0 on 30th June 1926, and 31st December 1926.

On 25th January 1926, before the decree was passed the appellant paid to the respondent Rs. 250. On 18th June 1926, the judgment-debtor paid Rs. 264-10-0 to the decree-holder. On 11th March 1927, the decree-holder applied for execution of his decree for recovery of Rs. 846-2-0 principal and interest by the arrest of the judgment-debtor. This application was subsequently sought to be amended by a petition dated 9th June 1927, because of a miscalculation as to the amount of interest. On 13th April 1927, the judgment-debtor paid to Babu Nawal Kishore Rs. 581 on account of the second instalment.

The judgment-debtor contended that in the evening of 25th January 1926, he had paid Rs. 250 to the decree-holder in part satisfaction to the decree and that the decree-holder was not entitled to execute the decree for this amount. He also contended that the payment of this sum had been duly certified in Court under O. 21. R. 2, Civil P. C. and that the decree-holder was bound by the order of the Court certifying the payment.

The learned Munsif accepted the contention of the judgment-debtor and dismissed the application for execution.

The learned Additional Subordinate Judge of Gorakhpur has by his judgment dated 18th October 1927, reversed the decree of the Additional Munsif and directed that execution should proceed according to law.

This appeal relates to Rs. 250 only forming part of the first instalment which was payable by the judgment-debtor on 30th June 1926.

The judgment-debtor contends that he paid the aforesaid sum of Rs. 250 out of Court in the evening of 25th January 1926, after the instalment decree had been passed and he relies upon an order passed by the executing Court on 19th June 1926, as an order recording a certified judgment under O. 21, R. 2, (2), Civil P. C.

On 18th June 1926, the judgment-debtor applied to the Court in writing that after deducting Rs. 250 already paid by the judgment-debtor on 25th January 1926, he is depositing Rs. 264-10-0 being the balance due for the first instalment together with interest upto 30th June 1926, and prays that the aforesaid sum be paid to the decree-holder. This application further stated that the receipt for Rs. 250 was attached thereto. The application bears an endorsement of the

decree-holder's pleader that he has received Rs. 264-10-0 on account of the first instalment.

This application on the very face of it is not an application within the purview of O. 21, R. 2 (2).

Where money payable under a decree is paid out of Court and the payment has not been certified by the decree-holder, it is open to the judgment-debtor to inform the Court that such payment has been made. The procedure which has to be followed in such cases is (1) that the judgment-debtor is to apply to the Court to issue a notice to the decree-holder to show cause, on a date to be fixed by the Court, why such payment should not be recorded as certified; (2) if after service of notice no cause is shown by the decree-holder the Court shall record the same accordingly.

Article 174. Lim. Act, prescribes that notice should be issued within 90 days of the date of the payment.

The alleged payment is said to have been made on 25th January 1926. The application of the judgment-debtor, dated 18th June 1926, even if treated as an application for issue of notice under O. 21, R. 2, is clearly time barred. As a matter of fact it is not an application of that description. No notice was issued to the decree-holder to show cause nor a date was fixed for this purpose.

The order dated 19th June 1926, is somewhat peculiar and runs thus:

"An application as regards the payment of the first instalment was put up today, and the decree-holder verified the payment. It is, therefore, ordered that a mark be made in the original register and it be forwarded to the record room for being filed."

The learned advocate for the appellant has not been able to refer this Court to any statement of the decree-holder on the record verifying the payment of the entire amount due on account of the first instalment. The only statement on the record is the endorsement made by the pleader for the decree-holder as regards the payment of Rs. 264-10 0. The order in question does not purport to be an order recording the certification of payment of the disputed amount.

The lower appellate Court was, therefore, justified in holding that the payment of the debatable sum was not certified by the Court executing the decree.

Under O. 21, R. 2, Cl. (3) a payment which has not been certified or recorded shall not be recognized by any Court executing the decree.

The executing Court therefore was bound to ignore an uncertified payment and was bound to proceed with the execution on the basis of no such payment having been made. The object of the legislature in enacting sub-Cl. (3), R. 2, was to ensure diligence on the part of persons interested in the payment and to save the time of the executing Court being wasted by evidence of doubtful value being produced to prove payment. This rule though wholesome proves disastrous to unwary judgment-debtors and is not unoften a weapon of oppression in the hand of an unscrupulous decree-holder. The rule is very clear and however undesirable the consequence may be in individual cases, the rule has to be given effect to.

The Courts below were not justified in trying the issue whether the alleged payment was or was not made by the judgment-debtor. When the payment has not been certified and recorded, it has to be ignored by the Court executing the decree and the decree must be enforced without allowing any deduction in favour of the judgment-debtor.

There was no question in issue between the parties about the payment of the specific sum now in dispute and the order of the Court dated 19th June 1926, cannot be treated as an order under S. 47, Civil P. C., relating to the execution or satifaction of the decree *qua* this amount. The said order, therefore, does not operate as res judicata. The learned advocate for the appellant did not argue that the application dated 18th June 1926, must be taken to have been jointly made by the judgment-debtor and the decree-holder and that the executing Court was competent to record a payment at the instance of the decree-holder untrammelled by the bar of limitation. The case has been rightly decided by the lower appellate Court in its legal aspect. I affirm the decision of the Court below and dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 676

BOYS AND YOUNG, JJ.

Bhagwan Das and *others*—Defendants—Appellants.

v.

Zamurrad Husain and *another*—Plaintiffs—Respondents.

Second Appeal No. 690 of 1926, Decided on 16th May 1929, from decree of Addl. Sub-Judge, Bulandshahr, D/- 24th March 1926.

Easements Act, S. 18—Plaintiff alleging infringement of right of privacy must prove customary right of privacy in neighbourhood and that he is individually entitled to take advantage of such custom.

Where a person alleges that another infringed upon his right of privacy, he must prove that customary right of privacy exists in the neighbourhood in which he lives and further that he is individually or as member of his particular class entitled to take advantage of such custom : 10 *All.* 358, *Expl.* [P 677 C 1]

U. S. Bajpai and *S. B. L. Gour* for *Panna Lal*—for Appellants.

M. A. Aziz—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit by plaintiffs to have certain windows and doors made by the defendants closed. The plaintiffs and defendants owned houses on the opposite sides of a street. It has been found to be at its maximum in the neighbourhood of the houses 17 feet in width. The locality is the town of Debai in the district of Bulandshahr. The plaintiffs' house faced towards the east, the defendants' towards the west. The plaintiffs had a two storied house, on the first floor, i. e, upper storey, of which the women folk of the house are said to, at any rate occasionally, spend their time. The defendants' house was originally a single-storied house but some three or four years ago they proceeded to rebuild it, and a few months before suit they proceeded to add to it a second storey. It was the plaintiffs' case that prior to the addition of this second storey there had been screen walls on the roof of the defendants' house and that as a result no one from the defendants' house had been able to see into the windows of the plaintiffs' first floor. The plaintiffs complained that by the addition of this second storey to the defendants' house the plaintiffs were aggrieved.

It appears that those who were responsible for drafting the plaint were a little uncertain as to how to state their grievance. There is a reference more than once to the plaintiffs' right to light and air through the windows to this first floor, which look towards the east. The case was stated that the plaintiffs were obliged to shut these windows, because the defendants had so constructed their house that they were able to look into the first floor room and see the ladies, and that the result of their having to shut the windows was a dearth of light and air. There was, thus, no direct claim to a right of privacy, but an allegation that an infringement of the right of privacy inevitably resulted in the loss of the right to light and air. This is how the plaintiffs stated their case. But the relief prayed for claimed that their right of privacy should be preserved. The trial Court held that there was no substantial inconvenience to the plaintiffs and dismissed the suit. The lower appellate Court held that there was such substantial inconvenience and decreed the suit.

The case came first before Mukerji, J., He referred to the decision of this Court in *Gokul Prasad* v. *Radho* (1) Of this case he said:

"It has never been dissented from and thoroughly establishes the proposition that a right of privacy enjoyed by a party is sacred and cannot be interfered with."

He continued:

"Mr. Aziz for the respondent (plaintiffs) states that he is not aware whether his client's windows have got shutters. The judgment of the first Court mentions them. If they have not got any they can easily be provided with shutters . . . , , . . The remedy of the invasion of privacy is very easy and lies in the hand of the plaintiff himself, namely, to hang up ordinary chicks if necessary, with thin pieces of cloth attached to a portion of them. This is done everywhere in bungalows occupied by respectable people whether Indians or European, whether observing or not observing the custom of parda. In cases where the plaintiff is without remedy for example, where his courtyard is overlooked, the case might be different. The custom of privacy which undoubtedly exists should not be carried to an oppressive length, and where there is a clear remedy available to a plaintiff, he should not have anything except by way of damages at the outset. The point is important and I refer the case to a Bench of two Judges."

With these remarks we entirely agree. If the plaintiffs were to be held entitled to relief in the circumstances of this case exactly as they claimed, it would mean that the owner of a small house in a growing part of a big city would be entitled

unconditionally to hold up for ever and ever the building of any houses in his vicinity. Mr. Abdul Aziz for the plaintiffs was constrained to admit that no such right of privacy could be supported in a business quarter, but was unable to suggest any test by which it could be determined what should be held to be and what not to be a business quarter or at what stage it became a business quarter. It is manifest that such a test would be impraticable.

But for a circumstances which we shall presently state, we might then have felt compelled to reconsider whether the decision in *Gokul Prasad* v. *Radho* (1), should still retains its full force after nearly half a century has passed, when it is manifest that the force of customs, especially the custom of parda, may be very largely varied in the course of so long a period. We have not, however, to reconsider that case now, for there is another fatal defect in the claim of the plaintiffs. Assuming that the decision to which we have referred should still have full force, it cannot amount to more than this that a customary right of privacy is not unknown in the United Provinces. It could not possibly be suggested that the effect of that decision was that a customary right of privacy exists at every single spot in the United Provinces, or that every single individual in the United Provinces is entitled to rely upon such a custom. The decision was passed before the Easements Act 5 of 1882, was applied to these Provinces, but there can be little doubt that much of the language used was taken from S. 18, Easement Act, and more particularly from the illustration (b) to that section. That illustration particularly refers to the existence of a custom in any particular town. The Act has been since applied to these Provinces by Act 8 of 1891, and the present case has undoubtedly to be decided having in view of the terms of that Act. The plaintiffs have made no effort of any sort whatever to prove, have not even alleged that a customary right of privacy exists in the particular neighbourhood in which the plaintiffs were living, much less have they alleged or attempted to prove that they were individually or as members of their particular class entitled to take advantage of any such custom. Their whole suit, therefore, should have failed at the outset. This is a matter which went to the root of the plaintiffs' case, but it was not, so far as we are able to ascertain, ever taken by the defendants. We think, therefore, that the parties should bear their own costs throughout. We agree, further, with Mukerji, J., that the plaintiffs have not even suggested any reason why they could not adopt the simple expedient of chicks. We allow the appeal and setting aside the order of the lower appellate Court, we restore the decree of the trial Court. The parties will bear their own costs throughout.

S.N./R.K. *Order set aside.*

(1) [1888] 10 All. 358=(1888) A. W. N. 135.

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* A. I. R. 1929 Allahabad 677

SULAIMAN AND PULLAN, JJ.

Maqbul Ahmad and *others*—Plaintiffs —Appellants.

v.

Pateshri Partab Narain Singh and *others*—Defendants—Respondents.

First Appeal No. 271 of 1925, Decided on 6th May 1929, against decree of Sub-Judge, Basti, D/- 29th April 1924.

(a) Limitation Act, Art. 181—Application for preparation of final decree is governed by Art. 181.

Application for the preparation of a final decree is not an application for the execution of a decree but an application which is governed by Art. 181. [P 679 C 1]

*** (b) Limitation Act, S. 4 — Period of limitation expiring in vacation—On Court's reopening day application filed in wrong Court—Applicant is not entitled to take advantage of both S. 4 and S. 14 and to take on vacation to period spent in prosecuting application in wrong Court — Limitation Act, S. 14.**

Provisions of S. 4 can be available only where the period prescribed expires when the Court is closed and the application is made to the proper Court on the day on which the Court reopens; but if on the reopening day the applicant files his application in a wrong Court he cannot be entitled to take advantage of both the sections and to tack on the vacation to the period spent in prosecuting the application filed in the wrong Court: 36 *Mad.* 131; *A. I. R.* 1921 *Mad.* 654; 14 *A. L. J.* 310; *A. I. R.* 1923 *Mad.* 114, *Foll.*; *A. I. R.* 1921 *Bom.* 379, *Diss. from.* [P 679 C 1]

(c) Limitation Act—Equity.

There is no question of equity in cases governed by the Limitation Act: *A. I. R.* 1921 *Bom.* 379, *not Appr.* [P 679 C 2]

(d) Limitation Act, S. 14 (2)—Time spent in prosecuting application for execution cannot be excluded while counting limita-

tion for application for preparation of final decree.

While counting limitation for the presentation of an application for the preparation of the final decree, time spent in prosecuting previous application for the execution of the decree cannot be excluded as the two reliefs being different S. 14 (2) will not be applicable. [P 679 C 2]

(e) Civil P. C., S. 150—Scope—Bengal, N. W. P. and Assam Civil Courts Act, S. 17.

When the Court which has passed a decree is abolished, it is the Court to which its business is transferred which is competent to execute the decree. [P 680 C 1]

(f) Civil P. C., O. 34, R. 4—Scope.

It is the appellate Court's decree which is the last preliminary decree and in that decree the first Court's decree must be deemed to have become merged : *A. I. R.* 1927 *P. C.* 25, *Foll.* [P 680 C 1]

(g) Civil P. C., O. 34, R. 4 — Appellate Court confirming lower Court's preliminary decree is not bound to fix period of six months for repayment — Practice — High Court.

The appellate Court when it affirms the preliminary decree of the lower Court is neither bound to fix a period of six months for payment after its decree, nor is it bound to extend the time fixed by the Court below. [P 680 C 1]

Iqbal Ahmad and *Mukhtar Ahmad*— for Appellants.

K. N. Katju, Zahur Ahmad, A. M. Khwaja and *Harnandan Prasad* — for Respondents.

Judgment.—This is an appeal from an order refusing to prepare a final decree in a contribution suit. A decree for about Rs. 80,000 was passed by the Additional Subordinate Judge of Basti on 7th May 1917, for recovery of the amount by sale of the six villages mentioned therein. This decree was drawn up on a printed form applicable to decrees under O. 20, Rr 6 and 7, Civil P. C., and not on the form prescribed for a mortgage decree under O. 34, R. 4. Two sets of defendants appealed to the High Court but the plaintiff did not file any appeal or cross-objection. One of these appeals was allowed and the other was dismissed and the decree of the Additional Subordinate Judge was modified under an order of this Court dated 7th June 1920. The form of the decree was affirmed by the High Court and the period fixed for payment in the Court below was not extended.

Perhaps misled by the form on which the decree had been prepared in the Court below, the decree-holder treated it as a simple money decree and applied for its execution to the Court of the Subordinate Judge of Basti on 23rd December 1920. By this time the Court of the Additional Subordinate Judge had been abolished. The property sought to be attached being ancestral, the execution was transferred by the Court to the Collector on 8th November 1921. In the Collector's Court objections were raised by some of the judgment-debtors that the proper course for the decree-holder was to apply for the preparation of a final decree and not to execute the preliminary decree.

From 20th May 1923 till 19th June 1923 (both days inclusive), the civil Courts were closed for the long vacation. On 20th June 1923, the decree-holder filed his application for the preparation of a final decree in the Court of the Additional Subordinate Judge of Basti. An Additional Court had then been re-established. On 4th August 1923, the Additional Subordinate Judge passed an order holding that the application had not been filed in the proper Court and directing that it should be returned for presentation to that Court. 5th August was a Sunday and on 6th August, the applicant took back his application and re-presented it to the Court of the Subordinate Judge at Basti on the same day. In the Court below the applicant sought to get the time extended by claiming the benefit of the time spent by him in prosecuting his application for execution from 23rd December 1920 to 8th November 1921, also of the period of the long vacation, viz., from 20th May to 19th June 1923 as well as the time spent by him in prosecuting his application in the Court of the Additional Subordinate Judge, viz., from 20th June 1923 to 6th August 1923. The learned Subordinate Judge has rejected the application as being timebarred. He has held that the applicants were prosecuting the application in the Court of the Subordinate Judge in good faith but even allowing for the exclusion of that time the application is beyond time.

The argument advanced on behalf of the appellants is that if their application had been filed in the Court of the Subordinate Judge which was the proper Court on 20th June 1923, instead of being filed in the Court of the Additional Subordinate Judge it would have been in time because they were entitled to the period of the long vacation under S. 4, Lim. Act. It is then argued that inas-

much as they are entitled to an exclusion of time from 20th June 1923, to 6th August 1923 when the application was pending in the Court of the Additional Subordinate Judge, their application filed on the next available day was in time. This argument is obviously fallacious. S. 4 does not provide that the whole period of the long vacation should be excluded from the period fixed by the Act. All that it lays down is that if on the date on which the period prescribed for an application expires the Court is closed, the application may be preferred on the day that the Court reopens, that is to say, that the applicant can take advantage of the Court being closed and may file his application on the reopening day. On the other hand S 14, Lim. Act, allows an exclusion of the time spent in prosecuting another application for the same relief and this time has to be excluded from the period of limitation prescribed for that application.

Admittedly the application for the preparation of a final decree is not an application for the execution of a decree but an application which is governed by Art. 181, Lim. Act. The period prescribed is three years. The applicant is therefore entitled to add 48 days (i. e., the period from 20th June 1923 to 6th August 1923) to three years, but these three years should be counted from the date when limitation began to run against them for this application. So far as most of the defendants are concerned the decree of the High Court dated 7th June 1920, gave a fresh start to the decree-holders. Even therefore if three years and 48 days are counted from that date the time expired some time about 25th July 1923. That did not fall within the long vacation. It therefore follows that the plaintiffs are not entitled to the benefit of S. 4 To allow them to take advantage of the provisions of both the sections would be to tack on the long vacation to the period spent in prosecuting the previous application. The provisions of S. 4 can be available only when the application in the proper Court is filed on the reopening day.

In this case unfortunately the application was not filed in the proper Court on the reopening day. This view has been upheld consistently by the Madras High Court and we may in this connexion refer to the case of *Mira Mohidin Rowther* v. *Nallaperumal Pillai* (1) and the case of *Ummathu* v. *Pathumma* (2). The Bombay High Court in the case of *Basvannappa* v. *Krishnadas* (3) has taken a contrary view on the ground that it would be inequitable not to allow the benefit of the vacation which preceded the period which has to be excluded. With great respect we would say that there is no question of equity in cases governed by the Limitation Act. The view of the Madras High Court has been followed by this Court in a short judgment reported in *Makund Ram* v. *Ramraj* (4). The Bombay case has been recently reviewed and dissented from by the Madras High Court in *Govindasami Padayachi* v. *R. Sami Padayachi* (5). Even therefore if we assume that the application for the preparation of the final decree had been prosecuted with due diligence and in good faith the application is beyond time.

The second point urged is that the time spent in prosecuting the application for the execution of the decree, viz. : the period from 23rd December 1920 to 8th November 1921, should also be excluded. This contention is untenable. S. 14, sub-Cl. 2, can apply only when the previous proceeding is prosecuted for the same relief. The relief claimed in the execution of the decree was the realization of the decretal amount by sale of the property mentioned therein. The prayer in the application for the preparation of the final decree is not for execution but for the preparation of the final decree which would be the last decree capable of execution. The two reliefs being different, S. 14, sub-Cl. 2 is not applicable.

It is next contended that the application was properly filed in the Court of the Additional Subordinate Judge at Basti because the decree had been passed by the Additional Court and not by that of the Subordinate Judge. As noted by the Court below the Court of the Additional Subordinate Judge which was in existence when the decree was passed subsequently came to be abolished and all its work was transferred to the Court of the Subordinate Judge. A new Additional Subordinate Judge was subsequent-

(1) [1913] 36 Mad. 131=21 M.L.J. 1000=12 I.C. 58=(1911) M.W.N. 221.
(2) A.I.R. 1921 Mad. 654=44 Mad. 817.
(3) A.I.R. 1921 Bom. 379=45 Bom. 443.
(4) [1916] 14 A.L.J. 310=35 I.C. 292.
(5) A.I.R. 1923 Mad. 114.

ly sent to Basti but the execution cases which were pending in the Court of the Subordinate Judge were not transferred to this Additional Subordinate Judge's Court. When the Court which has passed a decree is abolished, it is the Court to which its business is transferred which is competent to execute the decree : S. 17, Bengal, N. W. P. and Assam Civil Court Act, and S. 150, Civil P. C. It is thus clear that the application was wrongly filed in the Court of the Additional Subordinate Judge of Basti and was rightly returned for presentation to the proper Court.

The last point urged on behalf of the appellants is that it is the appellate Court's decree which is the last preliminary decree and in that decree the first Court's decree must be deemed to have become merged. This point must be conceded: vide *Fitzholmes* v. *Bank of Upper India Ltd.* (6). It is then argued that O. 34, R. 4, sub-Cl. 1, requires that a decree in terms of R. 2, sub-Cl. C, fixing a date within six months for payment should be passed. It is accordingly contended that it was the duty of the appellate Court when it affirmed the decree of the first Court to fix a fresh date for payment and that time cannot begin to run unless such a day has been fixed and has expired. This contention is not sound. The appellate Court is neither bound to fix a period of six months for payment after its decree, nor is it bound to extend the time fixed by the Court below. In most cases when the decree is affirmed and the appeal is dismissed the time is not extended unless specially asked for by the judgment-debtor. This Court did not vary the time fixed for payment by the Court below. The appellant is therefore entitled at best to calculate his period from the date of the appellate Court's decree, viz., 7th June 1923.

It may further be pointed out that some of the defendants, viz., respondents 20 to 26 had not been impleaded in the two appeals which were pending in the Court and in which the decree was varied. So far as these defendants are concerned time began to run against them from the date of the first Court's decree to which alone they were parties, viz., 7th May 1917. It is thus clear that the present application was hopelessly beyond time and must be dismissed. The objections raised by the various defendants were substantially the same, viz., that the application was barred by time. We direct that the applicant should pay one set of costs to all the respondents. It is to be noted that the counsel for the respondents state that respondent 52 died more than a year ago and his legal representatives have not been brought on the record. The appeal is accordingly dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(6) A.I.R. 1927 P.C. 25=3 Lah. 253=54 I.A. 52 (P.C.).

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* A. I. R. 1929 Allahabad 680

BANERJI AND KING, JJ.

Mt. Durgawati Kunwar—Defendant—Appellant.

v.

Jagannath Prasad and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 431 of 1927, Decided on 3rd May 1929, against decree of Sub-Judge, Allahabad, D/- 19th July 1927.

(a) Evidence Act, S. 66 — Pardanashin woman living with her brother—Summons served on brother constitutes notice such as is required by S. 66.

Where a pardanashin woman is living with her brother, service of summons on him instead of the woman herself would constitute such notice as is required by S. 66 and if that brother is expressly named in the summons as the person upon whom it might be served, it is only a technical irregularity. [P 681 C 2]

*** (b) Evidence Act, S. 66, Proviso (2)—Pro forma defendant is not necessarily "adverse party."**

It is doubtful if a pro forma defendant who is not interested in suit property or in the decision of the caseis not an "adverse party" within the meaningof Proviso (2). [P 681 C 2]

(c) Transfer of Property (Validating) Act (3 of 1917)—Attesting witness need not see executant sign it provided executant personally acknowledges his signature to him.

Since the passing of the Transfer of Property (Validating) Act, 1917, a witness who purports to attest a mortgage instrument need not see executant sign it, provided he receives from the executant personal acknowledgment of his signature : 35 *Mad.* 607 (*P. C.*), *Dist.* [P 682 C 2]

(d) Usurious Loans Act (10 of 1918), S. 3—Scope.

From the mere fact that the mortgagor was indebted and in urgent need of money, it cannot be inferred that the mortgagees were in a position to dominate his will, and interest at Rs. 2-8-0 per cent per mensum compoundable quarterly was not held unconcionable. [P 683 C 1]

K. N. Katju—for Appellant.

P. L. Banerji—for Respondents.

Judgment.—This was a suit for recovery of the money due on a mortgage-deed dated 20th October 1911 purporting to have been executed by Sidh Gopal deceased husband of Mt. Durgawati, defendant 1, in favour of Mata Prasad and Ram Prasad, defendants 2 and 3. The mortgagees sold their rights to Baijnath Prasad by sale-deed dated 16th January 1914. The plaintiff bought the mortgagee rights for Rs. 700 at an auction sale held on 20th April 1925 in execution of a money decree against Sheo Prasad (defendant 4), minor son of Baijnath Prasad. The plaintiff claims Rs. 8,000 on the basis of this mortgage. The suit was originally decreed ex parte on 16th February 1926 against Sidh Gopal and the other defendants, excepting Mt. Durgawati. After Sidh Gopal's death Mt. Durgawati, his widow, got the ex parte decree set aside upon proof that Sidh Gopal had no notice of the suit. Mt. Durgawati is the only contesting defendant. She denied execution of the deed and the passing of consideration and pleaded that the debt was contracted for gambling, that the deed was invalid, that the stipulation for compound interest was inserted under undue influence and that the suit was barred by limitation so far as her personal liability was concerned.

The trial Court found all the issues in the plaintiff's favour, except that the suit was barred, so far as a decree under O. 34, R. 6, was concerned, by six years limitation and passed a decree for sale for Rs. 9,215-14-8. Mt. Durgawati impugns the decree of the trial Court mainly on technical grounds. The first point is that secondary evidence was not admissible to prove the mortgage-deed, as no serious attempt had been made to produce the original. The mortgage-deed was sold by the original mortgagees to Baijnath as we have already mentioned. The plaintiff is the auction-purchaser of the mortgagee rights in execution of a decree against Sheo Prasad, the son and legal representative of Baijnath. The plaintiff's case is that the original deed is in the possession of Sheo Prasad who refused to give it up in spite of repeated demands, hence the plaintiff was forced to sue on basis of a certified copy obtained from the registration department. Sheo Prasad is a minor under the guardianship of his mother Mt. Ganga Dei, who is a pardanashin lady. According to the plaintiff's case she is living with her brother Hira Lal at Benares. The plaintiff deposes that he twice asked Hira Lal for the original deed before the suit was instituted. He also served a summons on Ganga Dei, through her brother Hira Lal to produce the original deed. This summons was served on Hira Lal personally but the deed was not produced. We see no reason to disbelieve the plaintiff's evidence on these points.

The appellant contends that this service of summons on Hira Lal was legally insufficient to constitute such notice to Mt. Ganga Dei as is required by S. 66, Evidence Act. It is true that Hira Lal is not a "recognized agent" of his sister, Mt. Ganga Dei, but as she is a pardanashin lady the summons could, under O. 5, R. 15, be served upon her brother if he was living with her. Objection is also taken to the fact that Hira Lal was expressly named in the summons as the person upon whom it might be served. At the most this was a technical irregularity due probably to the fact that the plaintiff knew that Mt. Ganga Dei was a pardanashin, and was living with her brother Hira Lal, and that the latter was the most suitable person to accept service of the summons.

For the respondent it is argued that no notice was necessary under S. 66, Proviso (2), because the defendant Sheo Prasad must have known that he would be required to produce the original deed. It was stated in the plaint that the original deed was in Sheo Prasad's possession. We doubt whether Sheo Prasad can be held to be an "adverse party" within the meaning of Proviso (2). He was a mere pro forma defendant who had no interest in the property or in the decision of the case. It is also pointed out that the Court may in its discretion dispense with a notice under S. 66. This is true, but beside the point, as the Court did in fact issue a summons to Sheo Prasad's guardian to produce the original deed. We are satisfied, however, that there is no force in the appellant's contention. Putting his case at its highest it only amounts to this, that the Court wrongly exercised its discretion in holding that sufficient notice had been given to Mt. Ganga Dei to produce the original deed. If we accept the contention it would only involve giving the plaintiff another chance of serving a notice on

Mt. Ganga Dei. The learned advocate for the appellant does not urge us to adopt this course nor is it likely to benefit his client in the least. There is no allegation that any part of the mortgage money has been repaid, which fact might be proved by an endorsement on the original deed, so the production of the original could not help the appellant or injure the respondent. We hold that in the circumstances of this case the trial Court was justified in admitting secondary evidence of the original deed.

The next point is that the execution of the deed in suit has not been proved. The deed purports to have been written by Bechu Lal and signed by Sidh Gopal and attested by Madho Lal and three other attesting witnesses. Madho Lal deposes that Sidh Gopal signed the deed in his presence and he (the witness) signed it as an attesting witness but nobody else attested it in his presence nor were any of the other attesting witnesses present at that time. Bechu Lal when first examined gave evidence only in proof of the sale-deed dated 16th January 1914 and was not asked any questions about the mortgage-deed. After both parties had closed their case, and arguments had begun, the Court allowed Bechu Lal to be re-called. He then said that he thought he had attested the mortgage-deed but he was certain that Madho and Babu Lal were marginal witnesses in whose presence Sidh Gopal signed. We think the Court acted unfairly in allowing Bechu Lal to be recalled after arguments had begun and we propose to disregard his second deposition. We take it then, on the evidence of Madho Lal, that Sidh Gopal signed the deed in Madho Lal's presence and no other attesting witness was present at that time i. e., no other attesting witness actually saw Sidh Gopal signing the deed.

It is argued for the appellant that in these circumstances the execution of the deed has not been proved and that it was not attested in the manner required by law. Reliance is placed on the Privy Council ruling in *Shamu Pattar* v. *Abdul Kadir Ravuthan* (1) for the proposition that attestation can only be made by a witness signing after seeing actual execution of the deed and a witness cannot attest the deed merely on the strength of the executant's acknowledgment of his signature.

It is perfectly clear, however, that this ruling and all the other rulings to the same effect must now be treated as obsolete. The Transfer of Property (Validating) Act 1917 applies to the mortgage in suit and expressly declares that the mortgage shall not be deemed to be invalid by reason only that any person who purported to attest such instrument as a witness did not see the executant sign it; provided that the witness received from the executant a personal acknowledgment of his signature. The definition of "attested" has also been inserted in the Transfer of Property Act by Act 27 of 1926 to which retrospective effect has expressly been given by Act 10 of 1927. This definition also shows that an attesting witness need not actually see the executant signing the deed. It is obvious, therefore, that the mortgage is not invalid by reason of the fact that only one attesting witness actually saw the executant sign it. If any one of the other attesting witnesses signed it in the executant's presence, after receiving from him a personal acknowledgment of his signature, then all legal requirements in respect of attestation are satisfied. It may be mentioned that the deed itself shows that the attesting witnesses signed "on admission of the executant." As the law now stands there is nothing in Madho Lal's evidence or in the deed itself to suggest that it was not executed in the manner required by law. The due execution of a mortgage-deed can no longer be held to mean its signature by the executant in the presence of two attesting witnesses. The Court was justified in finding execution proved by the evidence of Madho Lal only. S. 68, Evidence Act, does not necessitate the examination of more than one attesting witness. There is not the slightest reason to suspect the genuineness of the deed. Sidh Gopal got it registered on the very day of its execution. We hold that execution has been duly proved.

The third point argued for the appellant is that the rate of interest is so penal and unconscionable that undue influence should be presumed. The rate is certainly very high namely, Rs. 2-8-0 per cent per mensem compoundable quarterly, but there is nothing to show

(1) [1912] 35 Mad. 607=16 I. C. 250=39 I. A. 218 (P.C.).

that the original mortgagees were in a position to dominate the will of Sidh Gopal. From the mere fact that Sidh Gopal was indebted and in urgent need of money it cannot be inferred that the mortgagees were in a position to dominate his will. Hence we are not justified in presuming that the contract was induced by undue influence. We see no reason to disturb the decree of the trial Court and accordingly we dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 683

MUKERJI AND BOYS, JJ.

Jagmohan Singh and *others*—Defendants—Applicants.

v.

Ram Khilawan Dube and *others*—Plaintiffs—Opposite Parties.

Civil Revn. No. 22 of 1925, Decided on 15th May 1929, against order of Dist. Judge, Azamgarh, D/- 5th December 1927.

***(a) Civil P. C., S. 115—Permission to withdraw with liberty to file fresh suit under O. 23, R. 1—No reason given—High Court can interfere.**

Where a Court passes an order granting the plaintiff permission to withdraw the suit with liberty to sue again, but gives no reasons whatsoever for its order, High Court has reasons to interfere on the ground that the Court below has not applied its mind to the application and has therefore passed an order which could be revised under S. 115. [P 684 C 1]

(b) Civil P. C., S., 115—Decision erroneous—Still revision does not lie.

The correctness or error in a decision on a question of fact and law committed by the subordinate Courts will not give jurisdiction to the High Court to interfere under its revisional powers. [P 685 C 1]

(c) Civil P. C., O. 23, R. 2—"Other sufficient ground" must be ejusdem generis with formal defect.

An application under O. 23, R. 2, can only be granted if the Court is satisfied that the suit must fail by reason of some formal defect or if it was satisfied that there were "other sufficient grounds" for giving the permission. It is beyond dispute that any other sufficient ground must be ejusdem generis with a formal defect. [P 685 C 2]

***(d) Civil P. C., S. 115— Expression "material irregularity in the exercise of its jurisdiction" explained.**

The Court can be regarded as having committed a material irregularity in the exercise of its jurisdiction if either (a) it appears that it did not apply its mind judicially to the question before it, or (b) if the materials before it were not such as could reasonably be held to be materials on which the Court might, rightly or wrongly, hold that there was a formal defect or other sufficient reason ejusdem generis with formal defects under O. 23, R. 2 : *A. I. R.* 1921 *All.* 65 ; *A. I. R.* 1925 *All.* 466 ; *A. I. R.* 1926 *All.* 548 ; *A. I. R.* 1928 *All.* 98 ; 13 *M. I. A.* 160 ; 16 *C. L. J.* 103 ; 37 *Bom.* 682 ; 11 *A. L. J.* 733 ; 40 *All.* 612 ; *A. I. R.* 1927, *All.* 704 ; *A. I. R.* 1928 *Oudh* 482, *Ref.* [P 686 C 2]

Mukhtar Ahmad—for Applicants.

Harnandan Prasad—for Opposite Parties.

Mukerji, J.—This is an application to revise an order of the lower appellate Court dated 5th December 1927, by which the Court allowed an application made by the plaintiffs in the suit, who are the respondents before us, to withdraw the suit instituted by them with liberty to bring a fresh suit.

The facts which led to that application are briefly these : The plaintiffs came to Court with the prayer that they might be declared to be the owners of certain plots by virtue of a certain ancient gift. In the plaint they said that they were paying a certain amount of money periodically to the zamindars but that they were paying the same as being their share of the revenue payable to the Government, and that they are paying the same to the Government through the zamindars. When the parties were examined by the Court for framing the issues, on 18th December 1926, one of the plaintiffs said : "*muzhir zamindar ko lagan deta tha.*" The defendants to the suit, who are the applicants before us, were the zamindars. They opposed the claim on the ground that the plaintiffs were nothing but tenants of the lands in question. The learned Subordinate Judge who heard the suit found that it had not been proved that the plaintiffs were proprietors of the land. On this finding, he dismissed the suit.

An appeal was filed by the plaintiffs. The appeal was heard on 1st December 1927. Then the counsel for the appellants asked for a day's time to produce some rulings. The case was ordered to be put up on 3rd December 1927. On that date plaintiffs made an application for withdrawal of the suit with liberty to sue again. On that date the application was not heard because the counsel for the defendants were not present. The

application was taken up before the counsel for the parties on 5th December 1927. The arguments of the counsel were heard, their statements were taken down and the learned Judge passed the order which is now being complained of before us.

The learned counsel for the defendants applicants has urged that the learned Judge had no jurisdiction to pass the order that he did pass. The ground for this argument is thus stated: The Court had jurisdiction to pass the order only in case the provisions of O. 23, R. 1, were complied with by the plaintiff. If these were not properly complied with the Court below had no jurisdiction to pass the order.

On the other hand, for the respondent it has been urged that the Court had jurisdiction to pass the order it did pass and, therefore, this Court having no appellate jurisdiction, could not interfere even if the Court below should have been wrong in its order.

We have to see which of these arguments is sound.

According to the authorities in this Court it may be taken to be settled law, that where a Court passes an order granting the plaintiff permission to withdraw the suit with liberty to sue again, but gives no reasons whatsoever for its order, this Court has interfered on the ground that the Court below has not applied its mind to the application and has, therefore, passed an order which could be revised under S. 115, Civil P. C. This case is not one of the cases mentioned above. In the case before us, as I have already pointed out, the learned Judge heard the appeal almost to its completion. The only thing that remained to be done was the production by the plaintiffs' counsel of a ruling. When the application for withdrawal with liberty to sue again was put in, the learned Judge heard the counsel for the parties, and then passed an order. The order is couched in no less than 20 lines of our paper book. There can be no doubt that the order is one which does not satisfy me as a desirable order, but I have no doubt that the Judge did apply his mind to the application, and did all that he was capable of doing. It is not the case that he wanted to avoid hearing the appeal. He had heard the appeal almost to its conclusion and all that remained to be done was to dictate an order. If we analyse the order we shall see that he found, whether rightly, or wrongly that there was a formal defect in the suit. Much has been said before us to indicate that in this the learned Judge made an error. This may be so, but I would not stop to enquire if this was so because I am not sitting as a Court of appeal. Then we find that the Judge looked into the question of desirability of passing the order, in view of the possibility of evidence being concocted in a subsequent suit. The learned Judge having weighed this matter, thought that there was no fear of introduction of false evidence in future, because, in the main the case had to be decided on documentary evidence. Having said all that the learned Judge passed the order complained of. In my opinion it was within the competence of the learned Judge to pass the order, though, as I have said I myself might not have passed an order similar to his order.

That being the position, the question is whether the High Court has jurisdiction under S. 115. Civil P. C. to interfere with such an order. I am clearly of opinion that the High Court has not. There must always be a distinction between an appellate jurisdiction and a revisional jurisdiction. When the legislature shuts out an appeal, it does that with a certain motive. When revisional powers are given, they are given in guarded words, and although sometimes it may be difficult to decide whether a case comes or not within the revisional jurisdiction of the High Court, there can be no doubt that the revisional jurisdiction is always distinct from the appellate jurisdiction.

The learned counsel for the applicants has urged that in order to possess jurisdiction the Court below should have had before it the conditions mentioned in O. 23, R. 1, Civil P. C. I intirely disagree with this view. If the Court was authorised to permit the plaintiffs to withdraw the suit with liberty to sue again, the mere fact that the Court thought that the circumstances were present which would justify it to pass an order in plaintiffs' favour, would be enough to make the order, order being within its competence and jurisdiction.

The limit of interference placed by the Civil Procedure Code on the High Court's

power to interfere in its revisional jurisdiction is confined to a non-exercise of jurisdiction where jurisdiction exists, and exercise of jurisdiction where it does not exist, and to irregular exercise of jurisdiction by the subordinate Courts. The correctness or error in a decision on a question of fact and law committed by the subordinate Courts will not give jurisdiction to the High Court to interfere under its revisional powers. This was decided in *Balkrishna Udayar* v. *Vasudeva Ayyar* (1) by their Lordships of the Privy Council.

In this Court there are at least two cases decided by Division Benches which take the same view as I have taken above. These are the cases of *Jhanku Lal* v. *Bisheshar Das* (2), and *Ratan Lal* v. *Mahommed Hamidullah Khan* (3). The latter case was referred to two Judges, because it was thought that there was some conflict of opinion as regards the limits of the revisional powers of the High Court. The learned Judges, who decided the case of Ratan Lal, pointed out that no conflict really existed. At p. 49, line 2, of the report, the words "will not" are interpreted by me as amounting to "cannot," the reason being want of power on the part of the High Court. The Calcutta High Court in a Full Bench case *Hriday Nath Roy* v. *Ramchandra Barna Sarma* (4), has taken the same view.

In the result I am of opinion that this Court has no power to interfere under S. 115, Civil P. C. with the order of the learned District Judge.

I will, for the reasons given above, dismiss the application with costs.

Boys, J.—This is an application under S. 115, Civil P. C. The plaintiffs came into Court .asking for a declaration that they were the owners of certain plots. The defendants contended that the plaintiffs were tenants. Admittedly the plaintiffs paid periodically a certain sum of money to the zamindars. The plaintiffs described this sum as their quota towards the revenue. The trial Court held that the sum could not be revenue for it exceeded the portion of the revenue for which the plaintiffs might be liable. The plaintiffs appealed, and after the whole case had been argued, asked permission to withdraw with leave to bring a fresh suit. This application was made under O. 23, R. 2, and it could only properly be granted if the Court was satisfied that the suit must fail by reason of some formal defect or if it was satisfied that there were "other sufficient grounds" for giving the permission. It is beyond dispute that any "other sufficient ground" must be ejusdem generis with a formal defect. The lower Court granted the permission.

The question arises whether we have any power and what power to interfere with this order.

I may give at once my reasons for holding that the order was a bad order and should not have been passed. The plaintiffs' application saying that they wanted to withdraw if the Court would give them permission to bring a fresh suit was stated as follows :

"In the case noted above it is submitted that on account of the relief being vague a plea for the jurisdiction of the Court has been taken on behalf of the defendant-respondents. As a matter of fact the capacity of the plaintiffs is that of an inferior proprietor. Under the present circumstances on account of there being legal defect it is apprehended that the case will be lost. It is therefore prayed that the plaintiffs may be allowed to withdraw the case with permission to bring a fresh suit."

The application was opposed and the order of the Court was as follows :

"It appears that one of the pleas taken relates to the jurisdiction of the civil Court. The plaintiff came with the allegation that he is a shankalapdar paying rent. He now says he pays land revenue. The frame of the suit is clearly defective. There is not much of oral evidence in the case. There is no fear of introduction of false oral evidence. All things considered I am of opinion that this is a fit case in which permission should be granted. I therefore allow the application."

Now the facts are that the plaintiffs did not come with the allegation that they were shankalapdars paying rent. They did actually and definitely come with the allegation, i. e., they stated in their plaint, that they were paying revenue. The statement therefore in the order is at least inaccurate. Subsequently in their examination by the Court the plaintiffs described themselves as paying rent. The defence of course seized upon this. But the trial Court after discussing the point gave the plaintiffs the benefit of the doubt and did not decide the suit against them on the basis of the

(1) A. I. R. 1917 P. C. 71=40 Mad. 793=44 I. A. 261 (P. C.).
(2) [1918] 40 All. 612=46 I.C. 71=16 A. L. J. 495.
(3) A. I. R. 1921 All. 65.
(4) A. I. R. 1921 Cal. 34=Cal. 138 (F.B.)..

error alleged to have been committed by inadvertence by the plaintiffs in their oral examination. It dealt with the case as one in which the plaintiffs might be taken to have stated their case as being that they paid revenue. The suit therefore did not fail in the trial Court on the ground of the statement made by the plaintiffs in their oral examination that they paid rent. The next point I note is that the application for permission under O. 23, R. 1 (2) was vague to a degree. It only referred to "the relief being vague" and did not say in what respect it was vague, and then it alleged "a legal defect" without specifying what the legal defect was, or in what way, if there was anything that could be described as a legal defect, that legal defect had prejudiced or was likely to prejudice the plaintiff. Further the permission was given at a very late stage of the case after the arguments in the appeal had been concluded, and this is a course which has been frequently deprecated.

I have stated these facts merely in order to show that I am of opinion that the order granting permission to file a fresh suit was one which should not have been passed.

The next question is whether this Court has any power to interfere with it in the exercise of its revisional jurisdiction conferred by S. 115, Civil P. C. This Court cannot interfere under that section unless there has been a defect going to jurisdiction, or a material irregularity in the exercise of jurisdiction. It is in my view manifest that the Court had jurisdiction to make the order which it made. It had power to deal with the parties before it; it had power to deal with the subject-matter before it; and it had power to pass an order of the nature of the order which it passed, i. e., it had power to pass an order granting permission to file a further suit. The question whether in the particular circumstances of the case it rightly exercised its power is not a question going to jurisdiction. As to whether proper venue also is always an element of jurisdiction I need not here consider for no question of venue arises in the case.

The next question is whether in passing the order which it did in the particular circumstances of the case the Court committed a "material irregularity in the exercise of its jurisdiction." With a view to arriving at the tests properly applicable to enable me to answer this question I have considered carefully, amongst others the following cases:

Robert Watson v. *Collector of Rajshahyi* (5); *Kharda Co.* v. *Durga* (6); *Hiralal* v. *Udoychandra* (7); *Bai Kashi Bai* v. *Shidappa* (8); *Khubchand* v. *Ajudhya* (9); *Balakrishna* v. *Vasudeva* (1); *Jhanku* v. *Bisheshar* (2); *Hriday* v *Ramchandra*; (4) *Ratan* v. *Md. Hamidullah* (3); *Ganga* v. *Mt. Kishni* (10); *Kamta* v. *Ramratan* (11); *Mahabir* v. *Muhammad Ali Khan*, *A. I. R.* 1927 *All.* 704; *Kamta* v. *Bhagwan* (12); *Tikai* v. *Sheodayal* (13); *Ramsaran* v. *Radha* (14).

In one of these cases, *Kharda* v. *Durga* (6), it was broadly stated that there was no doubt but that the High Court could interfere with "an improper order"; and there is a hint of a similar proposition in *Ramsaran* v. *Radha* (14). If that proposition is to be taken literally it is in my view much too broadly stated. I do not propose to examine the remainder of the cases in detail, but having studied them with care it appears to me that all or nearly all of them can be regarded, though it may not have been expressly so stated, as having been decided on one or other of two principles which I would state as follows:

The Court can be regarded as having committed "a material irregularity in the exercise of its jurisdiction" if either:

(a) it appears that it did not apply its mind judicially to the question before it, or; (b) if the materials before it were not such as could reasonably be held to be materials on which the Court might, rightly or wrongly, hold that there was a formal defect or other sufficient reason ejusdem generis with formal defects.

The first proposition seems to underlie such cases as *Ratan* v. *Md. Hamid-*

(5) [1869] 13 M. I. A. 160=3 Beng. L. R. 48 =12 W. R. 43 (P.C.).
(6) [1910] 11 C. L. J. 45=5 I. C. 187.
(7) [1912] 16 C. L. J. 103=14 I. C. 33=16 C. W. N. 1027.
(8) [1913] 37 Bom. 682=21 I. C. 23=15 Bom. L. R. 823.
(9) [1913] 11 A. L. J. 733=21 I. C. 76.
(10) A. I. R. 1925 All. 466=47 All. 319.
(11) A. I. R. 1926 All. 548.
(12) A. I. R. 1928 All. 98=50 All. 199.
(13) A. I. R. 1928 Oudh 482=3 Luck. 403.
(14) A. I. R. 1929 Cal. 88=55 Cal. 1067.

ullah (3) *Ganga* v. *Mt Kishni* (10); *Kamta* v. *Ramratan* (11) and *Kamta* v. *Bhagwan* (12). In the case *Kamta* v *Ramratan* (11), Daniels, J., applied the test as to whether the Court had applied a judicial mind, but did not apply the second of the two tests which I have suggested; and, as it appears to me, if that second test had been applied the decision might have been otherwise. In *Kamta* v. *Bhagwan* (12), the High Court found that the lower Court had not applied its mind judicially and took, as it appears to me, the proper course of setting aside the order and sending the case back to the lower Court, giving it an opportunity to re-hear the application and give its reasons.

The second proposition or test appears to me to emerge from the decisions in *Robert Watson* v. *The Collector* (5); *Hiralal* v. *Udoychandra* (7); *Bai Kashi Bai* v. *Shidappa* (8); *Khubchand* v. *Ajodhya* (9); *Jhanku* v. *Bisheshar* (2); *Mahabir* v. *Muhammad Ali Khan*, *A. I. R.* 1927 *All.* 704 and *Tikai* v. *Sheodayal* (13).

Now applying these two sets to the facts that I have stated at the commencement of this judgment, I am unable to hold that the learned Judge of the appellate Court did not apply his mind judicially to the matter before him. Further I am unable to hold that the materials to which he applied his mind were not materials proper for consideration in determining whether there was a formal defect or other sufficient reason ejusdem generis with formal defects. These two conditions being satisfied, in my opinion this Court has no power to set aside the order of the lower Court merely because it may be of opinion that, applying its own mind judicially to the materials before the lower Court, it would have held that there was not in fact any formal defect or anything ejusdem generis.

I would, therefore, dismiss the application.

By the Court.—The order of the Court is that the application is dismissed with costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1929 Allahabad 687

BENNET, J.

Zaki Husain—Deft. 2—Appellant.

v.

Deputy Commissioner of Gonda and *another*—Plaintiff and Defendant 1—Respondents.

Second Appeal No. 862 of 1928, Decided on 4th July 1928.

(a) Deed—Construction — Security bond—Liability of surety for money received by mukhtar in virtue of his office "as mukhtar"—Money received by mukhtar contrary to directions—Surety was liable—Contract Act, S. 128.

Money entrusted to the mukhtar as mukhtar but received contrary to directions in mukhtarnama is money received "in virtue of his office" as mukhtar." [P 688 C 1, 2]

A surety for a mukhtar appointed by the Court of Wards executed a surety bond, that the mukhtar will "account for, render and deliver all moneys, securities for money and property whatsoever which he may receive or be entrusted with by virtue of his office." The mukhtar withdrew from the treasury certain money deposited for payment to the Court of Wards contrary to the directions in the mukhtarnama not to receive any money payable to the Court of Wards.

Held: that the money was received by the mukhtar in virtue of his office as mukhtar making surety liable for the amount.

(b) Contract Act, S. 128—Surety is liable for interest awarded on amount embezzled as damages.

Where a person's liability in civil law was for tort in regard to the amount embezzled and interest on that sum is allowed as damages the surety is also liable for the interest on the sum embezzled. [P 688 C 2]

Shabd Saran—for Appellant.

Judgment.—This is a second appeal by defendant 2 a surety. The facts which were proved before the lower appellate Court are as follows: Defendant 1 Mukhtar Husain, was appointed a mukhtar to the Court of Wards on 13th April 1920, and at the time of his appointment defendant 2 executed a surety bond in form No. 12 printed on pp. 97 and 98 of the Court of Wards Manual. Evidence was given before the Munsif, the Court of first instance, to the effect that on 22nd December 1923, defendant 1 the mukhtar of the Court of Wards withdrew Rs. 175 from the treasury which had been deposited for payment to Court of Wards as compensation in a land acquisition case. Plaintiff's witness 1 Wahid Ali stated that defendant 1 having withdrawn this money did not deposit it in the Court of Wards. The suit was brought against both defendants and was defended only by the appellant, defendant 2. The Court

of first instance dismissed the suit and the lower appellate Court has decreed it against both defendants. The first two grounds of appeal put forward the argument that as there is no finding that the money was received by defendant 1 in due discharge of his duties and as it is admitted that he acted beyond the scope of his authority in realizing this money, therefore, defendant 2 the appellant is not liable. It is true that the mukhtarnama dated 28th May 1923, from the Deputy Commissioner in charge of the Court of Wards to defendant 1 states that defendant 1 is not to receive any money payable to the Court of Wards. Contrary to that direction defendant 1 drew this sum of money from the treasury. But the security bond executed by defendant 2 states that defendant 2 is liable as follows:

"The said . . . . . *A B* . . . . . shall truly and faithfully perform his duties as . . . . . under the said Court of Wards and shall from time to time and at all times account for, render and deliver in such a manner and to such persons as he may by the said Court of Wards be required, all moneys, securities for money and property whatsoever which he, the said *A. B.*, may receive or be entrusted with by virtue of of his office as . . . . . , in the said Court of Wards department and shall not embezzle, withhold, destroy or anywise injure any such moneys, securities for money and property as aforesaid, then the above written obligation shall be utterly void; otherwise the same shall remain in force and virtue."

This provides not only that the servant of the Court of Wards shall truly and faithfully perform his duties but that the servant shall account for to the Court of Wards all money which he may have received or be entrusted with by virtue of his office. Now, although in receiving the money from the treasury defendant 1 was not performing his duty as mukhtar and in fact acted contrary to instructions in his mukhtarnama, it appears clear that he was entrusted with the money by treasury by virtue of his office, as mukhtar. In other words if he had not been the mukhtar of the Court of Wards the treasury would not have given him this money. It appears to me that this is the meaning of the expression "in virtue of his office as mukhtar." That is, the expression includes acts done in the capacity of mukhtar whether the mukhtar was carrying out the rules laid down for him or not in doing those acts. I consider, therefore, that the security bond of the appellant-defendant 2 makes him liable for the act in question.

Ground of appeal No. 4 objects to the lower appellate Court admitting additional evidence. It was argued before the lower appellate Court that the embezzlement by defendant 1 had not been fully proved and the lower appellate Court recalled a witness and received in evidence certain reports showing that the money had been withdrawn by defendant 1 from the treasury. I do not consider that the lower appellate Court was wrong in admitting this evidence.

Ground 5 alleges that the lower appellate Court was wrong in considering that the surety should prove that the money received by the servant was not actually embezzled by him. This ground appears to be taken under a misapprehension, as even in the Court of first instance P.W. 1 Wahid Ali stated that defendant 1 withdrew the money from the treasury and did deposit in the Court of Wards. This embezzlement was more fully proved by the evidence admitted by the lower appellate Court.

Ground 6 alleges that the plaintiff was not entitled to interest by way of damages. It is true that there is no provision in the security bond of defendant 2 for payment of interest on sums embezzled although that bond as printed at p. 98 refers to "any loss that may have been incurred." Under S. 128, Contract Act:

"the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract."

Now the liability of defendant 1 in civil law is for tort in regard to the amount which he embezzled and naturally interest on that amount would be allowed against defendant 1 by way of damages. In virtue, therefore, of S. 128, Contract Act, defendant 2 is also liable for interest on the sum embezzled. Interest has been allowed at 12 per cent per annum from the date of embezzlement, 22nd December 1923, to the date of suit.

Ground 7 was that the suit was time-barred. No argument was addressed on this ground and as pointed out by the lower Court the bond was a mortgage-deed of 1920 and could be enforced within 12 years. I dismiss the appeal summarily.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 689

NIAMATULLAH AND BENNET, JJ.

(*Thakur*) *Ishri Singh*—Plaintiff—Appellant.

v.

Tejbir Singh—Defendant — Respondent.

Second Appeal No. 601 of 1926. Decided on 30th April 1929, against decree of Dist. Judge, Bulandshahr, D/- 18th December 1925.

(a) Agra Tenancy Act (2 of 1901), S. 159—Lambardar continuing to be lambardar after partition and paying revenue for years subsequent to partition on behalf of other cosharers—In his suit for recovery of such revenue, it does not lie upon him to prove prior collection of arrears and that he paid it from his own pocket.

Where after partition between the lambardar and the other cosharer, the lambardar continues to be the lambardar of the whole mahal, and, having paid the Government revenue on behalf of the other cosharer for the years after partition, sues the cosharer for recovery of the revenue so paid under S. 159, it does not lie upon him to prove his collection of the arrears of rent on account of the years prior to partition, and to prove that he paid the revenue from his own pocket; (1892) *A. W. N.* 72, *Dist.* [P 690 C 2]

(b) Cosharer—Suit by cosharer against lambardar for his share in arrears collected by latter for years prior to partition—Lambardar has to bring all evidence in his possession to prove his collections—Otherwise it would be presumed that he made collections in full.

After the partition it is open to a cosharer to bring a suit against the lambardar claiming his share of profits from arrears collected by the latter for years prior to the partition. In such a suit the lambardar would naturally be required to produce all the evidence in his possession in regard to his collections, and if he does not do so it will be open to the Court to draw the presumption that he had collected those arrears in full. [P 690 C 1, 2]

M. L. Agarwala and *K. N. Laghate*—for Appellant.

P. L. Banerji and *S. N. Seth*—for Respondent.

Judgment.—This is a second appeal by a plaintiff lambardar whose suit for arrears of revenue under S. 159 of the former Agra Tenancy Act, Act 2 of 1901, has been dismissed by both the lower Courts on the ground that the plaintiff had not proved that the amount of revenue which he paid on behalf of the defendant was paid from his own pocket. The plaintiff and defendant are full brothers and were members of a joint Hindu family up to the end of Fasli 1327, when a partition took place by a registered deed dated 14th April 1920. This deed provided that from that date the parties would be entirely separate and would realize their rents from their separate tenants and would pay their revenue separately. Kuras were prepared and the property was divided plot by plot. No provision was made in the deed for arrears of rent due before the partition which would be collected subsequent to the partition. Ishri Singh, the plaintiff, was the lambardar of the mahal in which he and his brother were the sole cosharers, and he continued to be lambardar for both of the pattis of the whole mahal until F. 1331 when the defendant respondent was appointed lambardar for his patti on 13th March 1924. It is found by the lower appellate Court and admitted that during the years in suit 1328, 1329 and 1330 Fasli the plaintiff-appellant paid the share of land revenue due from the respondent-defendent as well as his own share. The deed had provided that the defendant-respondent would pay his own share of revenue but he neglected to do so and the plaintiff-appellant as lambardar was bound to make the payment in the first instance. The plaintiff-appellant has now sued under S. 159, Act 2 of 1901 to recover those payments of land revenue which he made on behalf of the defendant-respondent. The first issue framed by the trial Court was : did the plaintiff pay the amount claimed from his own pocket ?

The lower appellate Court has found as a fact that there were arrears outstanding at the beginning of F. 1328 which amounted to Rs. 2,133 of which Rs. 212 were time barred, and the plaintiff had decrees for Rs. 241. There was therefore at that date a sum of Rs. 2,162 realizable arrears, of which during the year F. 1338 the plaintiff admittedly realized Rs. 316 odd for arrears of previous years including a sum of Rs. 29-6-6 which definitely belonged to the defendant. The plaintiff therefore should have paid defendant Rs. 143-9-6 plus 29-6-6, i. e. Rs. 173. No further facts were proved in regard to collection of arrears. The sum claimed as land revenue, lambardari dues and cesses for the 3 years in suit is Rs. 402-8-0 per annum, total Rs. 1207-8-0 principal. It is obvious that the evidence produced

merely shows that a very small sum of arrears was collected by the plaintiff and by no means a sum equal to the land revenue admittedly paid by the plaintiff on behalf of the defendant. The question which we have to consider is whether under the circumstances of this case the onus lay on the plaintiff to prove his collection of arrears and to prove whether he had paid the whole sum claimed out of his pocket. It is to be noted that after the partition the plaintiff had no duty or right to make collections from tenants on behalf of the defendant nor is it found by the lower appellate Court that he did make any such collections for the years in suit. The lower appellate Court has relied on a ruling reported in *Dharam Pal* v. *Madan Mohan* (1) and the lower appellate Court has quoted the heading which states :

"in a suit by a lambardar against a cosharer to recover the cosharer's portion of Government revenue paid by the lambardar, it lies upon the plaintiff to show that he had in his capacity of lambardar exercised due diligence in the collection of rents."

But the ruling states :

"in the village the lambardar only had power to collect the rents. Out of those rents it was his duty to pay so far as they would go the Government revenue and the village expenses,"

"In the present case it was for the lambardar to show that he had performed his duty as lambardar, and that notwithstanding the exertion by him of due diligence, he was unable to collect sufficient rents with which to discharge the Government revenue."

The present case differs fundamentally from this ruling, because in the present case owing to the partition the lambardar plaintiff no longer had any power to collect rent of the patti of the defendant. It would be extending the principle of this ruling much too far to say that in the present case the lambardar should have proved what were the amounts of arrears of rent he had collected during the years in suit for years prior to the partition. The lower appellate Court is wrong in stating that the defendant could not sue the plaintiff for arrears of profits since there had been no question of profits between those parties at all prior to the partition. On the contrary after the partition it was open to the defendant to bring a suit against the plaintiff claiming his share of profits from these arrears for years prior to the partition. In such a suit the lambardar would naturally be required to produce all the evidence in his possession in regard to his collections, and if he did not do so it will be open to the Court to draw the presumption that he had collected those arrears in full. But it does not appear reasonable to expect the lambardar in a suit like the present to produce evidence of arrears he had collected on account of years prior to the years in suit. In the written statement it is not clearly pleaded that the plaintiff had paid the amount of revenue from the collections of arrears, it is merely stated that he had collected rent from tenants without stating whether it was for the years in suit or arrears of previous years. It appears therefore that the attention of the plaintiff was not drawn to the fact that the Court expected him to prove the amount of arrears he had collected. Nor do we consider that it is necessary that in a case like the present such a burden of proof should be thrown on the plaintiff. S. 159 does not state that the arrears of revenue claimed should have been paid by the lambardar from his pocket. On the contrary, it merely states :

"a lambardar may sue a cosharer for arrears of revenue payable to Government through the lambardar by such cosharers."

The word used is "payable," and there is no doubt whatever in the present case that revenue was payable by the defendant through the plaintiff for the years in suit. In regard to the details of the claim of the appellant the revenue is Rs. 700 per annum, the cesses are Rs. 70 and lambardari fees for collection of revenue amount to 5 per cent i.e. Rs. 35, total Rs. 805-7-0 and the half due from the defendant is Rupees 402-8-0. The lambardar is undoubtedly entitled to his 5 per cent as has been held in numerous rulings. Interest at 1 per cent per mensam is claimed by the plaintiff-appellant and this can be awarded as laid down in *Ganesh Prasad* v. *Bachu* (2). We accordingly allow the appeal and decree the suit of the appellant in full for Rs. 1207-8-0 and Rs. 249 interest up to the date of suit. and pendente lite interest and future interest at 6 per cent per annum with costs in all Courts.

S.N./R.K. *Suit decreed.*

(1) [1892] A. W. N. 72.

(2) [1886] 7 B. R. 1886.

A. I. R. 1929 Allahabad 691

DALAL, J.

Muhammad Akbar and *another* — Plaintiffs—Appellants.

v.

Syed Ali Sajjad and *others*—Defendants—Respondents.

Second Appeal No. 2312 of 1927, Decided on 8th May 1929, against the decree of the Addl. Sub-Judge, Jaunpur, D/- 14th September 1927.

(a) Specific Relief Act, S. 42—Plaintiff suing for declaration that he was sharer in superior proprietary rights and entitled to recover rent from defendants, inferior proprietors—Court finding that defendants also were superior proprietors and that plaintiffs had agreed not to recover rent in pursuance of defendants agreeing not to recover rent from plaintiffs in another village—Plaintiffs are not prevented from getting declaration as prayed for.

In a suit for declaration that plaintiff is owner of a share of superior proprietary rights and entitled to recover certain rent from defendants who are inferior proprietors, the finding of the Court, that the defendants are also superior proprietors along with the plaintiffs and that the plaintiffs are not entitled to recover rent because of their agreement not to recover rent from defendants in pursuance of the defendants' agreement not to recover rent from plaintiffs in another village, does not prevent the plaintiff from getting the declaration that they are superior proprietors and entitled to recover rent from defendants, the question whether they can recover rent or not being one for the revenue Court to decide.

[P 692 C 1]

(b) Agra Tenancy Act, (1926), Sch. 2, List 2, Serial No. 2—Scope.

A set off is not admissible in the revenue Court under Sch. 2 List 2, Serial No. 2.

[P 692 C 1]

Majid Ali—for Appellants.

Mushtaq Ahmed—for Respondents.

Judgment. — The judgment of the lower appellate Court is very confused, and the trial Court has gone off at a tangent and decided about a matter which was not properly fixed in the issues. The plaintiffs sued for a declaration that they were owners of superior proprietary rights in a certain village known as Peshkashi Bhadi ; that their share of such proprietary interest was one-half ; that the revenue was Rs. 52-5-0, and that they were entitled to recover Rs. 26-10-6 from the defendants who were inferior proprietors. The defence was that the defendants were such proprietors along with the plaintiffs, and that the plaintiffs were not entitled to recover any money from them because of an arrangement under which the plaintiffs forbore to recover rent from the defendants in this village in pursuance of the defendants forbearing to recover rent from the plaintiffs in another village. The final defence was really one of payment and did not in any way interfere with the plaintiffs' rights. The defendants admitted that the plaintiffs were owners of one-fourth of the superior proprietor's rights and that they themselves were inferior proprietors of this particular village. The trial Court held that the plaintiffs were owners of one-fourth, and not one-half, of the superior proprietor's rights, and that the defendants also were superior proprietors. Issue 1 was to the following effect :

Whether defendants 1 to 8 and 10 are also superior proprietors of the property in suit ?

This issue was answered in the affirmative. The defendants being superior proprietors did not prevent the plaintiffs from being superior proprietors also. There was no issue as to whether the plaintiffs should be deprived of the declaration as to their rights as superior proprietors for any reason. At the end of the judgment the trial Court refused to grant a declaration on the ground of mutual agreement between the parties under which the plaintiff had agreed not to recover their share of the rent from the defendants under-proprietors. I am afraid that I am unable to understand what the lower appellate Court has decided. There is a specific finding in favour of the plaintiffs of the trial Court that the suit is not barred under Arts. 142 and 144, Lim. Act. The lower appellate Court would seem to think that the suit is so barred because the plaintiffs had not recovered rent from the defendants for a long term of years. If there is any such finding it may be disregarded as being based on ignorance and insufficient knowledge of the pleadings of the parties.

It was argued on behalf of the appellants that there was no definite finding that the plaintiffs were owners of only one-fourth and not of one-half, and that the only finding was that the defendants were also superior proprietors. No doubt the judgment of the trial Court is not very definite, but I take it that that Court has decided to the effect that the

plaintiffs are owners of only one-fourth, and not of one-half, of the superior proprietary rights.

The second question is whether the plaintiffs may be deprived of the declaration. In my opinion they cannot be so deprived. The question as to whether they could recover rent or not is one for the revenue Court to decide. The civil Court can give only a declaration of title that the plaintiffs are owners of a particular share and entitled to recover certain amount from the defendants. If there is any reason why this amount should be considered to be paid off it is for the revenue Court to decide whether such a set off is admissible or not. Practically what the defendants plead is a set off, and a set off is not admissible in the revenue Court under the Sch. list 2, serial No. 2, of the Agra Tenancy Act. The plaintiffs, if they failed in this suit, will also be liable to have their names cut out of the registers on the ground that their suit for a declaration of proprietary title had failed. The respondents' learned counsel argued that the findings were in favour of the plaintiffs. The findings, however, did not count, but only the decree counted and the dismissal of the plaintiffs' suit would deprive them of any share in the superior proprietor's right in this village. In the result I set aside the decrees of both the subordinate Courts and decree the plaintiffs' suit for one-fourth of their rights of superior proprietor with half costs throughout.

S N./R.K. *Suit decreed.*

A. I. R. 1929 Allahabad 692

BOYS, J.

Rachhpal Singh—Plaintiff — Appellant.

v.

Sheo Ratan Singh and *others*—Defendants—Respondents.

Second Appeal No. 2000 of 1927, Decided on 30th April 1929, against decree of Addl. Sub-Judge, Banda, D/- 20th July 1927.

Civil P. C., O. 23, R. 1 (2)—Permission to file a fresh suit—Suit finally disposed—Failure to comply with terms strictly bars second suit.

Once the plaintiff has accepted the terms imposed by the Court the case is declared to be withdrawn and is no longer pending and the plaintiff must comply with those terms strictly or take the consequences by being barred from filing a second suit. The order should declare that the case has been and stands withdrawn and as the Court sees fit, that permission is given to the plaintiff to file a fresh suit, either unconditionally or on such terms as the Court sees fit and if the terms are imposed for payment of costs a date should be fixed for such payment and it is desirable in the interest of the defendant already once harassed, though not necessary, that an early date for the payment should be fixed : *A. I. R.* 1924 *Mad.* 877; 33 *Mad.* 253, *Foll* ; 31 *Cal.* 965 ; 14 *C. L. J.* 105 ; 19 *C. L. J.* 529, *not Foll.* ; 3 *P. L. J.* 63, *Expl.* [P 695 C 2]

Shambhu Nath Seth—for Appellant.

Damodar Das—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit instituted in 1926 for possession of certain immovable property. The plaintiff had previously in 1924 brought a suit of exactly the same nature and against the same defendants, but in 1925 he had obtained permission under O. 23, R. 1 (2) to withdraw the suit with liberty to file a fresh suit, subject to the condition that he must pay the costs of the defendants in the first suit before filing any second suit. The record containing the actual proceedings and actual order embodying this permission is not before me, but it is not disputed that the order of the lower appellate Court sufficiently accurately quotes it where it says :

"It was ordered that before filing a fresh suit the plaintiff should pay the costs of both the Courts."

The present suit was filed on the 14th May 1926, without the costs of the previous litigation having been paid. On 28th August 1926, the defendant Sheoratan Singh in his written statement and in a later written statement another defendant challenged the right of the plaintiffs to bring the second suit without having deposited the costs in both the Courts in the previous suit. On 27th November 1926, the date fixed for the final hearing, the plaintiff tendered the costs, but the defendants refused to accept them. Both Courts have dismissed the suit on the ground that the condition on which the plaintiff had succeeded in obtaining permission to file a second suit had not been fulfilled. The plaintiff appeals.

Mr. Shambhu Nath Seth, to whom I am indebted for his careful collection of the authorities, has drawn my attention to a number of decisions of other Courts

in which the effect of the failure of the plaintiff to pay the costs in cases of this type has been considered. There appears to be no decision of this Court.

I will first make some general observations:

Firstly, O. 23, R. 1 (2), reads: Where the Court is satisfied on certain points:

"It may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit ***"

It is of course manifest, as pointed out in *G. Seshayya* v. *N. Subbayya* (1) that the permission given does not really apply to the withdrawal at all but to the right to file a second suit. A plaintiff can always withdraw without permission (and this is expressly stated in sub-R. (1), R. 1, O. 23) if he is prepared to submit to the consequences set out in sub-R. (3).

When he is not prepared to submit to those consequences, he can, before he withdraws, intimate to the Court his desire to withdraw provided that he is given permission to file a fresh suit. The Court will then intimate whether it is willing at all to give permission to file a fresh suit and if so on what, if any, terms. If the plaintiff accepts those terms, the order passed will be:

"The suit is withdrawn and permission is given to file a fresh suit on such and such terms being fulfilled."

The suit, therefore, ceases to be a pending suit and has been finally disposed of.

Secondly, I am unable to see any reason why if permission to file a second suit has been granted subject to a condition the plaintiff should not be held strictly to that condition, and his second suit dismissed if he attempts to file it without having fulfilled the condition on which he secured permission.

If, for instance, he has been ordered to pay the costs of the first suit before filing a second suit, and yet he is to be allowed, on the principle, I imagine, that he is only removing a bar, to pay the costs after he has filed the second suit, on what principle is it to be capable of determination at what stage of the second suit he can or cannot be allowed to pay the costs. Is he to be allowed to wait till he can forecast the probable result of the second suit, and pay or not as he thinks best.

(1) A. I. R. 1924 Mad. 877.

Thirdly, it will be found that in the cases which have come before the Courts the exact nature of the orders has varied. The permission has been granted apparently subject to a condition sometimes (a) that "the plaintiff shall pay the costs", sometimes (b) that "the plaintiff shall pay the costs before a named date (specified in the order)," sometimes (c) that "the plaintiff shall pay the costs before filing a second suit."

The full wording of the order has not always been set out in the reports and it is probable that in the first class of cases there was a period named within which the costs were to be paid, the period being specified as in the second or third class of cases. It is clearly desirable that the order should specify a fixed date and an early date, if only because the defendant has been harassed unnecessarily and he may well be assisted to a speedy recovery of his costs. But whether the terms fix a named date or require costs to be paid before the filing of a fresh suit is immaterial. In either case failure to pay before the date fixed or, as the case may be, before the filing of the suit will equally amount to failure to comply with the condition on which alone permission was given.

Fourthly, it has been suggested: see *Kuldip Singh* v. *Kuldip Choudhry* (2), that the order should conclude by saying that:

"on failure to pay costs within that time the original suit shall stand dismissed with costs."

An order in this form was actually passed by the first Court in *Gopi* v. *Naggu Lal* (3). If the view that I have expressed above is correct, the case has already been finally withdrawn and there is nothing left to dismiss and such an order is meaningless and improper.

I will now refer to the authorities.

The first is *Abdul Aziz* v. *Ibrahim* (4), The report does not quote the exact words of the order giving the permission, but I think it may clearly be inferred that the condition was that the costs should be paid before filing the second suit. The costs were not so paid but were paid before the case came to trial. The case was decided under S. 373 of the

(2) [1918] 3 Pat. L. J. 63=44 I. C. 79=4 Pat. L. W. 134.
(3) [1911] 14 C. L. J. 105=10 I. C. 6=15 C. W. N. 998.
(4) [1904] 31 Cal. 965.

old Code of 1882 which for all practical purposes appears to correspond to the present O. 23, R. 1; para. 1, S. 373, broadly corresponding to sub-R. (2), while para. 2 corresponds to sub-R. (3), and para. 3 corresponds to sub-R. (4). Sub-R. (1), permitting a plaintiff to withdraw suit or abandon a part of his claim, has been added. Their Lordships drew attention to the fact that para. 2 of S. 373, corresponding to O. 23, R. 1 (3), did not apply to the case before them as permission had been given. They then repelled the contention of the defendants that there was an express order that the plaintiff should pay the defendants' costs before filing the suit by qualifying that order in the light of O. 26, R. 4 of the rules of the Supreme Court 1883. That order reads :

"If any subsquent action shall be brought before payment of the costs of the discontinued action for the same, or substantially the same cause of action, the Court or a Judge may, if it or he thinks fit, order stay of such subsequent action, until such costs have been paid."

It will be noted that O. 26, R. 4 makes no reference to any condition having been imposed by the Court which permitted the first suit to be withdrawn. I am not, therefore, able myself to hold that that order is applicable, even as a guide to practice, in this country where provision is made for the first Court imposing conditions and a definite condition has been imposed, a condition which, as I have said, I can see no reason for not strictly enforcing. How far their Lordships may have been influenced by the fact that defendant's pleader had actually accepted the costs in the course of the second suit it is not possible to say.

In *Robert Fischer* v. *Nagappa* (5), there was a withdrawal with permission to file a second suit, if costs of the first suit were paid before a certain date. The costs were not paid before that date. Both the lower Courts dismissed the suit as unsustainable. Their Lordships distinguished *Abdul Aziz* v. *Ibrahim* (4), on the ground that in that case there was no time specified and that the condition of payment of costs had been performed before the case "came for trial." The appeal was dismissed. I am unable to appreciate the reasons for distinguishing *Abdul Aziz* v. *Ibrahim* (4). It is true that in the earlier case no calendar date was mentioned, but the date, that of the filing of the suit, was a date which was capable of definite ascertainment; and as to the distinction that the condition in the earlier case was performed before the case came on for trial, it does not seem to me to touch the real point in the case, namely, whether the plaintiff was to be penalised for his failure to comply with the condition before the date on which he ought to have complied with it.

But the decision appears to have proceeded on the simple ground that the first case was withdrawn and finished with and that as to the second suit there was a condition accepted and failure to fulfil it and that there was no room for argument. I agree.

In *Gopi* v. *Lala Nagan* (2), the order was that the plaintiff be permitted to withdraw from the suit with leave to bring a fresh suit subject to limitation and paying the costs before filing a fresh suit "or else this suit shall stand dismissed with costs."

The suit was withdrawn and a fresh suit was instituted on 28th July, without payment of the costs having been made. Payment was made in the course of the trial. Their Lordships held that the plaint might be treated as having been filed on 23rd August, as it was immaterial so far as limitation was concerned whether the suit was taken as instituted on 22nd August or 28th July. They further followed the decision in *Abdul Aziz* v. *Ibrahim* (4). It does not appear whether any proceedings had taken place between the filing of the plaint and the deposit of the costs. If any such proceedings of any sort had taken place it is difficult to see how the suit could be treated as having been instituted on the later date for there would be no basis in any existing suit for the intervening proceedings, or on what principle the plaint could be treated as having been instituted on the later date if there had been no intervening proceedings and not so treated if there had been such proceedings; or what would be the position if in a common plaint one plaintiff was fettered and the other not by the condition.

In *Shital Prasad* v. *Gaya* (6) (the same

(5) [1910] 33 Mad. 258=6 I. C. 288=7 M. L. T. 226.

(6) [1914] 19 C. L. J. 529=23 I. C. 210.

case is reported as *Sadhu Charan* v. *Baikuntha Nath* in 23 *I. C.*), the order was that

"the suit be allowed to be withdrawn with liberty to bring a fresh suit on condition of paying costs."

No costs were paid before the fresh suit was filed. Their Lordships said :

"The condition of such permission in this case was the payment of costs. Until the costs were paid the permission was not operative and so there was no withdrawal with liberty to bring a fresh suit. The result was that until there was such withdrawal the former suit was still pending. . . "Where a plaintiff has obtained leave to withdraw upon payment of costs it is his duty to pay the costs at once for until they are paid there is no withdrawal with the permission of the Court."

It was held that the Munsif was wrong in dismissing the second suit when the costs were tendered, and that all that he could have done would be to hold that as the other suit was still pending, S. 10 was a bar to the present suit. The decision proceeds on the assumption that the first case had not been finally withdrawn. I am unable to accept this.

Kuldip Singh v. *Kuldip Choudhry* (2), was a case in which the condition was payment of costs before filing a fresh suit. Costs were not so paid. Their Lordships agreed generally with the view expressed in *Abdul Aziz* v. *Ibrahim* (4), and also agreed very specifically with the view expressed in *Shital Prosad* v. *Gaya Prosad* (6), that the first case must be regarded as pending until the costs were paid and that the second suit must be stayed under S. 10. I would note that the two cases were apparently decided differently ; in the former it was held that the second case could go on if the costs were paid. Their Lordships continued :

"The difficulty which has arisen in the present case is due to the incompleteness of the order passed in the first suit. The order in such circumstances should limit the time within which costs should be paid and should go on to direct that on failure to pay costs within that time the original suit shall stand dismissed with costs."

I have agreed in the view that I have already expressed that a time for payment should be fixed for payment, but I have already stated my reason for holding that such an order as that suggested in the second part of this last quotation would be meaningless and improper.

In *G. Seshayya* v. *N. Subbayya* (1), the first suit was withdrawn with leave to bring a fresh suit "on condition of paying the costs" (*p.* 500 *of* 82 *I. C. Col.* 1) and this was interpreted as a condition not specifying any date for payment (*p.* 500 *of* 82 *I. C. Col.* 2). Costs were actually paid "after the close of the trial" in the second suit (*p.* 500 *of* 82 *I. C. Col.* 1). Their Lordships relying on sub-R. (1), O. 23, R. 1, held that

"Inasmuch as the withdrawal of the suit does not require the permission of the Court, it must be taken that the first suit is withdrawn when the order is passed and that the permission granted refers only to the filing of the subsequent suit on certain conditions."

Their Lordships gave as a further reason for the view :

"If the first suit is still pending as held in the above cases, it would be open to the plaintiff to obtain permission under O. 23 and instead of complying with the conditions of that permission, to go to the Court and demand that the trial of his first suit should be proceeded with and this could be done however long the interval might be."

The force, however, of this second reason would be gone if the Court fixed, as it obviously should do, a reasonably short time for fulfilment of the condition. The first reasoning remains and I agree with it.

In view of what I have said above I am of opinion that once the plaintiff has accepted the terms imposed by the Court the case is declared to be withdrawn and is no longer pending and the plaintiff must comply with those terms strictly or take the consequences by being barred from filing a second suit. The order should declare that the case has been and stands withdrawn and, as the Court sees fit, that permission is given to the plaintiff to file a fresh suit, either unconditionally or on such terms as the Court sees fit, and, if terms are imposed for the payment of costs, a date should be fixed for such payment and it is desirable in the interests of the defendant already once harassed, though not necessary, that an early date for the payment should be fixed.

Applying this to the present case I hold that the suit was rightly dismissed and the appeal is dismissed with costs.

In view of the fact that this is the first decision of this Court so far as the reports indicate, I am prepared to give my consent to a Letters Patent appeal being filed against my decision.

V.B./R.K. *Appeal dismissed.*

* A. I. R. 1929 Allahabad 696

NIAMATULLAH AND BENNET, JJ.

Sabir Husain—Appellant.

v.

Rirasat Ghaus and *others*—Respondents.

First Appeal No. 342 of 1926, Decided on 4th June 1929, against decree of Dist. Judge, Moradabad, D/- 31st March 1926.

(a) Civil P. C., S. 11—Suit for redemption—Possession of part of mortgaged property claimed—Subsequent suit for proportionate contribution for part owned by other party is not barred by res judicata.

When a suit for redemption is instituted there is no cause of action for claiming proportionate amount from those who represent the equity of redemption in part of the property mortgaged, other than that belonging to the plaintiffs in the redemption suit. The claim to contribution can only be made after the entire mortgage-money has been paid off. So the plaintiffs in the redemption suit redeeming the whole mortgage and claiming possession of the part for which the equity of redemption is held by them, but not claiming possession of the property for which the equity of redemption is held by the defendants in the subsequent contribution suit, are not barred from claiming contribution in a subsequent suit by res judicata. [P 697 C 1, 2]

(b) Civil P. C., O. 2, R. 2—Redemption and contribution are different cause of action.

Cause of action for the redemption suit and the subsequent suit for contribution against the person who had the part of the equity of redemption are different. [P 697 C 2]

*** (c) Transfer of Property Act, S. 82—Rateable contribution is charge on property mortgaged and cannot be enforced against person.**

Where several properties are mortgaged to secure a debt and subsequently part of the property is owned by the mortgagee or his assignees and the mortgagor in redemption suit is made liable to pay the entire mortgage debt, the mortgagor has a charge for the rateable proportion of the debt paid and that charge can be enforced against the property in the hands of the mortgagee or his assignees but not against the mortgagee or his assignees personally. [P 698 C 1]

K. N. Katju and *Akhtar Husainkhan*—for Appellant.

Mushtaq Ahmad—for Respondents.

Judgment.—This appeal arises out of a suit for contribution brought by the plaintiff-respondents, who are the heirs of one Sheikh Inayat. The latter executed a deed of usufructuary mortgage in favour of Mahabir Husain on 25th November 1893 in consideration of a sum of Rs. 12,000. Three villages, namely, Rethali which is now in question, Imadulmulk and Habibpur were mortgaged with possession, the usufruct to be appropriated by the mortgagee in lieu of interest. On the same date the mortgagee granted a lease of the mortgaged villages to the mortgagor at an annual rent of Rs. 1080. Rent fell in arrears, which were assigned by the mortgagee to one Nasair Husain, who obtained a decree in respect thereof on 1st March 1899 for recovery of Rs. 497-10-4. In execution of that decree village Rethali was attached and sold on 20th April 1901. One Sabir Ali was declared to be the purchaser. He sold his rights to Sabir Husain, defendant 1, appellant, son of the mortgagee, on 6th October 1903.

The original mortgagor having died, his heirs brought the suit No. 117 of 1912 for redemption of villages Habibpur and Imadulmulk on the allegation that the third village Rethali had been acquired by the mortgagee himself in the name of his son who was only a benamidar and that the integrity of the mortgage having been broken, the redemption of part was permissible. Sabir Husain was impleaded as a defendant in that case with his father, the original mortgagee. It was held that Sabir Husain was the real purchaser, and that redemption piecemeal was not permissible. Accordingly the Court passed a decree directing the plaintiffs of that suit to pay Rs. 12,000 (principal secured by the mortgage of 1893) declaring that on payment of that amount plaintiffs of that suit would be entitled to recover possession of two villages, namely Imadulmulk and Habibpur. It should be observed that on payment of the entire mortgage money .then due all the three mortgaged villages would be freed from encumbrance. The Court, however, passed a decree in the following terms:

"The defendants shall deposit the sum of Rs. 12,000 in Court for payment to defendant 1 in the month of Jeth next and on such payment being made within the specified period the plaintiffs shall recover the possession of mauzas Imadulmulk and Habibpur. If such deposit is not made, those properties shall be sold and the proceeds applied in satisfaction of the mortgage debt, and in that case the defendants shall recover their costs."

On 19th June 1915 the heirs of the original mortgagor sold village Habibpur to one Muhammad Ismail and village Imadulmulk to one Sufi Ahmad Husain, leaving the entire consideration with the vendees for the satisfaction of the redemption decree already referred to. On 19th June 1915 the vendees deposited

the required amount in satisfaction of that decree. We should mention that the two vendees were joined as co-plaintiffs in the redemption suit subsequent to sales in their favour by the heirs of the original mortgagor. A final decree followed on 19th June 1915, directing delivery of possession and retransfer of the two villages to the vendees who subsequently obtained possession. The present suit was brought by the plaintiffs, seven in number, who are the heirs of Inayat, the original mortgagor, for contribution and interest at the rate of 12 per cent per annum. They claim Rs. 17,932-10-8 of which Rs. 7,988-2-8 represents proportionate amount of the principal of the mortgage of 1893 and the rest is interest. Defendants 1 to 9 are the heirs of the original mortgagee Zakir Husain. Defendant 1 Sabir Husain, is the owner of village Rethali, as has been already mentioned. Defendants 10 and 11 are Ismail Khan and Sufi Ahmad Husain, the present owners of villages Habibpur and Imadulmulk. They are pro forma defendants and are not interested in the result of the suit. The only interest of defendants 2 to 9 in the suit is that they are eight out of nine heirs of the original mortgagee. Zakir Husain. Defendant 1 fills the dual capacity of an heir of Zakir Husain and the owner of village Rethali.

The suit was contested by defendants 1 to 9. The defence, so far as it is necessary to mention for the purpose of this appeal, is (1) that the present suit is barred by res judicata and by O. 2, R. 2, Civil P. C., (2) that the plaintiffs are not entitled to any contribution, at any rate, as against the representatives of the mortgagee and (3) that the plaintiffs are not entitled to the interest claimed by them. The learned Additional District Judge, who heard the suit in the first instance, has decreed the plaintiffs' claim for Rs. 7,064-6-4 principal and interest at 1 per cent per mensem from 19th June 1915 to the date of suit. The present appeal has been filed by defendant 1 only. Defendants 2 to 9 have been impleaded as respondents. The learned advocate, who appeared in support of the appeal, has argued that the plaintiffs' claim is barred by the rule of res judicata and by the provisions of O. 2, R. 2, Civil P. C. It is contended that the plaintiff-respondents not having obtained possession of village Rethali in the redemption suit, it is not open to them to claim the relief of contribution We have no hesitation in rejecting this contention. The questions now arising between the parties did not and could not arise in the suit for redemption The claim to contribution can be made only after the entire mortgage money has been paid off. When the suit for redemption was instituted, the plaintiff-respondents had no cause of action for claiming a proportionate amount from these who represented the equity of redemption in the part of the mortgaged property other than that belonging to the plaintiffs of the redemption suit. Their cause of action for contribution arose for the first time when they discharged a liability common to themselves and their co-mortgagor, in this case defendant 1, the appellant. It is obvious that the questions now in controversy were not directly and substantially in issue between the parties to the redemption suit. Nor can it be urged that the plaintiff-respondents might and ought to have claimed in the redemption suit what they are doing now. The plea of res judicata has, therefore, no force.

As regards O. 2, R. 2, Civil P. C,, we may at once mention that the causes of action for the redemption suit and for the present one are different, one from the other. O. 2, R. 2, cannot apply unless the claim in the subsequent suit is based on the cause of action on which the earlier suit was based. The wording of R. 2 is thus:

"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action."

As we have already pointed out, the plaintiffs' cause of action for contribution arose long after the passing of the preliminary decree in the redemption suit. It is, therefore, clear that the plea based on the provisions of O. 2, R. 2, Civil P. C., has likewise no force and must be overruled.

As regards the liability of village Rethali to contribute, the provisions of S. 82, T. P. Act, leave no room for argument. Indeed the learned advocate for the appellant has not denied the liability of the property itself to contribute a proportionate amount of the mortgage-money. His contention is that the mortgagee, if he had been alive, not his re-

presentatives-in-interest, defendants 1 to 9, can be called upon to contribute. It is, therefore, urged that the suit as against them should be dismissed. The substance of the plaintiffs' claim is not what is assumed in the argument noted above. The plaintiff-respondents claim a decree for contribution by enforcement of the charge existing on village Rethali, which is now vested in defendant 1. Defendants 2 to 9, who are eight out of the nine heirs of the original mortgagee, have been impleaded, as their names stand recorded in the khewat, and as they presumably claim an interest in the property which the plaintiff-respondents desire to proceed against. No personal decree is claimed against them nor can it be granted. If they claim any interest in the property against whlch the charge is sought to be enforced, they must establish it, or the property shall be sold free from any interest in their favour, if otherwise the sale thereof is permissible. As for defendant 1, he is admittedly the owner of the property, and if he cares to prevent the sale of it, he must pay the amount decreed by the Court within the time to be fixed by it. If follows that if the property is subject to a charge in favour of the plaintiff-respondents in respact of contribution, all the defendants have been rightly impleaded in this case, and the only question is whether the property should be sold for satisfaction of the plaintiffs' claim. As to this, S. 82, T. P. Act, as already stated, is clear. We hold, therefore, that the plaintiff-respondents are entitled to claim contribution by sale of village Rethali.

As regards the amount, it appears that the parties agreed in the Court below that Rs. 7,064-6-4 is the proportionate amount chargeable on village Rethali. The plaintiffs claim interest from 19th June 1915 up to the date of suit at the rate of 12 per cent per annum. The learned Additional District Judge has decreed interest as claimed by the plaintiff-respondents. One of the questions argued before us relates to the liability of the defendants to pay interest. Though the plaintiffs' claim to recover interest was denied in the written statement, no specific plea either as regards the liability or the rate was taken in the written statement. We would not have been disposed to take a strict view of the pleadings if the subsequent conduct of the defendants had been different from what it has been. No question regarding either to the liability or to the rate was argued before the learned Additional Judge. Next day after the arguments were concluded an application was made for an issue being struck on the defendants' plea regarding interest. The learned Additional Judge very rightly rejected this application. In the grounds of appeal to this Court the only question as to interest that has been raised is embodied in ground 5, and that relates to the rate of interest only. No question regarding the liability to pay interest has been raised. In other words, the judgment of the lower Court as regards the right of the plaintiff to recover interest has been acquiesced in.

We refuse to allow the appellant to argue any questions not raised in the memorandum of appeal, and would consider only the question as to whether the rate of interest, namely 12 per cent per annum is reasonable. It was also argued before us that the period for which interest can be claimed cannot exceed six years. This again is a matter which was not agitated in the Court of first instance, nor has it been taken in the grounds of appeal to this Court. We refuse to entertain it. As regards the rate of interest, we think that 12 per cent per annum is somewhat excessive. The mortgage of 1893 was for Rs. 12,000. The mortgagee granted a lease of the mortgaged property to the mortgagor reserving an annual rent of Rs. 1080. The rate of interest works out at 9 per cent. per annum. There are no circumstances proved in this case, which could suggest that 12 per cent per annum is reasonable, having regard to local conditions and the circumstances of the parties. For these reasons we are of opinion that the ends of justice will be satisfied if interest at the rate of 9 per cent per annum is allowed. Accordingly we modify the decree appealed from so as to allow interest at the rate of 9 per cent per annum from 19th June 1915 up to the date of suit and thereafter at the rate of 6 per cent per annum. A fresh preliminary decree shall be prepared in terms of our judgment. The appeal has substantially failed. We direct that the appellant shall pay the costs of the respondents here and in the Court below.

V.B./R.K. *Decree modified.*

A. I. R. 1929 Allahabad 699 (1)

DALAL, J.

Murli Dhar—Plaintiff—Appellant.

v.

Surja and *another*—Defendants—Respondents.

Second Appeal No. 585 of 1927, Decided on 10th May 1929, against decree of Addl. Dist. Judge, Aligarh, D/- 12th November 1926.

Landlord and Tenant—Rent may be assessed on portion of grove consisting of compact plots when that portion loses character of grove.

The plots which retain the character of a grove can be distinguished from the plots which do not retain such character, and simply because the plots are situated together in a compact whole it is not necessary that those plots which are devoid of trees should be considered to continue to have the character of a grove for the simple reason that other plots may be considered to be grove land, and so rent may be assessed even on a portion of a grove when that portion loses the character of a grove : *Kishori Saran* v. *Rameswar*, 4 *Unpublished Decisions* 171, *Rel. on.* ; *A.I.R.* 1926 *All.* 519, *Dist.* [P 699 C 2]

Panna Lal—for Appellant.

G. Agarwala—for Respondents.

Judgment.—The plaintiff zamindar came to Court on the revenue side desiring assessment of rent on a grove which had lost its character. The grove consisted of seven plots, 627 to 633, both inclusive. An excellent map exists on the record. Both the subordinate Courts held that all the plots should be taken together as one plot and on this consideration when 88 trees are still standing thereon the plot cannot be considered to have lost the character of a grove. It was overlooked by both the subordinate Courts that rent may be assessed even on a portion of a grove when that portion loses the character of a grove. This is but reasonable. If several plots of land are given for the planting of a grove without rent the grove-holder may dishonestly keep a larger number of trees only in one corner and cultivate the rest of the land without payment of rent arguing that the large number of trees on a portion of the grove were sufficient to give the land the character of a grove. This principle of assessment of rent on the cultivated portion of the grove has long been recognized by the Board of Revenue see *Kishori Saran* v. *Rameswar* (1). The learned counsel for the respondents quoted the case of *Mahbub Ali Khan* v. *Chiddan* (2) to support the plea that no rent can be assessed on portions of a grove which has been brought under cultivation. That was, however, a case of ejectment. There were two plots, both of them had trees which gave them the character of a grove. The present case is totally different. It is one for the assessment of rent and for the zamindar to have a share of the benefit which the defendants derive contrary to the original arrangement. The plots which retain the character of a grove can be distinguished from the plots which do not retain such character, and simply because the plots are situated together in a compact whole it is not necessary that those plots which are devoid of trees should be considered to continue to have the character of a grove for the simple reason that other plots may be considered to be grove-land. In plot No. 628 there is only one tree, in No. 630 no tree at all, and in No. 632 there is a very large vacant land and only a few scattered trees. From the plan I am satisfied that plots Nos. 627, 629 and 633 are still groves, and No. 631 is covered by a building. I, therefore, hold that plots Nos. 628, 630 and 632 should be assessed to rent. As to No. 632, only the area .42 acre is quoted for assessment leaving out the area covered by a tank. The total area comes to .68 and the proportionate rent will be Rs. 14 per annum. As no rent had been assessed so far I shall not permit interest. In the result I set aside the decrees of both the subordinate Courts and declare plots Nos. 628, 630 and 632 to be cultivated land and liable to pay an annual rent of Rs. 14. The suit is further decreed for a cash sum of Rs. 42. The plaintiff shall recover his proportionate costs throughout.

P.N./R.K. *Decree set aside.*

(1) 4 Unpublished Decisions 171.

(2) A. I. R. 1926 All. 519.

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* A. I. R. 1929 Allahabad 699 (2)

BOYS AND BENNET, JJ.

Chhotey Lal—Judgment-debtor.

v.

Bansi Dhar and *others*—Decree-holders.

Ex. First Appeal No. 326 of 1928, Decided on 25th April 1929, against decree of Sub-Judge, Moradabad, D/- 7th July 1928.

*** Practice—Subsequent events—Point not available before trial Court—Point raised in appeal on subsequent events—Appellate Court should send the matter to trial Court for amending its order but should not decide it itself.**

Point urged in the grounds of appeal which could not have been taken before the Subordinate Judge as it was not then possible to make that objection, the fact giving rise to the same being subsequent to the order appealed against, is not proper to be decided by the appellate Court. But the fact having been brought to the notice of the appellate Court the matter should be brought to the notice of the lower Court for amendment of the order. [P 701 C 2]

Peary Lal Banerji and *S. N. Seth*—for Judgment-debtor.

Narain Prasad Asthana—for Decree-holders.

Judgment.—This is a judgment-debtor's appeal arising out of a suit on a puisne mortgage. The mortgagor had on 6th February 1903, mortgaged mauza Khajuri, the village with which we are concerned in this case, and other properties, to a person who had obtained a decree on the foot of his mortgage. The present judgment-debtor Chhote Lal, defendant 3 in the present suit, at an auction-sale purchased mauza Khajuri and subsequently paid off the full amount of the decree. The present suit was brought by one Bansidhar who had obtained a mortgage on 8th March 1911, which covered certain properties including amongst them mauza Khajuri, impleading, amongst others, Chhote Lal as defendant 3. Chhote Lal filed a written statement, but did not otherwise defend the suit. In the plaint, however, the existence of a charge in favour of Chhote Lal was recognized. In the decree in the present suit passed on 24th April 1922, there was no mention of Chhote Lal's charge, and the decree was finally upheld on 12th February 1927. On 12th March 1927, the decree-holder applied for execution by sale of certain properties, including mauza Khajuri. On 14th April 1927, objections were filed by Chhote Lal, of which the two material ones were as follows (we quote from the paper book of E. F. A. No. 291 of 1927):

"No. 4—Mauza Khajuri is by no means fit to be sold at auction and under all circumstances the decree-holder cannot without payment of the prior encumbrance either get mauza Khajuri sold at auction or eject the objector, and the objector can use the prior encumbrance as a shield.

No. 5—If in the opinion of the Court mauza Khajuri can be sold at auction, it can be sold at auction subject to the prior encumbrance aforesaid and not otherwise."

On 17th May 1927, the Subordinate Judge allowed the objections of the decree-holder his order concluding with the following words:

"The result is that the objections are allowed with costs. The objector in my view is quite within his right to enforce a proportionate amount of his charge in respect of the property in dispute."

As a question arises in this appeal as to what were the "objections" of the judgment-debtor which were accepted, we will note here immediately that the use of the plural word "objections" is clearly merely by inadvertence. What the learned Subordinate Judge really allowed, and the only objection which clearly was pressed before him, was the fifth objection which we have noted above. This is clear from the following passage in the same judgment:

"Rai Bahadur Lala Chhote Lal objects and pleads that the village Khajuri should be sold subject to his mortgage of 6th February 1903."

It is manifest from this that the objection which Chhote Lal was pressing was that the decree-holder was not entitled to sell the property free from his (Chhote Lal's) encumbrance altogether, and not any objection that he was entitled to have his charge discharged before the property could be put to sale at all. From the judgment and decree of the learned Subordinate Judge an appeal was filed to the High Court, E. F. A. No. 291 of 1927 which was decided by Sulaiman, J. and Banerji, J., on 19th April 1928. A perusal of that judgment again makes it manifest that the only matter in contest, whatever may have been the grounds of appeal between the decree-holder appellant and the judgment-debtor respondent was whether the sale should take place free from encumbrance, so far as Chhote Lal's claim was concerned, or whether it should take place subject to Chhote Lal's encumbrance. Clearly no question was there pressed before the Court other than these two respective views. What the view of the High Court was is clearly manifest from the following quotations:

"It is now in the execution department that Chhote Lal comes forward for the first time and says that he has paid off a large sum of money and has priority over the plaintiff's

claim and that therefore the property should be sold subject to his claim. The learned Subordinate Judge has upheld the objections and the decree- holders have appealed."

And again towards the end of the judgment:

"It therefore seems to us that unless Bansidhar in the former suit impugned the prior mortgage itself, the defendant was not called upon to appear and prove either the validity of the mortgage or the amount due on that mortgage. The relief claimed by the plaintiff in the suit amounted really to an invitation to Chhote Lal to prove the amounts which he had paid off on account of the prior mortgage. When the plaintiffs were not claiming a sale of the property free from encumbrances but only a sale subject to the previous charge, Chhote Lal was not bound to appear and prove the amount to which he was entitled. He could not be bound to prove the amount when it was never intended that the 'property would be sold free from encumbrances and when he had not given his consent to its being so sold."

Here again the inference is irresistible that the whole contest was on the one side and on the other as to whether Chhote Lal, having entered no defence beyond his written statement was debarred from now claiming that the sale could not take place except subject to his prior encumbrance.

On the matter returning to the Court of the Subordinate Judge, the decree-holder on 16th June 1928, applied for sale of, amongst others, the village Khajuri, subject to Chhote Lal's prior charge. On 7th July 1928, Chhote Lal again made objections. The first material objection urged before us is the second one which was based on a claim that the decree of the trial Court which had been upheld by the higher Court should be interpreted to mean that mauza Khajuri could not be sold at auction until the payment of the prior encumbrance of the objector: and the fifth objection which was that no proceedings towards sale were permissible until the actual amount of the prior encumbrance may be determined. The lower Court has dismissed these objections summarily on the same date with a brief order which we may quote in full:

"Heard the parties. The matter has sufficiently been thrashed out in the judgment of the Hon'ble High Court which has agreed with my view and is no longer open to controversy. As has been held already the property will be sold subject to the charge of the objector under the mortgage dated 6th February 1903. Proclamations will be issued accordingly."

From the quotations that we have made from the previous applications, objections and judgments in the prior proceedings, it is, in our view, manifest that the view taken by the Subordinate Judge in the present proceeding is correct. The present objections were either not specifically taken when they could have been taken, or having been taken were rejected definitely by this Court. In this view the appeal must fail.

There is, however, one further point which has been urged to us and which is taken in the grounds of appeal here but which could not be taken before the Subordinate Judge because at that stage the sale proclamation had not been drawn up. The objections of the judgment-debtor Chhote Lal and the rejection of those objections, which we have held to have been rightly rejected, are of date 7th July 1928 and the sale proclamation was not drawn up till 10th July 1928. The sale proclamation directs that the sale should take place:

"subject to the mortgage-deed dated 6th February 1903 executed by Abdul Rahim in favour of Babu Ram and others on the basis of which a decree, No. 33 of 1915, has been passed."

It is contended that the sale should only be subject to the claim which Chhote Lal himself makes and that that is only to a proportionate amount of the total amount of the decree which he paid off, that proportion being determined on the ratio of the value of mauza Khajuri to the value of the whole property mortgaged by the mortgage-deed of 6th February 1903. It is contended for the appellant and not challenged by the respondent, and there is, further, material on the record to show, that the latter statement expresses correctly the claim made by Chhote Lal. As it was not possible for the judgment-debtor to make this objection to the Subordinate Judge on 7th July 1928 and the Subordinate Judge could not therefore deal with it, owing to the fact that the sale proclamation was not drawn up till three days later, it is not an objection which we can properly decide in this appeal. But the fact having been drawn to our attention it is at least desirable that this matter should be drawn to the attention of the Subordinate Judge with a view to his considering the propriety of an amendment and in the hope that it may avoid further litigation. The amendment that

we have suggested to counsel for the appellant Chhote Lal and to which counsel for the respondent, the decree-holder, takes no objection in that the proclamation should be drafted so as to show that the prior encumbrance in favour of Chhote Lal is limited to a proportion of the total amount of the decree which he paid off based on the ratio of the value of mauza Khajuri to the value of the whole property mortgaged by the deed of 6th February 1903.

The last observation of ours as to the form the proclamation should take must not be interpreted as in any sense whatever a direction to the Subordinate Judge that he need not determine the pecuniary value of Chhote Lal's charge.

With these observations the appeal is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 702

NIAMATULLAH, J.

Gajram Singh and *another*—Defendants—Appellants.

v.

Balwant Singh and *another*—Plaintiffs—Respondents.

Second Appeal No. 2163 of 1927, Decided on 14th May 1929, against decree of Dist. Judge, Moradabad, D/- 6th July 1927.

Agra Tenancy Act (2 of 1901), S. 165—Non-lambardar cosharer suing another for his share of profits on entire rental—Defendant pleading non-collection of entire rent but failing to produce his account books—Court is justified in decreeing plaintiff's whole claim.

Where one non-lambardar cosharer sues another such cosharer under S. 165 for his share of the profits on the entire rental, and the latter alleges that he could not collect the entire rent but when called upon to produce his account books fails to do so, the Court is justified in finding that the entire rent was collected and in decreeing plaintiff's claim accordingly : 5 *A. L. J.* 117, *Dist.*

[P 702 C 2]

Zahur Ahmad Naqvi for *Mukhtar Ahmad*—for Appellants.

Shabd Saran—for Respondents.

Judgment.—Parties are cosharers in a certain mahal, neither of them being the lambardar. The plaintiffs-respondents brought the suit, out of which this appeal has arisen, for settlement of account under S. 165, Agra Tenancy Act 2 of 1901. They claimed profits to the extent of their share out of the entire rental of the mahal. The defendants contested their liability to pay the amount claimed by the plaintiffs, and pleaded that the collections fell short by a considerable amount. The Courts below have awarded profits to the plaintiffs, as claimed by them, on the entire rental, making allowance for Government revenue and incidental charges. The defendants appeal.

It is contended on behalf of the appellants that there is an essential distinction between a suit against a lambardar under S. 164 and one for settlement of account against an ordinary cosharer who has made collections under S. 165 of the same Act. In the former case there is a statutory provision making the lambardar liable not only for the profits actually collected but also for those which he could have collected by the exercise of due diligence. A cosharer who has made collections in a particular year is not liable to pay profits on what he might have collected by exercise of due diligence, there being, in his case, no duty enjoined by law to make collections. If the judgment of the Courts below rested on the ground that it was the defendants' duty to make collections of the entire rental and they failed to discharge their duty, this argument might have been entitled to weight but as I read the judgment of the lower appellate Court, it proceeds on the inference that the defendants did, in fact, collect the entire rental but fraudulently concealed their collections so as to deprive the plaintiffs, their cosharers, of their full share of the profits. The defendants were called upon to produce the accounts of their collections; but they failed to do so. The lower appellate Court has inferred that, if the accounts had been produced they would have been against the defendants. It was quite permissible for the lower appellate Court to base its finding of fact on the inference to be drawn from the failure of the defendants to produce the accounts.

Reference has been made to *Abdul Rashid* v. *Abdul Latif* (1), in which it has been held that in a suit under S. 165, Agra Tenancy Act, only the actual collections made by the defendant ought to

(1) [1908] 5 A. L. J. 117=(1908) A. W. N. 68.

be taken into account in determining the amount of profits due. That was a case in which profits were claimed on gross rental not on the ground that the defendant had made full collections, but on the ground that the rent left uncollected would have been collected but for the gross negligence of the defendant. In the case before me the decree of the lower appellate Court is based on the finding that the entire rental has been collected, and if this finding can stand—and I am of opinion it must stand in second appeal—the decree of the lower appellate Court is clearly right. In the view of the case that I have taken, this appeal has no force. It is accordingly dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 703

SULAIMAN AND PULLAN, JJ.

Govind Singh—Plaintiff—Appellant.

v.

Manglu and *others*—Defts.—Respdts.

Second Appeal No. 1178 of 1927, Decided on 17th May 1929.

(a) Agra Pre-emption Act. S. 19—Purchaser obtaining gift from Hindu father during pendency of pre-emption suit and becoming cosharer—Gift did not create indefeasible interest and so pre-emption suit could not be defeated.

By virtue of the provision of S. 19 a purchaser who has become a cosharer by virtue of a gift taken during the pendency of the suit can successfully resist the plaintiff's claim for pre-emption but such purchaser must show that he has acquired an indefeasible interest by means of the gift. If the gift is one made by the father of a joint Hindu family to which the purchaser is a stranger, the gift being invalid under Hindu law, does not create an indefesible interest and so the plaintiff's claim for pre-emption cannot be defeated by such a gift : *A. I. R.* 1929 *All.* 53 (*F.B.*); *A. I. R.* 1927 *All.* 575, *Rel.* [P 703 C 2]

(b) Agra Pre-emption Act, Ss. 20 and 19—"Indefeasible" meaning explained.

Although the word "indefeasible" cannot be taken in its widest sense so as to include transactions which have a possibility of being challenged, for instance on ground of undue influence, coercion, fraud, etc., it undoubtedly means that on the obvious facts the transaction must confer a valid title on the transferee. [P 704 C 1]

N. C. Vaish—for Appellant.

Ambika Prasad—for Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit for pre-emption of property transferred under a sale-deed dated 3rd August 1925. The suit was instituted on 1st July 1926. During the pendency of the suit the vendees obtained a share in the village from the vendor Sukhdeo under a deed which was ostensibly one of gift and was dated 3rd September 1926. A second suit for pre-emption was instituted to pre-empt the gifted property on the allegation that the transaction was really one of sale. The connected appeal arises out of that suit.

The first Court found that the ostensible gift was a colourable transaction, but at the same time it decreed the claim for pre-emption. The appellate Court has found that the gift was a transaction of gift and was neither fictitious nor was it a transaction of sale. We are bound by the finding of fact of the lower appellate Court. It has dismissed the suit on the ground that the vendee had become a cosharer on the same footing as the plaintiff by virtue of this gift.

In appeal it is contended before us that the gift was made by Sukhdeo of a share in his ancestral property when he had sons alive and was therefore invalid. It is accordingly contended that the defendants had not acquired such title as to enable them to defeat the plaintiff's claim. In a case where the purchaser has acquired an interest in the mahal prior to the institution of the pre-emption suit it is incumbent on him to establish that he has acquired an indefeasible interest (S. 20). The Full Bench in the case of *Ram Saran Das* v. *Bhagwat Prasad* (1) has held that S. 20 does not apply to a case where the gift is taken after the institution of the suit; but that the same result follows by virtue of the provision of S. 19, and a purchaser who has become a cosharer by virtue of a gift taken during the pendency of the suit can successfully resist the plaintiff's claim for pre-emption. In view of this pronouncement it seems to us that such purchaser also must show that he has acquired an indefeasible interest otherwise an illogical result will follow, viz., that a purchaser who takes a gift before the suit would not be entitled to defeat the claim unless the interest taken is indefeasible, but a purchaser taking a gift during the suit need not show that he has acquired an indefeasible right. We have therefore to see whether the interest acquired by the purchaser is an indefeasible interest or whether it is defeasible.

(1) A. I. R. 1929 All. 53 (F.B.).

Under the Hindu Law, with the exception of certain specified cases, a father cannot alienate family property except for legal necessity or in lieu of his antecedent debt. There can be no legal necessity for a gift in favour of a stranger when no questions of the gift being made to a near relation or at the time of marriage or for the purpose of conferring spiritual benefit or for religious purposes arise. Such a transfer is obviously without authority and can be upset as soon as it is challenged. The word "indefeasible" has been explained in the case of *Deonarain Singh* v. *Ajudhia Parsad* (2) as meaning liable to be defeated and not necessarily that it has already been defeated. A gift by a Hindu father of joint family property when he is not the sole owner of it is prima facie invalid and the defendants cannot take advantage of it without showing that it has become valid in consequence of the consent of all the other members of the family and that no such member is a minor. In the absence of such proof the gift must be deemed to have been invalid.

Although the word "indefeasible" cannot be taken in its widest sense so as to include transactions which have a possibility of being challenged, for instance on grounds of undue influence, coercion, fraud etc., it undoubtedly means that on the obvious facts the transaction must confer a valid title on the transferee. This is not the case here.

We would therefore hold that the defendants had not by virtue of this gift acquired an indefeasible interest so as to extinguish the plaintiff's subsisting right of pre-emption at the time of the first Court's decree. The first Court had found that the donor Sukhdeo had sons who were entitled to this property. This finding was not challenged by the defendants in their grounds of appeal before the District Judge. They are therefore not entitled to have the question of supposed consent of the sons determined by the lower appellate Court. The result therefore is that we allow this appeal and setting aside the decree of the lower appellate Court restore that of the Court of first instance with costs in all Courts including in this Court, fees on the higher scale. We extend the time for payment up to six weeks from this date. If the plaintiff fails to deposit the amount within the time allowed, his suit will stand dismissed with costs in all Courts including in this Court, fees on the higher scale.

(2) A. I. R. 1927 All. 575=49 All. 696.

S.N./R.K. *Decree set aside.*

A. I. R. 1929 Allahabad 704

DALAL J.

Hardani Lal—Applicant.

v.

Ram Nath—Opposite Party.

Civil Revn. No. of 1929, Decided on 7th March 1929.

Civil P. C., O. 21, R. 66—It is as much judgment-debtor's duty as of decree-holder to see that sale proclamation is prepared correctly.

Under O. 21, R. 66, it is as much the duty of the judgment-debtor as of the decree-holder to see that the sale proclamation is prepared correctly. If the former sleeps over his right he has only to blame himself if he suffers loss through wrong proclamation. [P 704 C 2]

Hem Chandra Mukerji—for Appellant.

Judgment.—This application is dismissed. As regards the third ground of appeal, I state most emphatically that it is wrong. It is alleged that under O. 21, R. 66, it is incumbent on the decree-holder and the Court to see that the proclamation is correct and the sale following an incorrect proclamation must be set aside. This is quite a wrong view to take of the duties of the decree-holder and the Court. Sir George Knox who had large experience in this matter was continuously of opinion and always informed the subordinate Courts that it was as much the duty of the judgment-debtor as of the decree-holder to see that the sale proclamation under O. 21, R. 66 was prepared correctly. If a judgment-debtor goes to sleep over his right he is well punished if a wrong sale proclamation is prepared, and he has only to blame himself if he suffers any loss through such incorrect preparation. The terms of O. 21, R 66 were specially prepared on a memorandam submitted by Sir George Knox making it incombent that all parties should be present at the time of the preparation of the sale proclamation. I have always insisted upon this as an administrative Judge. A revision that is based on a scandalously wrong argument must not be permitted to succeed.

S.N./R.K. *Revision dismissed.*

A. I. R. 1929 Allahabad 705

MEARS, C. J. AND YOUNG, J.

Ismail and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 936 of 1928, Decided on 18th February 1929, against order of Addl. Sess. Judge, Allahabad, D/- 24th August 1928.

(a) U. P. Excise Act (4 of 1910), S. 60 (a)—Not ownership but nature of occupation of house is of importance in estimating whether particular accused possessed excisable article—Cocaine discovered by police in house occupied by three men, two of whom were brothers and third their cousin—All carrying on same business and setting up same defence — Each of them comes within S. 60 (a).

The ownership of the house, under S. 60 (a), is not an essential element, but the nature of the occupation of the house might and often is a circumstance of very great importance in estimating whether the particular accused in any given case possesses the excisable article.

Three men, two of whom were brothers and the third their cousin, were in actual occupation of a house in which, on search, the police discovered packets of cocaine. They were carrying on the same business and set up the same defence.

Held : that the facts were sufficient to bring each of them within S. 60 (a) ; 26 *A. L. J.* 414, *Dist.* [P 706 C 1]

(b) U. P. Excise Act (4 of 1910), Ss. 71 and 60 (a)—Proviso in S. 71 that no person other than actual offender shall be punished with imprisonment does not modify S. 60 (a) which makes possession of cocaine punishable with imprisonment.

Proviso in S. 71 that no person other than the actual offender shall be punished with imprisonment except in default of payment of fine does not in any way modify the effect of S. 60 (a), which provides that a person in possession of cocaine may be punished with imprisonment which may extend to two years. [P 703 C 2]

(c) U. P. Excise Act (4 of 1910), S. 71, Prov.—Applicability.

The proviso as to punishment by fine applies only to that person who is able to show that he is the employer or principal, that he did not personally commit the act complained of, snd that he took all due and reasonable precaution to prevent the commission of such act. [P 706 C 2]

G. K. Shinde—for Appellants.

U. S. Bajpai—for the Crown.

Judgment.—This is an appeal by the Local Government against the acquittal by the Sessions Judge of Allahabad of Ismail and Ishaq, sons of Husain Bakhsh and Abdul Razak, son of Abdul Ghafur, on a charge under S. 60 (a), Act 4 of 1910, Excise Act. Ismail and Ishaq are brothers and Abdul Razak is their cousin. The three men had been living together for a considrable time in a house at Gulab Bari, and carrying on business together. On 2nd April 1928 their house was raided by the police and ten small and one large packet of cocaine hydrochlorate were found in a room in which they were all present. The cocaine was enclosed in paper, and the packets were found partly submerged in water, having been thrown into a degchi a few moments before their discovery, as was evidenced by the fact that the cocaine which had come in contact with water had not dissolved. The only explanation given at the moment was a general statement that the cocaine must have been planted there.

Before arriving at the house Mr. Measures, Superintendent of Police, had his party searched as also the search witnesses, and was himself searched. Later when the Magistrate was examining the premises in the presence of the three accused, they set up a story that they saw a constable, who entered with others by another door, throw the packets of cocaine into the degchi. Apart from the difficulty of this feat, there is the significant circumstance that they did not at once denounce the constable in the presence of Mr. Measures, when each of them had seen him do it with their own eyes. The search was concluded without this most important circumstance ever having been mentioned to Mr. Measures or any body. The only inference we can draw is that it never happened but was an invention thought out afterwards.

Section 60 runs as follows :

Whoever, in contravention of this Act..... (a).....possesses any excisable article..... shall be punished, if the offence is commited in respect of cocaine, with imprisonment which may extend to two years or with fine or with both.

Section 71 must also be considered in this connexion :

In every prosecution under S. 60, it shall be presumed, until the contrary is proved, that the accused person has committed an offence punishable under that section in respect of any excisable article.....for the possession of which he is unable to account satisfactorily."

There is a further point about S. 71, which we will touch on in due course.

Therefore the prosecution had to prove under S. 60 (a) that these three men were

in possession of the cocaine. We must consider the circumstances and their conduct. As we have already said, they are closely related. They have been living together for some time. They carry on the common business. Not one of the three ever dissociated himself from the others in any respect. All were in the room at the moment of the raid. One or some of them undoubtedly threw the paper packets into the degchi. They set up a common defence, which was that each of them had seen a constable himself throw the packets into the degchi. We think that these facts when taken together are sufficient to bring each of these three men within S. 60 (a) as being in possession of the excisable article. They have entirely failed to discharge the obligation cast upon them by S. 70 of accounting satisfactorily for its possession.

In both of the lower Courts a good deal of discussion turned upon the question of the ownership of the house. Under S. 60 (a) ownership of the house is not an essential element, but the nature of the occupation of the house might and often is a circumstance of very great importance in estimating whether the particular accused in any given case possesses the excisable article, and indeed it has had great weight in this case. A simple illustration will show the importance of the matter. If the police having raided a room found three people in it, and at the bottom of a drawer wrapped away in cloth found a packet of cocaine, the fact that two only of the three men lived in that room whilst the third was merely a casual visitor, would be a matter well worthy of consideration. The probability is that the place where the cocaine was found would tell seriously against the two occupiers of the room, and would tell considerably in favour of the visitor. We have come to the conclusion that the prosecution have made out their case, and that each of these three men was, what is described in S. 71 as the "actual offender," that is, the person in possession of an excisable artitcle for the possession of which he was unable to account satisfactorily.

It has been urged upon us that the learned Magistrate would have passed a sentence of imprisonment upon each of three men had he not felt himself bound by the decision in the case of *Abdul Rahman* v. *Emperor* (1). That case apparently proceeded on the basis of the man being the owner of the house. This case proceeds upon the actual possession by the accused, and we have no doubt that the Magistrate could have passed a sentence of imprisonment had he thought fit to do so. There is in S. 71 a proviso that no person other than the actual offender shall be punished with imprisonment except in default of payment of fine. We are of opinion that that proviso in S. 71 does not in any way modify the effect of S. 60 (a), which provides that a person in possession of cocaine may be punished with imprisonment which may extend to two years. The latter part of S. 71 recognises a set of circumstances which not infrequently arise where the owner of a business, which is hemmed in with statutory restrictions, has necessarily to carry on that business by means of managers, assistants and agents. An assistant may commit an act in direct violation of, say for instance, the licensing laws of which the proprietor may be wholly ignorant. The assistant in such instance is the "actual offender." No difficulty should arise in the construction of this section, because the Court can ask itself on each occasion whether it is dealing with a man who is the actual offender, or a man who sets up the defence that he himself had no knowledge of any wrong-doing, and that such wrong-doing (if committed) was committed by some person in his employ or acting on his behalf, and that he himself had taken all due and reasonable precaution to prevent the commission of such offence.

The proviso as to punishment by fine applies in our opinion only to that person who is able to show that he is the employer or principal, that he did not personally commit the act complained of, and that he took all due and reasonable precaution to prevent the commission of such act. The actual offender is of course the person who commits the particular breach of the law. Whilst we have no doubt that we could inflict upon each of these three accused the punishment of imprisonment, we, however, think the fines imposed by Mr. Azim-ud-din Khan a sufficient penalty. We set aside the order of Mr. Rup Kishen Agha of the 24th August 1928, restore the convictions and sentence of Mr M. Azimuddin

(1) [1923] 26 A. L. J. 414.

Khan of 11th June 1928. The accused will therefore each pay Rs. 100 as fine, and in default of fine will each undergo rigorous imprisonment for three months.

S.N /R.K. *Acquittals set aside.*

A. I. R. 1929 Allahabad 707 (1)

SULAIMAN AND PULLAN, JJ.

Kalka Prasad, In the matter of.

Misc. Ref. No. 598 of 1929, Decided on 24th July 1929, made by Dist. Mag., Benares, on 22nd May 1929.

Workmen's Compensation Act (8 of 1923), S. 8—Compensation is payable only to dependents and not to distant relation though next-of-kin.

Section 8 makes it quite clear that compensation is payable only to the dependents of the deceased. It follows, therefore, that if no near relation who is mentioned in S. 2 (d) exists, the money cannot be paid to a more distant relation even though he be his next of kin. The amount is to be refunded to the employer. [P 707 C 1, 2]

Judgment.—This is a reference from the District Magistrate of Benares who has been appointed Commissioner under the Workmen's Compensation Act (Act 8 of 1923). It appears that one Kalka Prasad who was employed by the Benares Electric Light and Power Company was unfortunately injured in the course of his employment and died in consequence. The company have deposited a sum equal to thirty month's wages as compensation. It is an admitted fact that the deceased has left no one who was his dependent. A dependent is defined in S. 2 (d) as meaning any of the near relations mentioned therein. It is not disputed that the deceased has left no such near relation. He was, however, being supported by Mr. Hanuman Prasad Varma, the present District Judge of Ghazipur and was related to him as a first cousin, but the deceased of course was not in any way supporting Mr. Varma. The learned District Magistrate considers that the money should be paid to him. We do not agree with his view.

Section 8 makes it quite clear that compensation is payable only to the dependents of the deceased. Sub-Cl. 4 of that section makes it still more clear that if the Commissioner is satisfied after enquiry which he may deem necessary that no dependant exists he shall repay the balance of the money to the employer by whom he was paid. It follows, therefore, that if no near relation who is mentioned in S. 2 (d) exists the money cannot be paid to a more distant relation even though he be his next of kin. The amount has got to be refunded to the employer.

This is our answer to the reference. Let the papers be retured.

R.M./R.K. *Order accordingly.*

A. I. R. 1929 Allahabad 707 (2)

MEARS, C. J. AND BENNET, J.

Sukhwa and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 344 of 1929, Decided on 10th June 1929 against order of Sess. Judge, Fatehpur, D/- 5th April 1929.

Penal Code, S. 302—Persons lying in wait for deceased with intention of beating—Previous enmity—Beating causing death—Persons held guilty of murder.

Where four persons deliberately lay in wait for the deceased intending to beat him with lathis on account of enmity in regard to a grove. There was evidence of eyewitnesses, one of whom accompanied deceased and others who were close to the scene of occurrence, who stated that they had witnessed the assault and that all the four accused beat the deceased with lathis. The first report, made without delay, named the four as assailants. In the dying declaration the deceased named all the four as his assailants. The medical evidence showed that the death was due to injuries to the lung caused by the fracture of six ribs, and haemorrhage of the brain produced by contused wound on the head, and that there were numerous other injuries.

Held: that the intention of the accused must have been to cause death or such injuries as would in the ordinary course of nature cause death. [P 709 C 1]

Surendra Nath Verma and *D. Man Singh*—for Appellants.

U. S. Bajpai—for the Crown.

Judgment.—This is a reference of the death sentence passed on Sukhwa Pasi and appeals by Sukhwa, Darshanwa, Mangalwa and Parbhua Passis. These four persons have been convicted under S. 302, I. P. C., of causing the death of a Kalwar called Ram Prasad on 12th November 1928 as a result of an assault committed on 7th November 1928. The parties are all residents of the village of Palia. The questions to be decided are

firstly, whether the assault was committed by all four accused or by the accused Sukhwa alone, and secondly, what were the circumstances which led up to the assault. For the prosecution three eye-witnesses, Ram Bharose who admittedly accompanied the deceased and two persons Bore and Badri who were close to the scene of occurrence, stated that they witnessed the assault and that all the four accused beat the deceased with lathis. Four witnesses have given evidence for the defence, but we consider that their evidence is not worthy of credit. The first report which was made without any delay named all four accused as the assailants of Ram Prasad. Ram Prasad's dying declaration was taken on the following day by the Tahsildar and he made a very clear statement in which he named all the four accused as .his assailants. We consider therefore that the prosecution story as regards the assault by all four accused is the correct version of the occurrence.

As regards the motive for the assault, it is stated by Mahabir Prasad, nephew of the deceased, that the deceased some five years ago purchased a grove and two years later surrounded that grove with a ditch. This piece of land had formerly been used by the accused Sukhwa for grazing his cattle and his cattle shed is just outside the grove. The witness Bore states that on the day previous to the assault he saw Sukhwa appellant grazing his cattle inside the grove and Ram Prasad remonstrated with Sukhwa and reminded him that he had impounded Sukhwa's cattle for that very matter on the previous year and that he would do so again if there was any further trespass. Sukhwa replied with a threat against Ram Prasad. Ram Prasad in his dying declaration and Ram Bharose in his evidence stated that they were returning on the day of the assault early in the morning to their village of Palia and that when they came about a furlong and a half from the village, the four accused who were waiting on the road near a culvert assaulted Ram Prasad with lathis and continued to beat him after he fell down. Ram Bharose remonstrated with them saying that Ram Prasad was an old man and would be killed, but the accused Sukhwa told the other accused to kill Ram Prasad. This account of the origin of the quarrel has been clearly set out in the first report which was made a few hours after the assault on the same morning. Later than that report the accused Sukhwa made a rival report in which he set out a story to the effect that Mahabir, the son of the deceased sent for him and demanded half of Sukhwa's crop. Sukhwa stated that he had taken his field on rent. The report continues that on this account on the day of the assault Mahabir beat the mother and sister of Sukhwa and that the mother was injured on her mouth and would be taken to the hospital. The report then says that Sukhwa came up and committed marpit, but does not say whom he assaulted. There is nothing whatever in this report about any action by Ram Prasad. None of the accused put forward any explanation in the Court of the Magistrate, but when the case came to the Sessions Court Sukhwa put forward a story to the effect that Ram Prasad, Mahabir, Raghubir and Ram Bharose alias Sankata came to his threshing-floor and asked his mother to give them half of his rice crop ; that abuse followed and Ram Prasad and Mahabir beat the mother and sister of Sukhwa and that hearing their cries Sukhwa came up and remonstrated with Ram Prasad. He received a lathi blow on his ankle by Ram Prasad. Sukhwa then picked up a lathi and beat Ram Prasad.

Some attempt is made to support this story by the evidence of a single defence witness called Kunthi. No evidence was given of any injuries on these women. Kunthi was not one of the two witnesses named in the original report of Sukhwa. We do not consider that his evidence is worthy of credit. The story as put forward by the defence of the origin of the quarrel is a story that is extremely improbable. It has been changed considerably from the version put forward in Sukhwa's first report and it is not supported by any reliable evidence. Accordingly we reject this story of the defence altogether.

We believe the evidence of the prosecution witnesses and we find that the four appellants deliberately lay in wait for Ram Prasad intending to beat him with lathis on account of the enmity in regard to this grove. The medical evidence shows that death was due to injuries to the lung caused by the fracture of six ribs, and haemorrhage of the brain

produced by a contused wound on the head, and that there were numerous other injuries. The intention of the accused must have been to cause death or such injuries as would in the ordinary course of nature cause death. There is evidence that Sukhwa told the other accused to kill Ram Prasad, and that Sukhwa took a leading part in the assault.

We affirm the conviction under S. 302, I. P. C., of all the accused and we confirm the sentence of death of Sukhwa and the sentences of transportation for life on Darshanwa, Mangalwa and Parbhuwa. We dismiss the appeal.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 709 (1)

DALAL, J.

Ch. Resal Singh—Applicant.

v.

Baljit Singh and *others* — Opposite Parties.

Criminal Ref. No. 107 of 1929, Decided on 10th April 1929, made by Sess. Judge, Meerut, on 28th January 1929.

Criminal P. C., S. 139-A—Who is to have existence of right decided by civil Court or what order Magistrate has to pass is not stated—Magistrate must, however, fix a date for getting the right decided.

In S. 139-A it is not stated who is to have the matter of existence of a right decided by a civil Court and what order the Magistrate has to pass in order to reach an end to criminal litigation. Under Cl. (2) the Magistrate has to stay proceedings and obviously the proceedings are not meant to be stayed indefinitely. There should be some period of stay and the Magistrate ought to have the power of dismissing the application on the right not being decided by a civil Court on motion by a particular party within a certain time.

[P 709 C 1, 2]

S. N. Mukherji—for Applicant.

Nehal Chand and *Harendra Krishna Mukherji*—Opposite Parties.

Judgment.—As I have previously remarked in several judgments Chap. 10, Criminal P. C., was not revised with care in 1923 when additions were made to it in accordance with certain rulings of certain High Courts. In S. 139-A it is not stated who is to have the matter of the existence of a right decided by a competent civil Court and what order the Magistrate has to pass in order to reach an end to the criminal litigation. Under Cl. (2) of that section the Magistrate has to stay proceedings and obviously the preceedings are not meant to be stayed indefinitely. There should be some period of the stay, and the Magistrate ought to have the power of dismissing the application on the right not being decided by a civil Court on motion by a particular party within a certain time. In the present case the question of the authority of the Magistrate to direct a party to take proceedings in the civil Court has not been questioned by Mr. Nihal Chand, and argument was addressed to me only on the particular facts of the present case as to whether Pisal Singh or Baljit Singh should be directed to take proceedings in the civil Court. I think that this is the right view taken of the law by Mr. Nihal Chand and of the deduction that is to be made both from statute law and from cases decided by this Court.

Coming to the particular facts of this case, Bisal Singh desired that there should be a public road over a particular area of land which is claimed by Baljit Singh as his own. The finding of the Magistrate is :

"Taking all the facts in view, it seems to me that there is reliable evidence in support of the denial of the defendants that, for some considerable time past, there has been no existence of any public right of way as claimed by the complainant."

The present decision, therefore, is in favour of the defendant, and if no action were taken the result would be that the compainant's application would be dismissed. Under the circumstances I direct that Risal Singh shall prove the existence of a public right of way over the land in dispute within one year of today's date, in default of which the Magistrate will be at liberty to dismiss his application.

R.M./R.K. *Decision postponed.*

A. I. R. 1929 Allahabad 709 (2)

DALAL, J.

Bhagwati Prasad and *another* — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 453 of 1929, Decided on 15th July 1929, against order of Addl. Sess. Judge, Allahabad, D/- 30th April 1929.

Penal Code S. 366-A — Consent of minor does not prevent commission of offences under S. 366-A.

The aim of the provisions of S. 366-A is to prevent immorality and the provisions are framed more with the desire of the safeguarding the public interest of morality than the chastity of one particular woman. The consent therefore of the minor against whom the offence is committed is immaterial. The consent might have been induced and any reason given by the accused to move the girl from one place to another is sufficient inducement. Once the offence of inducement is proved, the girl's subsequent willingness will neither prevent the offence nor reduce the gravity of the offence. [P 710 C 1, 2]

A. P. Dube and *Harnandan Prasad*—for Appellants.

Shankar Sharan—for the Crown.

Judgment.—In my opinion there was no misdirection to the jury. The learned Judge was fully justified in telling the jury to rely more on medical evidence than the opinion of a lay European Magistrate as to the age of an Indian woman. The jury was rightly directed and found by their verdict the girl to be under 18 years of age

It was next argued that the appellants had been discharged of an offence under S. 366-A by the Magistrate. Such, however, is not the case. The Magistrate has definitely stated that the accused were discharged of the offence under S. 363. He has nowhere stated that they were discharged of an offence under S. 366-A. Finally, the argument was that if the minor is a consenting party no offence is committed under S. 366-A. Such, however, is not the law. The consent may be induced and such consent would not prevent the commission of an offence.

The aim as I have been stating from this Bench of the provisions of S. 366-A is to prevent immorality and the provisions are framed more with the desire of safeguarding the public interest of morality than the chastity of one particular woman. Often it may happen that a girl under 18 may desire to leave her husband to better her prospects elsewhere. Such a desire would not save her helper from a conviction under S. 366-A. Any reason given by the appellants to move the girl from one place to another is sufficient for inducement. In the present case it appears that the appellants first put forward the story 'that the girl was to be taken to her sister. Even after the girl discovered that she was not being so taken she fell in with the plan of the appellants. The offence, however, of inducement had been committed, and the girl's subsequent willingness will neither prevent the offence nor reduce the gravity of the offence of the appellants. The gravity of the offence consisted in trading in women and that offence the appellants certainly committed.

I dismiss the appeal and direct that Bhagwati Prasad who is on bail shall surrender to undergo the balance of his sentence

R.M./R.K. *Appeal dismissed.*

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BOYS AND BENNET, JJ.

Azam Ali—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 332 of 1929, Decided on 7th May 1929, from an order of Sess. Judge, Sahajahanpur.

(a) Criminal P. C., S. 423 (1) (b) (1)—Appellate Court can reverse finding and sentence of death if there is no evidence to justify conclusion that there has been murder.

Where the body of the person said to have been murdered is missing and the identity of the person with the person who is reported to have been assaulted in the house of the accused is not established, the charge of murder against the accused must fall. It is impossible for a Court in a matter of life and death to leap a gap in the prosecution evidence and to arrive by a process of speculation at a conclusion which there is no evidence to justify. The Court can in such a case reverse the finding and the sentence. [P 717 C 2]

(b) Criminal P. C., S. 403 (1)—Section forbids retrial only where a person is convicted or acquitted and the conviction and acquittal is in force.

Section 403 (1) forbids a retrial only where a person has been convicted or acquitted and such conviction or acquittal remains in force. When the conviction is set aside and is no longer in force and no acquittal also is in force, a retrial can be ordered. [P 717 C 1]

Sailanath Mukerji—for Appellant.

U. S. Bajpai—for the Crown.

Judgment. — Azam Ali, son of Mammi Sheikh, age 25, resident of Talaiya Ghuran, police station Kotwali, District Shahjahanpur, appeals from his conviction under S. 302, I. P. C. and a sentence of death. The case is one of a most difficult nature. As we are of opinion that a retrial should be ordered we will endeavour to say as little as

possible of our reasons for thinking that there should be a retrial. It is, however, of course, unavoidable that we should say something.

The prosecution story is that one Mt. Idia, a Bhatiarin woman, was living in the city of Shahjahanpur, 200 or 300 paces away from the house of the accused Azam Ali. It was the practice of Mt. Idia to go out during the morning to collect refuse. Her husband had been living with her. There were also in her house, according to the first report by Shabrati, her husband's cousin three small children, but according to the evidence of the same man four little children. She had also a son the eldest, of about 15 or 16 years of age, who apparently was not living with her. Some time, it is not stated how long, before 28th November 1928, the husband Magsad is stated to have left Shahjahanpur. He is variously stated to have gone to Moradabad "for the cultivation of melons," and to have gone to Lahore. Strangely enough nothing further has apparently been heard of him, judging from the record throughout the trial. There may be no significance in this. It may only be due to the fact that the surrounding circumstances have not been put before the Court with the care which should have been exercised. It was, to say the least of it, desirable that the Court should know what the husband had to say as to his wife's being missing.

It is said that in the early morning about sunrise on 28th November 1928, Mt. Idia went out as usual to collect refuse taking with her refuse basket and her broom. The first report stated that she had gone out at 10 a. m. and had not returned since. The discrepancy between "sunrise" and 10 a. m. again may not be of real significance. Some attempt has been made to explain it, and the discrepancy was possibly due to misunderstanding on the part of one person or another. At any rate, since 10 a. m. at the latest Mt. Idia has never been seen again. It is, of course, possible that her disappearance is due to some other cause than her having been murdered in Azam Ali's house. It is one of the facts which we have had to consider. At 6-30 p. m. on the evening of 28th November 1928, Shabrati made a report at the police station, which is to be found at p. 5 of the paper book, narrathing the circumstances of Mt. Idia's disappearance and expressing anxiety. Mt. Idia is said in that report to have been wearing :

"silver kharua and chhanni, two silver churis on each wrist, a silver kanthsari containing 10 beads and four ear-rings."

The report concludes with the remark that the complainant was told that investigation would be made and he was to go away. As a result of the investigation the evidence of Mt. Dallo was obtained to the effect that she had seen Mt. Idia about nine paces from the house of Azam Ali, and the witness adds: "she then went to the house of Azam Ali when I left her." In the same compound apparently as the house of Azam Ali there lived his stepmother Mt. Akbari and Mt. Akbari's brother Shaukat Ali, and the man called Inayat, who was living in one of the houses in the compound as a tenant of Mt. Akbari. This man Inayat purported to have been leaving his house about sunrise on the morning of 28th in order to return to his village Mohammadi with his family. He said that he passed through the compound to go to the gate. He saw Azam Ali seize and beat and drag into his house some woman, but he could not say what woman. Rustam, who lived not in the same compound but in a neighbouring house stated that in the early morning he had heard some woman calling out, and the voice seemed to come from Azam Ali's house, "Alas : He has killed me." ("*hai re mar dala*"). The Sub-Inspector tells us that he left the thana at 9 O'clock to make an investigation. This part of the case is not easy to understand. He was at the thana at 6-30 p. m. when the report of Mt. Idia being missing was made. But then all that we know is that the reporter was told that investigation would be made and he was to go away. In his evidence the Sub-Inspector says that he got to the house of Azam Ali about 9 p. m., and that the house was about 3 furlongs from the Kotwali. He does not explain in his deposition what happened between 6-30 p. m and 9 p. m. or what took him to the house of Azam Ali. But a report (Ex. E.), printed at p. 7 of the paper book, and which purports to have been made in the general diary at 4 p. m. on 29th November, i. e. the next day, says that:

"at the time of departure yesterday it was learnt through a reliable source that Azam Ali mentioned above had shut up a woman in the small room in which he lived and was beatink her very mercilessly in the morning and that her cries and wailings were heard by the people in the muhalla. On the basis of this information I , ... arrived at the house of the aforesaid Azam Ali."

It will be noticed that the Sub-Inspector speaks of a rumour which he had heard through a reliable source having reference to Azam Ali and the beating of a woman. We are not told what his reliable source was, or when he heard this rumour. It is manifestly a point that ought to have been elucidated, not necessarily as evidence against Azam Ali but as a matter which would have thrown a valuable light on the facts of the case, for there are other references in the record to the existence of such a rumour. If this had been properly before the Court it would at least have shown that Rustam Ali's evidence was possible not a very late invention. The Sub-Inspector arrived then at Azam Ali's house at about 9 p. m. He found it locked and sent for two search witnesses Audhbehari and Bhagwanua. He broke open the lock and seeing signs of blood in the room he thought it better to send for the Tahsildar, who came. As a result of the search there were found the articles detailed at p. 8 of the paper book. It is sufficient to say that most of these articles were spattered with blood, some very little, some soaked in blood, and that there was a large patch of blood in the middle of the room. He also found signs of something or somebody having been dragged either from the room outside to the chabutra or across the chabutra to the room. Some women and Shabrati were sent for with a view to identifying if possible the ornaments, and according to the prosecution story they identified the pota and four churis and some keys as belonging to Mt. Idia. All the blood that was examined on the various articles has been found to be human blood with the exception of a minute spot of blood on the pota which was exhausted in the examination by the Chemical Examiner and there was nothing left to be sent to the Imperial Serologist. Amongst the articles is a "pharua" or spade of the shape used for collecting dung, and not only was it stained with blood, but there was a long black hair on it, and there can be little doubt that it was used for the assault which was apparently committed on some human being in that room.

We have had to examine with very great care the evidence that has been produced to establish this story and our burden has been very very much the heavier because the case has neither been well investigated nor well tried. There are countless points which should have been elucidated and no attention has been paid to them.

It is manifest that in order to bring home the charge of murder of Mt. Idia against Azam Ali it was not necessary that the prosecution should be able to produce her body, but it was essential that they should be able to prove to the satisfaction of the Court that she was dead and that she was murdered by Azam Ali.

Though it is not, of course, essential to prove motive it is equally obviously one of the elements to be considered in the case. We may dispose of this by stating at once that while suggestions have been vaguely made there is admittedly no evidence worth the name of any motive whatever. There is a hint that Mt. Idia was comely but at an earlier stage Shubrati said she was between 40 and 50. There is a suggestion that sometimes quarrels arose between these gari owners and ekkawalas on the one side and the women who desired to collect the stable refuse on the other. But there is no hint of any sort or description that Mt. Idia and Azam Ali had ever before come into contact even in the most ordinary way. Much less is there any evidence whatever of any intrigue or any evidence whatever of any prior quarrel. On the other hand the evidence of Inayat, who had lived in the compound for two months previously, is to the effect that he had never seen the woman there before. The suggestion of murder for the sake of her ornaments is equally untenable. She was evidently a poor woman and there is no suggestion that her ornaments were of any considerable value. Some of the ornaments which she is said to have been wearing have disappeared altogether. On the other hand the prosecution has based its case largely on the alleged identification of the pota and the four charis which are said to have been found in the house, and the total value

of these is not more than Rs. 5 or 6. At the outset therefore it must be taken, and indeed is practically admitted, that the prosecution have failed to suggest seriously any motive at all. The only account of any quarrel or anything bearing on the question of motive we have in the record is to be found in the evidence of Inayat It is transparently unconvincing. He says that as he came out of his house in the compound about sunrise in order to leave with his family for Mohammadi he saw:

"a woman with a basket was collecting rubbish .... Azam Khan came from his house. He caught hold of the hand of the woman, she began to cry out. He had a stick and he hit her with it. I thought that quarrels of this kind went on daily and so did not think any more of it. I went away, he dragged her into his house .... I did not know the woman before. I had not seen her anywhere before."

Anything more unconvincing than this account it would be difficult to imagine. He purports to have seen the assault on the woman from the time when she was peacefully sweeping her rubbish to the time when the accused beat her and dragged her away inside his house, but he does not suggest that one word was spoken by either the woman or Azam Ali during this assault to indicate what the trouble was about. It is only necessary to add that it is admitted that there was very bitter litigation between Mt. Akbari, the stepmother, and her brother Shaukat, on one side, and Azam Ali, the accused, on the other, all three living apparently in the same compound, and that this witness Inayat was a tenant of of Mt. Akbari, the stepmother, living in the same compound and that Inayat's statement was not taken for six days, owing, it is said, to his absence from Shahjahanpur, to appreciate that no reliance whatever can be placed on the testimony of this witness Inayat.

The police entirely failed to discover any body. The suggestion for the Crown is that Mt. Idia was murdered in the early hours of the morning very shortly after sunrise. No suggestion supported by any indication on the record is made at all as to when her body was removed. The best that can be suggested is that it may have been removed after dark on the evening of 28th November that is to say, some time between sunset and shortly before 9 O'clock when the Sub-Inspector arrived at Azam Ali's house. It is suggested that Azam Ali removed the body in his gari he being the owner of a gari and two ponies. But the cushion and boards of the gari were sent to the Chemical Examiner and no blood was found on them. It is possible, of course that the body was so well wrapped up that no blood stains affected the gari itself, but in view of the way in which the whole room was spattered with blood and the two garments found in the room were soaked in blood, and in view of the fact that there was nothing in the room to indicate, so far as the record shows, that Azam Ali kept any clothes there, and in view of the fact that the murder is clearly suggested to have been unpremeditated, it is difficult to understand what Azam Ali would have had with him in that room, or what he brought to that room, to wrap the body in, which would have effectively stopped any blood stains getting on to the gari. It is, of course, possible that he brought something else there to wrap the body in during the day. It is possible that a large amount of blood had escaped from the body, for there was evidently a spot two feet across in the middle of the room which had been caused no doubt by a pool of blood. It would be infructuous to speculate further. The fact remains that no blood stains were found on the gari.

Another suggestion was that the accused had taken away the body on his brother's ekka. It would be unnecessary to mention this but that a matter of considerable importance has been more or less inadvertently revealed, and that is that there is a distinct indication that improper pressure was brought upon Azam Ali to make him confess. As the evidence on this point has come out into the daylight it is desirable to mention it. The inquiry before the Committing Magistrate took place before an Honorary Magistrate, we do not know of how much experience. Anyhow before him Mr. Simpson, Line Inspector, was permitted to give evidence which was manifestly inadmissible and which the prosecuting Inspector knew or certainly ought to have known that he could not tender. The Crown can under S. 27, Evidence Act, give evidence of so much of a confession made to the police as may have led to the discovery of any fact. Mr. Simpson was allowed by the Magistrate to give evidence to the following effect:

"The accused had voluntarily told me that he had thrown the dead body into Dakka tank (again said subsequently) into Garra river. I therefore sent for a motor lorry and went to the river Garra along with the accused and the Sub-Inspector. As pointed out by the accused I had two men dive into the river and had it searched, but the dead body was not found. After that the accused took us to Dakka tank. There was not much water in the tank. I had a search made in all the directions. The dead body was not found. In the course of this (investigation) when the accused told me that he took the dead body on Nanhu's ekka, I went to see Nanhu's ekka. I examined two of his ekkas. No blood stains were found on them. B. Jagannath Prasad, the investigating Sub-Inspector (i. e., the officer responsible for the investigation in this case) had gone with me to inspect the locality.

No one can read this without being satisfied of two things firstly, that the accused was never from first to last intending to make a voluntary confession, and, secondly, that the evidence was on the face of it wholly inadmissible. The conclusion from the first point can only be that presure had been brought to bear on Azam Ali to make him confess; and that such pressure was brought to bear is clearly proved from the fact that he did not show the police anything at all but only gave them so-called clues which were absolutely false. He must have been either confessing willingly or have had illegal and improper pressure brought to bear on him. Had he been confessing willingly there is no reason why, if he really knew anything about the body, he should not have disclosed it. This conclusion might not have been justified from the mere fact that nothing was found at the place in the river which he first pointed out, but it is conclusively established by the fact that having first pointed out a place in the river he then pointed out a place in a tank. The conclusion from the whole of the record is that there is not an atom of evidence indicating how or when the body, or the living person whose blood had been shed in that room, was removed.

We next turn to the important question whether Mt. Idia is actually dead or only missing, and whether, if she is dead, she is to be identified with the human being who was assaulted in Azam Ali's room. The Crown relies upon, firstly, the fact that she is missing. That is clearly by itself not sufficient. Next, reliance was placed by the Government Advocate on the woman's basket and the ornaments said to have been found in the house. The basket is not a serious item of the evidence. It is admittedly a basket such as all these Bhattiarin women use. It is such a basket as may well have been used by any ekkawala, and no real stress has been placed upon it. Mt. Idia is said to have started out with such a basket but also with a broom. No broom has been found in Azam Ali's house, or left behind in the compound; and no suggestion is made as to why Azam Ali should have removed the broom.

Coming to the ornaments, these are the really serious items in the evidence said to connect the missing Mt. Idia with the person who was assaulted in Azam Ali's room. The first striking feature of these ornaments is that one of them is an article described as a "pota." It is a small string wristlet or child's anklet consisting of 16 small silver beads threaded on cotton or black string. Witnesses purport to have identified it as belonging to Mt. Idia. It was manifest when it was produced before us that it bore the appearance of being a small child's ornament and not that of a woman at all, and in fact we found from the record that it is even the case for the prosecution that it belonged not to Mt. Idia at all except in the sense that it is said to have been an ornament belonging to one of her small children who was actually living at the time in the house. When we asked the Government Advocate to suggest how one of the small children's ornaments should have found its way into Azam Ali's house, he was unable to suggest any rational explanation. If the child was wearing the ornament it is impossible to understand why Mt. Idia should have taken it off and taken it with her when she went on her ordinary duty to collect refuse. There is nothing about it which suggests that it was in need of repair. The ends of the black strings are in fact securely joined together, wound round and round, and firmly knotted, and it manifestly has been so secured for some time past. If it had fallen off the child's wrist, there is no conceivable reason why Mt. Idia should have taken it with her. It is needless to follow the other suggestions made. It remains impossible to account for Mt. Idia having this child's ornament with her on any rational supposition. On the other hand, it may well

have found its way there if an instruction was given to some of those interested in the prosecution to produce some ornament which might be alleged to have been found in the room with a view to the manufacturing of evidence. The case presented by the churis calls for more serious consideration. There are three churis of one kind and one of another pattern. They are bent in such a way as one would expect if they had been pulled off a hand with violence. On the other hand it is not possible to be dogmatic about this because it is not certain how much they would be bent if they had to be taken off a wrist at leisure. They may also have been bent considerably since. We must take it as so far in favour of the prosecution theory that the twisting of them is consistent at least with their having been taken off with violence. They are said to have been found in a corner of the room and some earth appears to have been on them. It is not clear whether it was only some earth that had by accident fallen over them when earth was thrown on the blood in the middle of the room, or whether the suggestion is that there had been any endeavour to conceal them by covering them with earth. The former appears to be the more possible suggestion so far as we can judge from the evidence. It is manifest that the circumstances of the finding of these ornaments require careful examination, and we will give our reasons fully for not being able to place raliance on this evidence. We have already stated in this connexion the conclusions at which we have arrived in regard to the "pota" or child's ornament. Next, we have the fact that no rational explanation is forthcoming or suggests itself why Azam Ali should have taken away some of the ornaments which the woman was wearing and left these four churis and the "pota." The whole lot of the ornaments could have been gathered up in a handkerchief. The churis themselves are of the most ordinary type. There is nothing peculiar by which they can be identified as the property of any particular person. The Sub-Inspector Jagannath Prasad in his report No. 27 made at 4 p. m. on 29th November 1928, says (we quote from p. 7 of the paper book) that he :

"got the locks of the room and the house broken open and made a formal search in the presence of Audh Behari Lal, Bhagwannu and Pt. Bhup Narain Avasthi, Tahsildar."

This would clearly give an impression that the lock of the room was broken open in the presence of the Tahsildar. A similar impression is the only one that can be drawn from the "fard talashi." This position has since been abandoned owing to the proper attitude of the Tahsildar. As a matter of fact it now has to be admitted that the Tahsildar was not present when the locks were broken. It is on the other hand manifest that before the Tahsildar arrived at all other people, including the police, had been inside the room. This is established by the evidence of Bhagwannu, one of the prosecution witnesses. Next is the question of when the "fard talashi" was written. It is manifest from the nature of the document itself that it is most unlikely that it was written there and then. Confirmation of this is to be found in the statement of the Tahsildar who has frankly and properly stated that the sight of the blood in the room turned him so sick that he did not remain. But notwithstanding this the Sub-Inspector Jagannath Prasad endeavoured to, as it would be put in vulgar parlance, "bluff" the Tahsildar into signing the "fard talashi." He took it to him the next day and asked him to sign it. The Tahsildar tells us that he refused to sign it as the things had not been taken over in his presence. The Tahsildar did state in the early portion of his deposition that :

"there were also four churis with a little earth over them, some of those there said that there was blood on them."

But how little attention owing to the impression that the blood made on him he was really able to pay to what was going on is shown by his statement in cross-examination :

"I think that the keys were on the wall or it was the pota."

the pota being the child's ornament to which we have already referred. In fairness to the prosecution it should also be stated that the Tahsildar said :

"then some Bhatiari men and women came and looked at the property."

He was therefore there apparently when the witnesses came who are said to have identified the property. But he continues :

"I then felt a bit sick as I had never seen blood before and so I went away."

As to the valuelessness of this "fard talashi" we may note the evidence of Bhagwannu who says :

"the Tahsildar was there when the paper (fard talashi) was written."

The Tahsildar was manifestly not there. Next, we may note that there is an entire absence of any mention that either the police or the search witnesses or the other persons who came there had their persons searched before entering the room. Finally we may note the futile and improper proceeding adopted by the Sub-Inspector in reference to the alleged identification of these ornaments. It would have been manifest to him that the question whether these ornaments were the ornaments of Mt. Idia was one of vital importance and in regard to which he should be most careful. Instead of taking the smallest care about the identification he took the very step which must render all identification of the ornaments practically valueless. Having as he alleges found the ornaments there he proceeded, accepting his own version, to call Shabrati, the cousin of the woman's husband, and one or two women to the house, and there and then showed them the ornaments. A matter of minor but still some significance is that these persons who were called to identify the ornaments also purported to identify the bunch of four keys found in the room. We have no explanation offered to us of why this clue, for such it certainly was dropped. A bhatiari woman does not carry about four keys unless the keys are of some importance to her. We do not hear of a word about any attempt to fit the keys to any box or boxes which the woman possessed. The evidence to be afforded by such a test would suggest itself to any one, and the only conclusion possible is that the clue failed in other words, that the keys could not be proved to belong to Mt Idia. Both according to the "fard talashi" and according to the report (Ex. E) No. 27, to which we have already referred, all the witnesses identified the keys as belonging to Mt. Idia. All the witnesses dropped this portion of their testimony when they came to Court. In view of all these facts we find it impossible to accept with any confidence the testimony in regard to the search in relation to these ornaments. Before leaving this part of the case we note that the report of the Sub-Inspector (Ex. E.) of his proceedings on the night of the 28th was not written till 4 p. m. on the next day. He tells us in his evidence that he did not leave the house till 2 a. m. and that he did not get back to the thana till after 2 a. m. It may be that he could have accounted for this but we have nothing to show what he was doing all that time. It would clearly seem to have been his duty to report what he had done at any rate early in the morning of the 29th. We find him stating in his evidence that :

"I did not make any report of my return as I thought that when the witnesses came I should have to open the samman (clearly meaning the bundles of articles taken from the house) ten times, and it was better to wait until they had identified it. There is no rule that I must record my departure and return at the time."

Now according to the evidence all the witnesses had identified the churis, keys and other articles pnrporting to have belonged to Mt. Idia. There is no identification evidence even now before us other than this with the exception of the evidence of the dhobi as to the identity of a dhoti and shirt. His reason given for not making his report earlier is entirely futile. If there was anything to report later it could clearly have been made and should have been made the subject of a further report. Moreover it is difficult to accept his statement—but here we must speak with caution—that there was no need for him to make a report of his return. Para. 279 (4) of Chap. 21 of the Police Regulations says that amongst other matters that must be recorded in the general diary are "departure and return of police officers on and from duty." It is manifest that when the Sub-Inspector returned to the Kotwali at 2 a. m. on the early morning of the 29th he returned from duty. The evidence connecting Mt. Idia with that room depended chiefly on the bona fides of the finding of these ornaments and of their idantification. With this we have dealt and given our reasons for feeling that no reliance can be placed on it.

There remains only to cosider the oral evidence. We have already dealt with that of Inayat, which it may be noted does not even purport to go to the identity of the woman and in any case he

is manifestly entirely untrustworthy. Similarly that of Rustam. There only remains the evidence of Mt. Dallo. Her evidence takes us very little distance at all. She says that she saw Mt. Idia going along the road about nine paces from the house of the accused. Manifestly this does not involve the going or the intention of Mt. Idia to go into the compound in which Azam Ali lived. She states in a later sentence "She (meaning Mt. Idia) then went to the house of Azam Ali when I left her." This was not elaborated and it was not made clear what the witness meant when she used these words whether she had any conversation with Mt. Idia on the subject or whether she saw her actually go into the compound of Azam Ali. One thing is certain that she did not see her to go into the house of Azam Ali, if there is a word of truth in the evidence of Inayat. However, later she said in answer to the question from the Court:

"Before that I had not seen her go to the house of Azam Ali. I had known her for a year or two."

She also therefore makes it plain that there is no evidence of Mt. Idia ever having gone to the house of Azam Ali before. Further in this connexion we may note that Shaukat Ali, the brother of Mt. Akbari, with whom Azam Ali had been in such bitter litigation for a year past admits that he has "known Dallo as long as I can recall." This evidence is again in our view, manifestly wholly inadequate to satisfy us that Mt. Idia went to the house of Azam Ali that morning. Before leaving Mt. Dallo we may note that she makes the striking statement at p. 21, line 43: "It was at all 11 a. m. that I heard that the woman had been murdered." Earlier in her deposition she had said, according to the English version: "About 11 p. m. that night I heard she had been killed." But we have checked this from the vernacular and what she said was: About 11 O'clock and not about 11 p. m. that night. Now we find it difficult to understand why this point was not pursued and elucidated. Manifestly what the witness said she had heard was not evidence that either Mt. Idia or any other woman had been killed, but it would have been invaluable as showing that the story that a woman had been killed did not first find utterance in the statement of Rustam which was not in fact recorded till 3 or 4 days later. There should also have been some attempt at any rate to enquire how it was that if Mt. Dallo had heard this rumour at 11 O'clock in the morning Shubrati, Mt. Piria and the other woman who were anxious about Mt. Idia's disappearance had heard nothing. This might not have elucidated anything that could be actual evidence against Azam Ali, but a matter of such importance should not have been left in obscurity. We have then given our reasons for being unable to hold that the identity of Mt. Idia with the person who was assaulted in Azam Ali's house has been established. It is manifest that the fact that Mt. Idia was missing from the morning of 28th November read with the fact that human blood had been freely shed in Azam Ali's house under circumstances indicating that at least a grievous assault had been committed must to any mind very very strongly suggest that there was a definite connexion between the two facts. But it is impossible for a Court in a matter of life and death to leap a gap in the prosecution evidence and to arrive by a process of speculation at a conclusion which there is no evidence to justify. We are, therefore, of opinion that the charge against Azam Ali of having murdered Mt. Idia must fail and under the provisions of S. 423 (1) (b) (1) we reverse the finding and sentence.

We have now to consider another aspect of this case. Hitherto we have considered the question whether a charge of murdering Mt. Idia was established against the appellant and for that purpose we had to consider what evidence there was showing that Mt Idia was dead, and, if so, what evidence there was establishing the identity of Mt. Idia with the person who was assaulted in that room. For this purpose it was unnecessary to consider a very important item in the evidence, namely the finding in that room of two garments, a dhoti and a shirt, both of which may be described as smothered in blood. The prosecution led the evidence of Heta dhobi to prove that these two garments belonged to the accused. Apart, however, from this evidence the appellant did before the Magistrate admit that the dhoti

and shirt were his, and before the Sessions Judge he not only admitted that the statement made to the Magistrate read out to him was correct, but he further again was specifically asked in regard to the dhoti and the shirt, and admitted that they were his. He was asked whether they were found covered with blood in his house and he replied:

"No, they had not blood on them. They are lying there as dirty clothes."

While we have had reason to doubt the finding of the ornaments in the house we can find no reason whatever for doubting the evidence that these two garments smothered in blood were found in the house immediately the search began. We are satisfied, therefore, that two garments smothered in human blood and belonging to the appellant were found in the house. The next question clearly is in what manner did that blood get upon the clothes. In some cases it might appear that the assailant, whether the appellant or another, was wearing the clothes at the time the person was assaulted in the room. It might be on the other hand that the evidence would indicate that the blood might have got on to the clothes either when they were lying on the ground at the time of the assault or by being thrown on the ground after the blood had been spilt there. The third alternative is that there might be no satisfactory conclusion at all to be drawn from the nature of the blood stains. In the Sessions Court no attempt appears to have been made to consider which of these three conclusions was the correct one. We have, however, here examined these garments with care. In regard to the shirt we may say that in our view the appearance of the blood stains on it is consistent with the idea that their origin might be due to blood having fallen thereon during the assault, or that the blood might have stained the shirt owing to its being thrown on the ground after the assault had been committed. We only pause to note that there is apparently a foot-print of blood on the shirt. But the appearance of the dhoti is much more suggestive. The evidence is that when it was found it was folded double and from the coincidence of the blood stains it is apparent that it was thus folded when the stains came upon it. But this is not all. If the dhoti be spread out to its full length and width on the ground the soiled marks of wearing, apart from the blood at all, show very clearly that it had been worn for some considerable time subsequent to the last occasion on which it was washed. The dhobi says that the last occasion on which he had washed the garments was about eight or ten days before he had them shown to him for identification, and that it was on 22th November. However that may be, the dirt which had affected the dhoti through its being worn a considerable time is very clearly apparent on the garment. There are very clearly separately visible and identifiable the portions of the dhoti which are exposed to ordinary dust and dirt, and the portions which were protected from ordinary dust and dirt when worn are clearly identifiable as clean.

It then becomes immediately apparent that the clean portions of the dhoti which were inside when worn and so protected from anything which affected the dhoti when being worn, are absolutely free from blood. One conclusion is strongly suggested and that it is that the dhoti was being worn in the ordinary way on the body of some person at the time the blood stains came upon it. The prima facie conclusion, then, that we have been impelled to draw is that some human being was very grievously assaulted in that house and by someone who was wearing a dhoti belongiug to the accused. Add to this the fact that the accused, so far as the evidence goes, did not appear in the house or in the compound in which his house is situated subsequently to the early morning of the 28th, but took his ponies and carriage away to the house of another person and spent the night there. There are at any rate materials for considering whether it is not established against the appellant that he did at least grievously assault some human being in his house on or about 28th November 1928. We have next to consider whether, if this be our view, while setting aside the conviction for murdering Mt. Idia we could properly arrive at a conviction on any other charge. We do not think it desirable ourselves to arrive at such a conviction for the simple reason that it might be said on behalf of the appellant that his whole effort during the trial had been directed to establishing that he did not murder

Mt. Idia and that he has in the view of this Court succeeded in showing that that offence was not proved, and that he was not charged with the offence of committing grievous hurt on or attempting to murder or murdering some person unknown in his house. The next question then we have to consider is whether we ought to and whether we can direct a retrial in this case. We have already referred to the provisions of S. 423. Under S. 423 (1) (b) (1) we have reversed the finding and sentence and we can further proceed to order the appellant to be retried. S. 403 (1) forbids a retrial only where a person has been convicted or acquitted and such conviction or acquittal remains in force. We have set aside the conviction and it is no longer in force, or is there any acquittal in force.

We have found the setting out of our views in regard to the evidence unavoidable, but the trial Court will bear in mind that the appellant may not have had any clear indication that he must meet some of the other aspects of the case on which we have laid stress, and that Court will no doubt approach the case with a wholly open mind, and will give the appellant the opportunity of producing any further evidence that he may desire to produce. We cannot lay too much stress on this point that the trial Court must approach the case with a wholly open mind. There will be no need for any further magisterial inquiry, but it will be open to the Magistrate to examine any further witnesses nnder the provisions of S. 219, Criminal P. C., and it may be desirable that the prosecution, if they desire to produce any further evidence at the trial, should have the witnesses so examined. It will, of course, further be open to the prosecution to tender all or any of the prosecution witnesses who have already been produced, or to omit such of the witnesses already examined whose evidence the Crown does not consider relevant to the amended charge. In framing the charge upon which the appellant will be retried we have, in the absence of any evidence establishing the death of the person assaulted, refrained from framing a charge of murder.

Before concluding it is desirable to summarize some of the points on which the investigation and the trial have been so defective that it has been quite impossible for us to arrive at a clear conception of the facts..

The accused denied that the room in question was his living room. There is no evidence of any charpai or any cooking utensils or other small articles such as a living room might be expected to contain having been found there, or in the other room described as "zenana" on the map. The accused was not asked if he would like to say where he did live. A pestle is the only article in the nature of a food utensil found and of that, curiously enough, the accused denies ownership though he admits that the dhoti and shirt are his. This whole question is left in obscurity.

The evidence leaves in doubt where actually Mt. Akbari and her family and Shaukat Ali were living. In speaking of this we have had to say "apparently." Had the facts been known with certainty, it is probable that valuable conclusions might have been drawn.

Failure to make it clear when it was first known and how that an assault, at least, had been committed in that room; failure to put on record when the husband of the missing woman went away and what he had to say about his wife; failure to put on record full evidence about the keys; the reprehensible way in which the ornaments were shown without any test to the witnesses; the reprehensible effort to extort a confession; the failure to make it clear that Rustam was really in a position to hear anything; the failure to devote any attention to the examination of the dhoti and shirt; the failure of the Sub-Inspector to put the articles immediately into the malkhana and to make any proper report; failure to produce or explain the absence of Asghar from the witness-box; failure to get any finger-prints though these must have been easily available from the pharua and doors; these are matters that immediately suggest themselves. The list does not purport to be exhaustive.

In conclusion having reversed the conviction and sentence we order that Azam Ali be retried on the following charge:

That you Azam Ali on or about 28th November 1928, at mahalla Talaiya Ghuran, in Shajahanpur city, attempted to murder a person unknown, and by such act caused hurt to that person, and

thereby committed an offence punishable under para. 2, S. 307, I. P. C., and within the cognizance of the Sessions Court of Shajahanpur.

The trial Court will have of course the usual power to amend the charge in accordance with law if it sees fit.

R.M./R.K. *Case remanded.*

A. I. R. 1929 Allahabad 720

NIAMATULLAH, J.

Murli—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 449 of 1929, Decided on 8th July 1929, made by Sess. Judge, Jhansi, D/-.18th May 1929.

Arms Act Ss. 15 and 17—U. P. Arms Rules and Orders (1924), R. 35—Repairer of arms in possession of guns for repairs cannot be convicted of offence of being in possession of arms without license—Length of time of possession depends upon circumstances.

From the provisions of the U. P. Arms Rules and Orders (1924) it is perfectiy clear that a person who repairs arms and is in possession of guns made over to him for repairs cannot be convicted of an offence of being in possession of arms without license. Once it is found that a person was in possession of arms for bona fide purpose of repairing them the length of time during which his possession thereof is justified depends upon the circumstances of each case. [P 720 C 1, 2]

M. Waliullah—for the Crown.

Judgment.—Heard the learned Assistant Government Advocate. I have no hesitation in aceepting the reference made by the learned Sessious Judge, who has rightly referred to the provisions of R. 35, U. P. Arms Rules and Orders (1924). It is perfectly clear that a person who repairs arms and is in possession of guns made over to him for repairs cannot be convicted of an offence of being in possession of arms without license.

The explanation of the learned Magistrate does not refer to any section of the Arms Act or to any rule framed thereunder which requires a person carrying on the business of repairing arms to take out a license for the exercise of his profession or for being in possession of arms made over to him for the bona fide purpose of repairs. The learned Magistrate emphasises the fact that the accused was in possession of the guns in question for a longer time than would be necessary for effecting the required repairs and refers to the evidence of a witness who says that the owners of the guns did not come to the shop of the accused the whole day to take back the guns. The learned Magistrate argues that :

"in ordinary sense temporary means short time, and if we read it with the words mere repairs as laid down in R. 35, it suggests still more shortness of time, say a possession for a few minutes when the owner is present within the premises of the smith."

I find no warrant for the proposition implied in the remarks quoted above. Once it is found that a person was in possession of arms for the bona fide purpose of repairing them, the length of time during which hia possssion thereof is justified depends upon the circumstances of each case. If the owner does not choose to turn up for several days after the repair has been made, the smith is not required to take any action with regard to the gun thus in his possession. He can wait for a reasonable time till the owner turns up to take back his gun. The repairer may have the occasion to keep the gun in his possession for a longer time, if some part not locally procurable is needed for the repair of the gun and has been ordered from some other place. It is difficult to illustrate all cases in which a long possession may be justified. Whether possession by a smith who received the arms in question in ordinary course of his business was reasonable depends on the nature of the work to be done, whereabouts of the customer and the exigencies of his own profession and so on.

Accepting the recommendation of the learned Sessions Judge, I set aside the conviction of the applicant Murli, and direct that the fine, if paid, be refunded.

R.M./R.K. *Conviction set aside.*

A. I. R. 1929 Allahabad 721 (1)

MUKERJI AND NIAMATULLAH, JJ.

Yudhishter Lal—Decree-holder—Auction-purchaser.

v.

Fateh Singh and *another*—Judgment-debtors—Opposite Parties.

Civil Revn. No. 289 of 1927, Decided on 26th April 1929, against order of 2nd Sub-Judge, Saharanpur, D/- 8th December 1927.

Civil P. C., S. 151—Court can entertain application by judgment-debtor for restoration of his previous application made for setting aside sale—Application restored—Order will not be interfered.

The Court has jurisdiction to entertain an application made by the judgment-debtor for the restoration of his previous application made for setting aside the sale, and if the Court passes an order of restoration on being satisfied that there was a good ground for the default in appearance made by the judgment-debtor on the day when his previous application came up for hearing the High Court will not interfere in revision on the merits. [P 721 C 2]

M. L. Aggarwala—for Applicant.

P. L. Banerji and *S. C. Das* — for Opposite Party.

Judgment.—This is an application by one who was the decree-holder in the Court below for setting aside an order dated 8th December 1927, passed by the Second Subordinate Judge of Saharanpur, in the exercise of our revisional power. The facts are these :- The decree-holder brought about the sale of the judgment-debtors' property. The judgment-debtors applied for setting aside the sale. The application came up for hearing on 30th June 1927. On that date there was a default in the appearance of the judgment-debtors, and their application was dismissed for default, the sale being confirmed, automatically. Within a month of this date, namely, on 26th July 1927, the judgment-debtors applied for the restoration of their application and for a re-hearing of it. The learned Subordinate Judge has granted this application by the order under revision.

The point that has been taken is that the learned Subordinate Judge had no jurisdiction to pass an order of restoration, although he professed to act under S. 151, Civil P. C. We have given the argument our best consideration and we are of opinion that whether S. 141, Civil P. C., applies or not, S. 151 may safely be applied. In this case the learned Subordinate Judge was satisfied that there was a very good ground for the default committed by the judgment-debtors. If that was so, it was necessary that the applicants should have their application for setting aside the sale re-heard. Justice was done in their favour and we shall be loath to hold that the Code did not provide any remedy, when S. 151, Civil P. C., gives wide powers to the Court to be exercised where there was no specific provision in it.

On the merits the learned counsel for the applicant argued that the learned Judge did not consider the case fully and that he quoted the affidavit of only one of the applicants and did not consider whether there was any good ground for the other judgment-debtor to be absent. This is a matter relating to the facts of the case and if the learned Subordinate Judge had jurisdiction to entertain the application for restoration of the previous application we do not think we should interfere on the merits. The application is dismissed with costs.

P.N./R.K. *Revision dismissed.*

A. I. R. 1929 Allahabad 721 (2)

BOYS AND BENNET, JJ.

Sri Kishan Pandey—Petitioner.

v.

Ghana Nand Joshi and *another*—Opposite Parties.

Misc. Reference No. 293 of 1929, Decided on 30th May 1929.

(a) Limitation Act, S. 18—Where plaintiff alleges fraud, initial burden of proving date on which he acquired knowledge for first time is on plaintiff, but where, although plaintiff definitely alleges date of his acquiring knowledge, defendant's pleadings do not raise specific issue as regards such date, burden of proving date is not on plaintiff.

Where the plaintiff alleges fraud and states that he acquired knowledge on a particular date in ordinary cases the initial burden would be on him to lead evidence, prima facie at any rate establishing the date of his knowledge: 17 *Bom.* 341 (*P. C.*), *Expl.*; 27 *All.* 540, *not Appr.* [P 723 C 2]

But if notwithstanding the fact that the plaintiff did in most specific terms allege in his suit the date and the circumstances in which he acquired knowledge for the first time, the defendant's pleadings are evasive and do not raise specifically an issue as to the

date of the plaintiff's acquisition of knowledge the burden of proving the date is not on him. [P 723 C 2]

(b) Civil P. C., O. 8, R. 4—Pleading should be specific.

It is a principle underlying O. 8, R. 4, that the pleadings should be specific [P 723 C 2]

P. L. Banerji and *B. L. Dave* — for Petitioner.

K. N. Katju and *M. L. Chaturvedi*— for Opposite Parties.

Judgment.—This is a reference under R. 17 of the Rules and Orders relating to the Kumaun Division, of 1894, under the following circumstances:

The plaintiff alleged that he had entrusted two bearer drafts to the defendant for the latter to hand over on behalf of the plaintiff to the brother of the plaintiff, and that the defendant had cashed one of the draft himself and appropriated the money. Art. 48, Lim. Act, has been applied by the Commissioner of Kumaun. The date stated by the plaintiff as that on which the defendant cashed the draft was prior to three years before the date of suit. But the plaintiff further alleged in his plaint that he did not obtain definite knowledge that the defendant had misappropriated the money until a date within the three years on which the defendant told him that he had cashed one of the drafts but refused to pay the money.

In his written statement the defendant admitted that the plaintiff had come to the place where the defendant was on the date of the interview with him alleged by the plaintiff, but as to that part of paragraph in the plaint in which the plaintfff set out what had happened at that interview, the defendant contented himself with saying that it was "not admitted." In his further pleas the defendant said nothing about the alleged interview, but in one further plea said "the plaintiff's claim is beyond time." In support of his plea as to the date of acquisition of knowledge the plaintiff led no evidence. The defendant referred to certain incidents, but the Commissioner has held that those did not establish knowledge on the part of the plaintiff. The Commissioner holding that the burden of proof of the date of acquisition of knowledge by the plaintiff was on the defendant rejected the plea of limitation, and having found the fraud proved decreed the suit. The defendant in a lengthy memorandum asked the Local Government to refer questions concerning the correctness of the decree to this Court for its opinion. The Local Government has only referred to us the question of the correctness of the view of the Commissioner as to on whom the burden of proof lay, remarking that the decree of the Commissioner seems to be open to the objection that the Commissioner has taken a wrong view of the burden of proof, and has therefore come to a wrong decision on the question of limitation.

There are really therefore two questions:

(1) Did the Commissioner take a wrong view as to on whom the initial burden of proof lay?

(2) Did the Commissioner come to a wrong decision on the question of limitation?

Dr. Katju for the plaintiff has drawn our attention to a passage in the decision of their Lordships of the Privy Council in *Rahimbhoy* v. *Charles Agnew Turner* (1). The passage reads as follows:

"Their Lordships consider that when a man has committed a fraud, and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of these facts which constitute the fraud, at a time which is too remote to allow him to bring the suit."

He has further referred to the decision of a single Judge of this Court in *Sukhlal* v. *Maduri* (2). Mr. Piare Lal Banerji for the defendant has contented himself with suggesting that a commentator has said that in *Sukhlal* v. *Maduri* (2) the decision of their Lordships of the Privy Council in *Rahimbhoy's* case was misapplied. This is all the assistance that we have had from counsel. We proceed to exmine the case.

In reference to the passage quoted from the judgments of their Lordships of the Privy Council it is manifest that it is not justifiable to take a proposition out of the context in which it is stated, and to ask for it to be applied to a wholly different set of circumstances. The passage relied upon by Dr. Katju must obviously be read in the light of what is actually the preceding paragraph in which their Lordships say that

(1) [1893] 17 Bom. 341=20 I. A. 1=6 Sar. 256 (P. C.).
(2) [1905] 27 All. 540=2 A. L. J. 350=1905 A. W. N. 88.

"the (official) assignee (the plaintiff) is positive that he did not know anything about this fraud until the year 1885 when he learnt of it in the course of a suit brought against Ahmedbhoy to recover a number of other items in conjunction with this one belonging to the insolvency estate.

From this preceding paragraph the only possible conclusion is that the plaintiff had gone into the witness-box and sworn to the date on which he acquired knowledge and the circumstances under which he acquired it. The observations of their Lordships therefore relied upon by Dr. Katju manifestly cannot be taken to state a proposition that where the plaintiff merely alleges a fraud, without leading any evidence of it, the initial burden is on the defendant to prove that the plaintiff acquired knowledge on a particular date; nor, with the exception of one or two cases in which their Lordships' decision has been misapplied, has any such interpretation ever been put upon it in the very numerous cases in which reference has been made to it. Dr. Katju further quoted to us the decision that we have mentioned above in *Sukhlal* v. *Maduri* (2). In that case the learned Judge held that the suit was in time whether the first part of Art. 10 or whether Art. 120 was applicable, and this entirely irrespective of when the plaintiff acquired knowledge, for the learned Judge said at p. 543 that if the property in dispute admitted of physical possession, i. e., applying the first part of Art. 10, the suit was clearly within time, for it was evident that on the date of the compromise decree the defendant had not got possession, and in Art. 120 the period is six years. The lower Court had applied the second part of Art. 10, and in reference to that finding the learned Judge remarked that the lower appellate Court had, in view of the decision in *Rahimbhoy* v. *Charles Agnew Turner* (1), wrongly thrown the burden on the plaintiff. But in the case before the learned Judge the plaintiff had led no evidence and in that respect, in our view, the decision of their Lordships of the Privy Council was distinguishable. We may add that in the Allahabad cases we think the burden might rightly have been thrown on the defendant but for another reason, namely that it would appear that in the trial Court he had not pleaded limitation at all, but for the first time raised it in appeal. It is not necessary to say anything on the point that *Rahimbhoy's* case was one where it was necessary for the plaintiff to call in aid S. 18, Lim. Act. We are of opinion, for the reasons we have stated, that the remarks of their Lordships relied upon by counsel for the plaintiff do not in the smallest degree support his contention, and we agree with the suggestion thrown out by counsel for the defendant that the case *Sukhlal* v. *Maduri* (2) in so far as the obiter dictum of the learned Judge may be said to have decided anything, misapplied the decision in *Rahimbhoy's* case.

There is in our view no room for doubt that the initial burden of proof was on the plaintiff, and we have stated in the affirmative. The Commissioner did take a wrong view as to on whom the initial burden of proof lay.

Turning to the particular facts of this case, the mere fact that the plaintiff did not by evidence establish the date of his acquisition of knowledge is not sufficient to decide the second question referred to us without consideration of other facts. The plaintiff did in the most specific terms allege in his suit the date and the circumstances in which he acquired knowledge for the first time. It is a principle underlying O. 8, R. 4 that the pleadings should be specific; and while the plaintiff's pleadings were specific those of the defendant, so far from being specific, were shifty to a degree. He did not deny but merely refused to admit the portion of the plaint in which the plaintiff made his allegation, and in his further pleas he did not state a word about the alleged interview though he admitted the plaintiff's coming to the place where he was on the date alleged by the plaintiff. It is true that the defendant formally took a bald plea that the suit was barred by limitation, and an issue was framed thereon, but reading the pleadings in the written statement it is manifest that they were wholly evasive, and that though they referred to the question of limitation they did not properly raise the issue as to the date of plaintiff's acquisition of knowledge. We would, therefore, hold that though in ordinary cases the initial burden would be on the plaintiff to lead evidence, prima facie at any rate, establishing the date of his knowledge, there was no burden on him in this case the

issue not being definitely raised by the defendant. To the second question therefore we would answer that the Commissionor did not come to a wrong decision on the question of limitation. We would therefore, answer the reference as follows:

1. The Commissioner did take a wrong view as to on whom the initial burden of proof lay.

2. But the decision of the Commissioner that the suit was not barred by limitation was a correct decision.

With this expression of opinion we would return the reference.

S.N./R.K. *Reference answered.*

A. I. R. 1929 Allahabad 724

BANERJI AND KING, JJ.

Ram Sarup—Plaintiff—Appellant.

v.

Kanhaiya Lal—Defendant—Respondent.

First Appeal No. 29 of 1926, Decided on 8th May 1929, against decree of Sub-Judge, Muzaffarnagar, D/- 21st September 1925.

Practice .— New plea — Appeal after retrial on remand—Plea of res judicata raised—Plea is quite competent.

If an order of remand is made by the High Court under O. 41, R. 23, and on retrial the plaintiff's claim is disallowed and plaintiff appeals against the order, it is quite competent for the appellant to raise the plea of res judicata in appeal. The order of remand does not in any way prevent the Court below nor the High Court from holding that the point of res judicata was properly raised and the High Court in allowing it does not in any way go behind the order of remand in the previous appeal: *A. I. R.* 1928 *All.* 527 and *A. I. R.* 1921 *P. C.* 23, *Dist.* [P 725 C 2]

K. N. Katju—for Appellant.

Iqbal Ahmad and *R. C. Ghatak*—for Respondent.

Judgment—This is a plaintiff's appeal in a suit against his commission agent praying for rendition of accounts for the Sambat years 1973 to 1975 and for a decree for Rs. 8,000 or whatever additional amount may be found due to the plaintiff by the defendant. The plaintiff is the proprietor of the firm, Lachhman Das Bhojraj at Jalaun, and the defendant Kanhaiya Lal is the proprietor of the firm Kanhaiya Lal Baijnath at Shamli in the district of Muzaffarnagar. The plaintiff's case is that there were transactions of purchase and sale of wheat and the result of an accounting on 13th October 1918, was that a sum of Rs. 6,838-12-6 was found to the credit of the plaintiff. The defendant pleaded that no money was due to the plaintiff. His case was that the plaintiff entered into certain transactions with his shop at Jalalabad and Shamli and on an account of all the transactions having been settled it was found that a sum of Rs. 5,260 was due to the defendant by the plaintiff. The Subordinate Judge holding that the defendant admitted the agency passed a preliminary decree on 6th January 1922. There was an appeal to this Court and on 20th January 1925, the defendant's appeal was allowed, the decree of the Subordinate Judge set aside and the case remanded to the Court below with certain directions. It is admitted by the learned advocate for the respondent that the remand was one under the provisions of R. 23, O. 41, Civil P. C. The case having gone back to the Court of the Subordinate Judge of Muzaffarnagar the learned Subordinate Judge recorded the statement of the parties and framed issues. It was admitted before him that up to 13th October 1918, Rs. 6,838-12-6 was due to the plaintiff from the defendant on account of profits of khatti transactions at Shamli. The defendant's case was that the plaintiff purchased some other khattis at Jalalabad and some grain at Baraut and got the payment made for them by the defendant and finally there was a balance of a large sum of money in favour of the defendant's firm. The learned Subordinate Judge states in the judgment at p. 20:

"I examined the parties and find that the only points on which they are at difference are about this alleged settlement of account, about the fact whether the plaintiff entered into any transactions at Jalalabad and Baraut through the defendant and the defendant had to pay anything on the plaintiff's account about these transactions."

The points, therefore, that he had to decide were whether the plaintiff entered into the Jalalabad transactions and the Baraut transactions and whether the defendant had to pay anything on account of the plaintiff for these transactions.

The learned Subordinate Judge framed the following issues:

(1) Had Fakir Chand and Munshi Lal any authority on behalf of the plaintiff to settle accounts with the defendant and (2) If so, did those persons actually settle the account with the defendant and strike balance of Rs. 5,260 in favour of the defendant and can the plaintiff therefore not now call upon the defendant to render an account ?

He has found that the defendant had proved that the plaintiff entered into the Jalalabad and Baraut transactions and that a sum of Rs. 5,260 was the balance found due to the defendant on an accouut being settled by Fakir Chand and Munshi Lal who had authority on behalf of the plaintiff to settle account with the defendant. He, therefore, dismissed the suit.

The plaintiffs have come up in appeal before us and it is contended by the learned advocate for the appeallant that the plaintiff never authorised the sales and purchases of wheat at Jalalabad and Baraut, that the plaintiff never entered into any business transaction at Jalalabad and that the finding in Suit No. 48 of 1920 that there was no such transaction was res judicata and could not be gone into in this case. It was further submitted that, as a matter of fact, there was no settlement as alleged in para. 23 of the written statement.

The first point which we have to decide is whether the decree and the finding of the Subordinate Judge in Suit No. 48 of 1920 bars the trial of the question in the present suit.

In para. 11 of the plaint the plaintiff referred to the suit and stated that the defendant had brought a false suit. In para. 24 of the written statement we have the defendant's version about the suit. It was admitted that the plaintiff in that suit had denied having entered in any transaction but as Kanhaiya Lal had left the case to be decided on the oath of the plaintiff the plaintiff took the oath and the claim was dismissed.

To enable us to see whether there was the alleged settlement we have to decide whether the Jalalabad, Shamli and Baraut transactions did or did not take place. We have some to the conclusion that the finding arrived at in that suit that Ram Sarup had not entered into those transactions at Jalalabad cannot now be agitated in this suit.

It is contended by the learned advocate for the respondent that as the plaintiff had not raised the question of res judicata before the Subordinate Judge at the trial of the suit after remand he cannot now be permitted to raise the point, specially as the point was never urged when the case was before this Court in appeal (F. A. 120 of 1922). It was said that the judgment in that case directed an enquiry to be made whether there was the settlement as alleged in para. 23 and the point not having been raised either in the High Court or before the Subordinate Judge on the analogy of Expl. 4 to Civil P. C. S. 11, the present appeal is barred. We cannot accept the contention. All the facts necessary for determining the point were before the Court and the parties had admitted the fact of the suit and the plaint and the necessary papers are before the Court. We cannot accept the contention of the learned advocate that permitting the plaintiff to plead res judicata would be going behind the judgment of this Court in F. A. 120 of 1922 The order of remand was clearly an order under R. 23, O. 41 and the decree, which follows the judgment says as follows:

"It is ordered. . . . . that the case be and it hereby is sent back to the Court of the said Subordinate Judge with directions to summon the parties before it and to strike careful and considered issues so that the merits of the case may he gone into from the points of view of para. 23 of the written statement, para. 6 ef the plaint, and any other matters which to the Court examining the pleadings may seem relevant and proper."

It is impossible to hold that the order of remand in any way prevented the Court below or prevents us from holding that the point of res judicata had not been properly raised and that we are in any way going behind the order passed in F. A. 120 of 1922 remanding the case. In support of the contention of the learned advocate that Expl. 4 to S. 11 prevents our going into the question of res judicata reference was made to the case of *Ram Kishan* v. *Lalta Singh* (1) and to the case of *Raja of Ramnad* v *Velasami Tewar* (2), *Hook* v. *Administrator General of Bengal* (3). These cases do not, in our opinion, in any way, apply to the facts of the present case and are not of

(1) A. I. R. 1928 All. 527.
(2) A. I. R. 1921 P. C. 23=48 I. A. 45 (P. C.).
(3) A. I. R. 1921 P. C. 11=48 Cal. 499=48 I. A. 187 (P. C.).

any help to us in deciding the question of res judicata.

It was further contended by the learned advocate for the respondent that the previous suit was for recovery of money on account of dealings between 23rd December 1918 and 2nd April 1919 and as the plaintiff's suit related to transactions prior to this date the finding could not amount to res judicata. It was further contended that at the most the judgment shows that nothing was due on the transactions between the 23rd December 1918 and 2nd April 1919 but that did not show that there was anything due to the plaintiff. We are unable to follow this argument.

It was further submitted that there were insufficient materials on the record to find that the decision of the previous case amounted to res judicata and that the two suits were not between the same parties. We find from the statement of the defendant printed at p 14 that he stated that he had sued for Jalalabad shop in the name of Kanhaiya Lal Balchand and for the Baraut shop in the name of Kanhaiya Lal Baijnath. No question arises as regards the transaction relating to the Baraut shop as that suit was instituted after the institutiou of the present suit in the Court of the Munsif of Kairana. (The judgment then discussed evidence and concluding that there was no settlement of account binding on the plaintiff proceeded.) There remains the question of the transactions entered into by the defendant Kanhaiya Lal at Baraut. It appears to us that the plaintiff cannot get behind these transactions by urging that Fakir Chand and others had no legal authority to act on his behalf. The defendants have, in our opinion, given sufficient evfdence for us to hold that they honestly believed that the plaintiff had authorized his own relations to enter into transactions relating to Shamli. Fakir Chand is the natural father and the other persons who entered into the contract on behalf of the plaintiff were admittedly his natural relations, and although they might legally not have any right to enter into a settlement of account under their authority as general attorneys they certainly could act as agents for particular transactions which in our opinion they did with either the implied or express authority from the plaintiff and the plaintiff is bound to pay the defendant the sums on account of the Baraut transactions.

The learned advocate for the appellant suggested that we might pass a preliminary decree and when the final accounts are adjusted the defendant's claim for the Baraut transactions should not be set up as a set-off against the plaintiff's claim. We do not propose to pass a preliminary decree in the case. The litigation has lasted for eight years and we think there are sufficient materials on the record of this case to pass a final judgment between the parties. The defendant being admittedly a commission agent of the plaintiff no question of set-off arises. The money which remains in the hands of the defendant after all the transactions are taken into account the defendant is bound to pay back to the plaintiff. Admittedly on 13th October 1918 the sum of Rs. 6,838 was due to the plaintiffs from the defendants. In the plaint in Suit No. 48 of 1920, para. 12 at p. 71, it was admitted that Ram Sarup had paid a sum of Rs. 5,438 to the plaintiffs, that is, the firm Kanhaiya Lal Balchand, through the shop of Kanhaiya Lal Baijnath (the defendants in this case). The defendants must, therefore, pay back to the plaintiffs the sum of Rs. 5,438 as they admittedly had that sum in their hands which they allege they had transferred to their other firm. As regards the rest of the plaintiffs' claim we think that the plaintiffs have failed to show that the defandants had anything more than Rs. 5,438 in their hands. They are, therefore, entitled to a decree for that sum. We allow the appeal, set aside the decree of the Court below and decree the plaintiffs' claim for Rs. 5,438 with interest at the rate of 6 per cent from 13th October 1918 to the date of payment. Parties will pay and receive costs in both the Courts in proportion to failure and success.

V.B./R.K. *Appeal allowed.*

*** A. I. R. 1929 Allahabad 726**

MUKERJI AND NIAMATULLAH, JJ.

Kishan Sarup—Defendant—Appellant.

v.

Brij Raj Singh and *another*—Plaintiffs and Defendant—Respondents.

First Appeal No. 190 of 1926, Decided on 7th May 1929, from decision of Addl. Judge, Moradabad, D/- 6th April 1926.

(a) Hindu Law—Partition—Intent to defeat creditor—Liability of sons for father's debts is not affected.

The liability of the sons for the father's debt's incurred before partition is not affected by a partition if it was made to defeat or delay the creditors. [P 728 C 1]

*** (b) Hindu law—Debts—Liability of sons arising before partition and corresponding right of creditor to recover money from them are not affected by partition to which the creditor is not a party.**

The liability of the sons which arises before a partition between them and their father and the corresponding right of the creditor to recover his money from them cannot be affected by a partition which the father and sons may choose to make and to which the creditor is not a party : *A. I. R.* 1928 *Mad.* 657; *A. I. R.* 1928 *Bom.* 232; *A. I. R.* 1924 *P. C.* 50 and 40 *Cal.* 407; *A. I. R.* 1925 *All.* 221; *A. I. R.* 1927 *Oudh* 180, *Ref.*; *A. I. R.* 1925 *Pat.* 688; *A.I.R.* 1927 *All.* 714, *not Foll.* [P 729 C 1]

(c) Hindu Law—Debts — Decree against father is binding on the sons.

The reason why the interest of a son in the joint family property can be sold in execution of decree obtained against the father alone is that the decree is binding on the sons as they are deemed to be represented by the father and therefore themselves parties to the suit: *A. I. R.* 1914 *P. C.* 136, *Ref.* [P 730 C 2]

(d) Hindu Law—Partition—Decree against father after partition cannot be executed against sons.

A decree obtained against the father after the disruption of the family cannot be executed against the sons for they are no longer represented by the father in any suit brought by the creditor. [P 730 C 2]

*** (e) Hindu Law—Partition—Rule that unequivocal intention creates severance of status is inapplicable to minors.**

The rule that the filing of a plaint for partition or such other clear and unequivocal expression of intention to become divided creates a severance of status is inapplicable to the case of a minor. [P 731 C 1]

K. N. Katju, *P. L. Banerji* and *Hari Ram Jha*—for Appellant.

Shambu Nath Seth—for Respondents.

Niamatullah, J.—I agree with the conclusions arrived at by my learned colleague. I am satisfied, for the reasons given by him, that the evidence fails to establish that the debts had been contracted for immoral purposes, as alleged by the plaintiffs-respondents. I am, however, not prepared to hold that the partition between the plaintiff-respondents and their father was effected in good faith. The circumstance that the suit for partition was brought by the minor sons, one aged seven years and the other aged nine months at that time, only four days after the appellant instituted the suit for recovery of money on foot of promissory notes, does not inspire confidence in the bona fides of the alleged partition. It is clear to my mind that the suit for partition was brought by the maternal grandfather of the plaintiff-respondents on their behalf in view of the money suit, instituted by the appellant, as it was apprehended that the family property would be proceeded against for satisfaction of the decree likely to be passed in his favour. Ordinarily a suit for partition at the instance of minors, especially against their father is not countenanced by Courts.

"Such a suit cannot be brought by, or on behalf of, a minor to enforce partition, unless on the ground of malversation or some other circumstances which make it for his interest that his share should be set aside and secured for him. Otherwise he might be thrust out of the family at the very time when he is least able to protect himself. In short, it is in the discretion of the Court to grant or refuse a decree for partition at the suit of a minor plaintiff, and the Court has to consider in such cases whether a decree for partition would be for the benefit of the minor. (Mayne's Hindu Law, 9th edn., p. 688)."

In view of our finding that the debts in question were not contracted for immoral purposes, it cannot be maintained that the separation of the sons was to their interest, unless we assume that they would be enabled thereby to escape their liability to pay their father's debts. The father, who was the only party to the partition suit, did not raise any objection to a partition between him and his infant sons, and an ex parte decree defining their rights inter se was passed. The learned Subordinate Judge has assumed the total value of the family property left by the plaintiffs' grandfather to be Rs. 70,000, and the liabilities of defendant 2 (plaintiffs' father) to be (1) Rs. 12,500 due to the appellant and (2) What might have been due to one Sham Kunwar under a pro-note for Rs. 5,000 on which some interest must have accumulated. It is difficult to find exactly what the liabilities of the father were at the time of the partition. Assuming that there were no other liabilities, we find that the value of the entire family proparty brought into the hotchpot, as given in the plaint of the partition suit (p. 97), was Rs. 60,000. The liabilities of the father, referred to above, amount to nearly the value of the father's share in the entire family property, including lands, houses, house-

hold effects etc. No arrangement was made for payment of debts, and it could not have been honestly believed that the partition would not defeat or delay the father's creditors. The subsequent events clearly indicate that the so-called partition was the first manoeuvre towards the long drawn battle against the father's principal creditor. It is difficult to imagine that the father has been a silent spectator, and not a real litigant under cover of his infant sons. For these reasons, I am inclined to think that the partition was not made in good faith, and that it was prompted by a desire to defeat the claims of the creditors to whom the sons were under an obligation to pay so far as the extent of the family property would enable them to do so.

Cases in which partition has been held to be a bar to the creditors' claim, for father's debts incurred before the partition, against the sons' expressly lay down that the liability of the sons is not affected by a partition, if it was made to defeat or delay the creditors. Apart, therefore, from the question of law, on which there has been some difference of opinion the appellant is entitled to succeed on the ground that the partition not having been made in good faith can be ignored by him. I do not, however, desire to rest my decision on this ground alone and would proceed to consider the more important question whether, assuming the partition to have been made in good faith, the remedy of the creditors is, in any way, impaired thereby.

An examination of the plaint shows that the plaintiffs questioned the right of defendant 1 to recover what was due to him under the decree obtained by him against defendant 1, the father, and further contended that, in any case, their property could not be seized in execution of a decree obtained in a suit to which they (the plaintiffs) were not parties. The latter part of their contention finds some support from certain observations made by learned Judges who otherwise confirmed the right of the creditors to proceed against the interests of the sons after a partition had been effected. I shall consider it separately from the general question of the sons' liability after partition for the father's debts incurred before it.

The answer to the main question, one way or the other, must be a corollary from the following well established propositions:

"(a) Under Hindu law, pure and simple, a son is under a pious obligation to pay his father's debt not contracted for illegal or immoral purposes, regardless of the extent of any joint family property or property inherited by him from the father, But the British Indian Courts regard this obligation, which is of too far reaching a character, to be only a moral obligation, and the extent to which it can be enforced in a Court of law is limited to the interest which the son acquires by birth or which he inherits from the father. *Masitullah* v. *Damodar Prasad* (1) (*at p.* 526 *of* 48 *All.*)

(b) The sons cannot set up their rights, which are to take present vested interest, on their birth, jointly with their father in ancestral estate, against their father's alienation for antecedent debt or against his creditor's remedy for his debt, if such debt has not been contracted for an immoral purpose. . . . . If the father's debt, not having been contracted for an immoral purpose, is such as to support his sale of the entirety of the joint estate, either he may sell the latter without suit, or the creditor may obtain a sale of it by a suit, but the joint sons, not being parties to the execution proceedings or to the sale, are not precluded from having a question as to the nature of the debt tried in a suit of their own—a right which will, however, avail them nothing, unless it can be shown that the debt was not such as to justify a sale of the joint estate. *Nanomi Babuasin* v. *Madun Mohan* (2)."

"(c) There is no rule that this result is affected by the question whether the father who contracted the debt is alive or dead. *Brij Narain* v. *Mangal Prasad* (3) *at p.* 104 *of* 46 *All.*"

"(d) Where after the father's death joint family property is divided among sons, the entire family property is liable : Ss. 50, 52 and 53, Civil P. C."

The liability of the sons being established in these terms, it follows that a creditor can proceed against the family property immediately after the liability is incurred. The liability of the sons, in this respect, arises at the same time as the father's. Their liability is co-extensive with that of the father, except that, in their case, it is limited to the interests which they have in the joint family property. It cannot be disputed that, if a creditor is so advised, he may sue the sons alone and obtain a decree for recovery of the father's debts ; but in such a case he can proceed only against the interests of the sons in the joint family

(1) A. I. R. 1926 P. C. 105=48 All. 518=53 I. A. 204 (P.C.).
(2) [1886] 13 Cal. 21=13 I.A. 1=4 Sar. 632 (P.C.).
(3) A.I.R. 1924 P.C. 50=46 All. 95=51 I.A. 129 (P.C.).

property. In practice such a course is hardly conceivable, as it can never be expedient for the creditor to sue the sons and leave out the father. A decree obtained against a father alone binds the sons, because they are represented by the father in such a suit. It is, therefore, clear that the liability of the sons which arises before a partition between them and their father and the corresponding right of the creditor to recover his money from them to the extent indicated cannot be affected by a partition which the father and sons may choose to make and to which the creditor is not party. This conclusion has not been accepted by some learned Judges. The opposite view has been forcibly and elaborately put by Srinivas Ayyangar, J., in his dissension judgment in *Subramania Ayyar* v. *Sabapathy Aiyar* (4). The reasoning on which it proceeds will appear from the following extracts from his judgment :

"It has never been to my knowledge suggested that the pious obligation, as it may be, of the sons was towards any person other than the father himself. Otherwise it is difficult to see what room there is for any piety. The right of the creditor, therefore, is only against the father. If it were against the sons also, the general rule should be that the sons should also be made a party to the suit itself in every case and a decree obtained and that no decree obtained merely against the father is capable as such of being executed against the interests of the sons also in the family property. It seems to me, therefore, that there can be little doubt that the pious obligation of the sons is only towards the father. The right of the father corresponding to this obligation on the part of the sons is his admitted right to alienate the entire family property, including the sons' share for bona fide antecedent debts of his own. Being a power of sale, although only under certain circumstances, it is really in the nature of property, and that is how it comes about that in a mere execution of the decree against the father, this power of sale is enforced and made available for the satisfaction of the decree. (p. 384)."

"To my mind Sahu Ram's case has not been overruled in its entirety by the case of Brij Narain, and it must be regarded as having been merely modified to the extent of engrafting the exceptions recognized by their Lordships of the Judicial Committee on the ground of stare decisis . . . . The true view would, therefore, seem to be that the pious obligation of the sons, no doubt, arises only after the father's death, but because of that obligation a power of sale has been created in the father, and because ot this power of sale it is possible to proceed even during the father's lifetime against the sons' share . . . As the creditor's rights and remedies have reference to, and are based on, the father's powers of alienation, it would follow that the creditor would have such right only if and so long as the father has such right . . . . On a partition of the family property there is a disruption of the family, and the managership of the father ceases, and with the managership being lost the power is also lost of the father to effect an alienation of the family property not only for the purposes of family necessity but also for his own antecedent debts . . . . If, therefore, after partition between the father and the sons, the father lost that power of sale, it must follow that the creditor cannot seek to enforce any rights based on or referable to the existence of such power. (p. 388).

"In other words, it is in full accordance with the principles I have tried to indicate that in all such suits and proceedings the creditor of the father is seeking to exercise no right of his own against his sons, but is only seeking to work out a right of his own debtor the father. (p. 390).

The essence of this line of argument is that the direct liability of the sons to the creditors arises only after the father's death, and that the liability of the sons during the father's lifetime is somewhat different, being towards the father and not towards the creditor, who is, however, enabled to treat the father's right to sell the family property for satisfaction of his own debt as a saleable right or property which the creditor avails of for proceeding against the interest of the sons. With great respect, I would point out that the latest Privy Council case *Brij Narain* v. *Mangal Prasad* (3) (at p. 103 of 46 *All.*), runs counter to the theory of the creditor's right in the above proposition. Their Lordships observed :

"There are, however, some observations in Sahu Ram Chandar's case which are not necessary for the judgment but which their Lordships are bound to say that they do not think can be supported. Founding upon them the learned counsel in this case argued in the Court below that no liability of the sons based on the pious obligation to pay father's debt could be made available to the creditor while the father was still alive. Here sgain, if the point was open, there would be much to be said in favour of a position which seems consonant with common sense, but their Lordships are satisfied that a long train of authorities has settled the question."

In summarising their view their Lordships enunciated proposition No. 5 as follows :

"There is no rule that this result is affected by the question whether the father . . . . . is alive or dead."

It is thus made clear that the liability of the sons to pay the debt of their father in his lifetime is exactly of the same

(4) A. I. R. 1928 Mad. 657=51 Mad. 361 (F.B.).

nature as after his death, and no distinction is to be made in consequence of the father being alive or dead. This being so, and it being conceded that, after the father's death, the liability of the sons is directly to the creditor, indeed it cannot be otherwise, the liability of the sons in the father's lifetime cannot be different and must be taken to be towards the creditor. It is almost a truism that, if a creditor is entitled to recover his debt from the sons to the extent of their interest in the family property, the sons are liable to him directly to that extent. It follows as a necessary corollary that the sons' liability to the creditor is not affected by partition after the father's death. There is no conceivable reason why a partition in the father's lifetime should make any difference. It seems to me that there is a close analogy between the liability of the heirs of a debtor, not being a Hindu, to pay the debt of the deceased to the extent of the assets in their hands and the liability of a Hindu son to pay his father's debt, with this difference that, in the first case, the liability arises on the death of the ancestor and on receipt of the assets, while in the second it arises in the lifetime of the father, the sons having acquired an interest by birth. The reason in both cases is the same, namely obtaining an interest in property through the ancestor or the father, as the case may be. The liability once incurred cannot be shaken off in either case by subjecting the property to a division among the heirs or sons.

The view stated above does not imply that the debt is a charge on the family property any more than it is so on the assets of a deceased debtor not being a Hindu. If transferred by the father or by the sons after the partition, it cannot be followed in the hands of transferees just as the property sold by the heir of a debtor, not being a Hindu, cannot be followed by his creditor not having charge or lien on any property. The share of the sons being determined on partition, the extent of their liability is ascertained and the creditor can hold them liable to that extent just as in case of the heirs of a deceased debtor, not being a Hindu, their liability extends to the property inherited by them. In either case, there is no charge on the property received on partition or inherited, as the case may be, and if the separated sons or the heirs have validly transferred it, the creditor cannot seize the property in the hands of the transferees but can hold the sons or the heirs liable to the extent of the property originally received on partition or by inheritance. To this extent the liability is personal.

The reason why the interests of a son in the joint family property can be sold in execution of a decree obtained against the father alone is not that the father has a right to sell the family property for satisfaction of his own antecedent debts, which right is treated by the creditor as the property of the father, but the decree is binding on the sons as they are deemed to be represented by the father and, therefore, themselves parties to the decree. Their Lordships of the Privy Council held in *Sheo Shankar Ram* v. *Jaddo Kunwar* (5) (at p. 386 of 35 *All.*) that :

"there seems to be no doubt upon Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions, when the managers of joint Hindu famlies so effectively represent all other members of the family that the family as a whole is bound."

If the sons establish in a suit of their own that the debt, for which a decree was obtained by the father, had been incurred for illegal or immoral purposes, the decree will not be one in respect of debts as to which the father could represent the sons. Whether the sons were represented by the father or not depends upon the subject matter of the suit, and if a decree was obtained for what turns out to be a family liability, the sons must be deemed to have been parties to the suit through the father.

As regards the 2nd branch of the question, namely, whether a decree, obtained against a father after disruption of the family, can be executed against the sons, my answer is in the negative. I think the creditor must obtain a decree against the sons themselves, if he desires to proceed against that part of the family property, which has been allotted to the sons on partition, for satisfaction of the father's pre-partition debts. As already stated, the sons are represented by the father in case of a decree obtained before partition ; but the same consideration cannot apply after disruption of the

(5) A. I. R. 1914 P. C. 136=36 All. 383=41 I. A. 216 (P.C.).

family, when sons are no longer represented by the father in any suit brought by the creditor, any more than they are represented in transactions relating to the property allotted to the sons. But, in the case before us, the suit for recovery of money had been instituted before the partition, and a decree was passed against the father before any decree defining the shares of the father and sons was passed, though the suit for partition was instituted before a decree in the money suit was passed. In a case where :

"it is in the discretion of the Court to grant or refuse a decree for partition at the suit of a minor plaintiff, the Court has to consider in such cases whether a decree for partition would be for the benefit of the minor. It would seem to follow from this that the rule laid down by the Privy Council that the filing of a plaint for partition or such other clear and unequivocal expression of an intention to become divided of itself effects a severance of status, is inapplicable to the case of a minor suing by a next friend. It being left to the discretion of a Court to say whether there should be a division of the family or not, it is obvious that that discretion cannot be anticipated or coerced by the determination of another person who purports to act on behalf of a minor . . . . But in case of a minor the mere institution of the suit cannot effect a division in status, for until the suit proceeds to a decree it is uncertain whether the Court will or will not deem it a proper case in which to allow partition. It would seem to follow also that, where the Court decrees a partition at the suit of a minor, the partition will take effect as from the date of the decree :" Mayne's Hindu Law, pp. 687-688, 9th Edn.

In this view of the matter, the plaintiff-respondents must be deemed to have separated from their father after the appellant obtained his decree, and the debt to which it related not being immoral, the plaintiff-respondents were fully represented by their father, with whom they were joint at the date of his decree, which is accordingly binding on them.

My learned brother has commented on the case law bearing on the question arising in this appeal, and I fully agree with his views. Of the two cases decided by this Court, namely, *Sita Ram* v. *Beni Prasad* (6) and *Gaya Prasad* v. *Murli Dhar* (7), which take conflicting views as regards the liability of the sons to pay the father's pre-partition debts after disruption of the family, I prefer to follow the former.

For the reasons stated above, I concur with my learned colleague in allowing the appeal, in setting aside the decree of the Court below and in dismissing the suit of the plaintiff-respondents with costs throughout.

Mukerji, J.—This is an appeal by one who was defendant 1 in the suit out of which this appeal has arisen. There was a family consisting of three persons namely, Babu Ram, the father (defendant 2 in the suit) and his two sons Brijraj Singh and Raghuraj Singh, the plaintiff-respondents. The family was a joint one. The plaintiffs were respectively eight years and nine months old at the date of the institution of the suit. The father, Babu Ram, borrowed money from the appellant Lala Kishan Sarup from time to time on promissory-notes and Kishan Sarup instituted a suit for recovery of his money against the father alone on 14th November 1925. Thereupon, the two plaintiffs of the present litigation filed, against their father, a suit to which the appellant was not made a party for partition, on 18th November 1925. The decree in the appellant's suit against Babu Ram was passed on 15th December 1925. The partition suit was decreed ex parte on 13th January 1926. Having got their preliminary decree for partition, the plaintiff-respondents instituted the present suit to obtain a declaration that the appellant, Kishan Sarup, was not entitled to execute his decree against the two-thirds share that have been declared, by the partition decree, to be the plaintiffs' property. They also asked for a perpetual injunction restraining Kishan Sarup from executing his decree against those shares. It does not appear that the preliminary decree for partition, which will be found printed at p. 103 of the record was ever followed by a final decree or by actual partition of the family property.

The basis of the claim of the respondents was that the father Babu Ram fell into bad company and squandered money on immoral purposes. The plaintiffs have got their two-thirds share separated by partition and, therefore, the father's debts are not recoverable from the plaintiffs' two-third share. It will be noticed that the plaintiffs did not say that their father's debts were, in any way, tainted with immorality. An issue, however, was framed on that point, so we have taken it for granted that there was such a pleading as that, on behalf of the plaintiffs.

(6) A. I. R. 1925 All. 221=47 All. 263.
(7) A. I. R. 1927 All. 714=50 All. 137.

The defence of the appellant was that the father had a good character and was frugal in his habits, that the debts were not tainted with immorality, that the partition took place after the family property had been attached before judgment and the partition was ineffective as against the realization of the plaintiff's debts, that the partition was a collusive transaction and that the entire property of the family in the hands of the father and the sons was bound to pay the plaintiff's debts.

The learned District Judge, who tried the suit, came to the conclusion that the debts contracted by defendant 1 with the appellant were tainted with immorality, that the partition was one effected in good faith, that it was not vitiated by the attachment before judgment and that the result of the partition was that the property in the hands of the sons could not be proceeded against by the appellant.

At an early stage of the suit there was a 3rd defendant but he was sent away from the suit and we are no longer concerned with him.

In appeal, all the findings of the learned District Judge have been challenged. The points that we have to determine, therefore are :

1. Whether the debts on foot of which the appellant obtained his decree were tainted with immortality ?
2. If not, whether the fact that the plaintiffs obtained a partition decree exempts their two-third share from being taken in execution of the decree passed against their father ?
3. What is the effect of the attachment before judgment on the partition ?
4. Whether the partition was effected in good faith ?

(His Lordship then discussed evidence regarding points 1 and 4 and concluding that the debts were not proved to be tainted with immorality proceeded).

Point No. 4.—On the question whether the partition was effected in good faith, we may take it that it was effected in good faith. If the idea was, as it must have been, that the partition would save two-thirds of the family property from payment of the just debts of the father, a partition with this object may have been really sought for. How far it will succeed in its object will be considered under issue 2. But if the well wishers of the sons believe that they can save two-thirds of the property by merely suing for partition, there would be no reason to think that a partition was not meant to be effected. In this sense, and in this sense alone, I am prepared to hold that the partition was asked for in good faith. There was no question of the father and the sons finding it inconvenient to live.

Point 3. — I have already mentioned that the appellant, as soon as he filed his suit on the promissory notes, obtained an order for attachment before judgment. The question is whether that attachment in any way stands in the way of the partition suit. Partition is not alienation. The result of partition is only this that what was held jointly by several members of the family came to be held in severality by the same parties. I hold that the attachment does not affect the partition.

Point 2. — Now comes the most important point in the case. In view of the fact that it has been strenuously contended on behalf of the respondents that after the partition decree or even after the filing of the suit for partition, the father's creditor cannot proceed against what is now the sons' separated share in the property, in order to realize simple debts against the father already existing and payable by the father at the date of the institution of the suit for partition, I propose to discuss the point at some length. Personally speaking, the contention of the respondents would seem to be very startling indeed. But for the fact that a contrary view has been taken sometimes. I should have thought that the point was not even open to argument.

The position is this. In a Mitakshara joint family consisting of the father and sons, the father may :

"by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of the debt: see *Brijnarain Singh* v. *Mangal Prasad* (3) (*at p.* 104 *of* 46 *All.*)

Their Lordships of the Privy Council have, from time to time, pointed out that this is the rule, although there are two conflicting principles recognized by the Mitakshara Law. One is that the joint family property is meant for the support of the entire family and except in the case of distress, a single member, even the father, cannot dispose of it. The second principle is that it is the pious duty of a son to pay his father's debts, not tainted with immorality. The strict

rule of Mitakshara Law would make the son even personally liable to pay the father's debt where there was no family property out of which it might come. The Anglo-Indian Courts have put a restriction to this extreme tenet of law, by laying down (in the case of Bombay, there was a recourse to legislation) that the liability exists only so far as the son's share in the joint family would go and not beyond that. If we just ponder over the reason why the law-givers of old countenanced the two apparently contradictory propositions, the reason would be entirely clear. It is true that the family property is the means of the support of the family and must not be lightly handled by any one of the members of the family. On the other hand, the father of the family, in order that the family might live, must have credit in the market. Otherwise, everybody with whom the family has to deal would know that any loan granted to the family could not be recovered without perhaps the strictest proof that the loan was required for the purposes of the family. The father had to be trusted ; otherwise the sons could not be brought up. Credit therefore was given to the father by making it a rule that not only the father shall pay the debt, but so shall the sons. It was believed to be a disgrace that a man should contract a debt and he should die without having made that good. The result was that even the sons and grandsons were called upon to pay the debt of the father and grandfather. The Bengal school of law have improved on this position and have made the father, even where the property is entirely ancestral, the full master of the entire property, in his lifetime.

The Mitakshara Law, therefore, being what it is (as quoted above from the latest Privy Council case on the point), the question arises, could the father and sons defeat the substantive right of the creditor to proceed against the family property, by merely agreeing, among themselves, that from a particular moment they would hold the property in severality and not jointly ? The remedy of the creditor to proceed against the entire family property is not a mere matter of procedure, but it is a substantive right. It is on the faith of the joint family property that the creditor lends money, and although he does not take any charge or mortgage, he knows that he has some security at least for his money. Otherwise, he would not lend it. It would be disastrous, if one fine morning, the father and the sons were to tell the creditor that, on the previous evening, the father and sons had sat together and had agreed that from the next morning they should become separated members and that, therefore, the creditor could recover his money only from what had been given to the father as his share of the joint family property. If as is surely the case, for effecting a partition, mere volition on the part of the members of the joint family is enough, it is necessary to go into Court for the purpose. In such circumstances, there is the debt of the father which, for all practical purposes, was payable out of the property belonging to the father and the sons and there are the debtors, in the shape of the father and his sons. Simply because the debtors agree that they shall no longer be joint, the debt is gone, so far as the sons' share is concerned, which in many cases, would be many times the father's share ? Can their proposition be sound ?

It has, sometimes, been argued that a simple creditor has no charge on the family property and if he be permitted to follow the property, after partition, in the hands of the sons, the Courts will, virtually, be giving the creditor a charge on the property. This argument, in my opinion, with all respect, is entirely fallacious. The family property does not cease to be the family property simply because it has been decided to enjoy it separately by the father and the sons. Only the mode of enjoyment has been changed and not its character or its liability, if any existed. Take the case of a debtor who is not a Hindu governed by the Mitakshara Law. He is an unsecured creditor. If he chooses, the debtor may sell away his entire property, leaving nothing out of which the creditor may realize the debt. If such a debtor dies and if the creditor proceeds against his property in the hands of his son, nobody will ever suggest that the creditor had a charge against the property and he is following up that charge in the hands of the deceased person's son. The result of the doctrine of pious duty of a Mitakshara son to pay his father's debt is, for all practical purposes, the same as to make the father the absolute owner of the pro-

perty so far as the payment of his personal debts, not tainted with immorality, is concerned.

Let us take, again, this case. A father governed by the Mitakshara Law dies while joint with his sons. After the death of the father, the sons divide the family property among themselves. Can it be argued that an unsecured creditor of the father cannot proceed against what was the joint family property in the lifetime of the father, simply because the sons have effected a partition. I suppose such an argument will not find favour with anybody. If such be the case, what difference should it make if a partition be effected in the lifetime of the father himself?

If a Mitakshara father contracts a debt, after separation from his sons, there is no liability in the sons to pay their father's debts. The reason is not the separation of the sons but it is this. The pious duty of the sons, to pay his father's debts, has been limited by Anglo-Hindu law to what is the joint family property of the father and the sons. It is this property to which a creditor looks for payment when he lends money to the father. In the case of a separated father, there is no property in the hands of the father other than what is his own, unshared by anybody else. The father cannot sell his son's divided property to pay his own debt contracted after separation. In the circumstances, although the sons may be under a pious obligation to pay the father's debt, there being no property jointly held by the father and the sons, the property in the hands of the sons is not liable. The creditor, while lending the money, has looked upon the property in the hands of a separated father alone to find out how far he could give his debtor credit.

On principle, therefore, it must held and I do hold that what was joint family property in the hands of the father, at the date of his incurring the last one of the debts in question, may be proceeded against by the appellant, although some of the property is now in the hands of the sons, to realize the decree passed against the father.

As regards authority, almost all the High Courts have taken the same view as mine, though sometimes after some conflict of opinion. In Madras High Court, for a time, the view of the law was uncertain. The Full Bench case, however, of *Subramaniya Ayyar* v. *Sabapati Aiyar* (4) settled the law so far as that Court was concerned. Three learned Judges as against two others held that:

"a simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a bona fide partition between the father and the sons."

The case of *Jagannath Rao* v. *Viswesam* (8) was approved. It follows that this case overrules the earlier cases in which a contrary opinion was enunciated including the case of *Vinjamampati Peda Venkanna* v. *Vadlamannati Sreenivasa* (9).

In Bombay the same view was accepted as in the Madras Court: see *Annabhat* v. *Shivappa* (10). One of the learned Judges quotes from Mitakshara and Narad certain passages showing that separation is no cure of the liability to pay the father's debt.

In Calcutta the same view was taken in *Kuiada Prasad* v. *Haripada* (11). In this case there was no separation by partition but by the fact that a member of the family became a convert to Christianity. Such a conversion operates, under the law, as a separation and the question was whether the share of the member thus separated was liable for pre-existing debts of the father. It was held that it was liable.

In Patna *Ram Ghulam Singh* v. *Nand Kishore Prasad* (12), the High Court in a very short judgment following the case in *Vinjamampati* v. *Vadlamannati* (9) and another in *Krishnasami* v. *Ramasami* (13) which have since been overruled by *Subramania Ayyar* v. *Sabapati Aiyar* (4), held that a creditor of a father could not proceed against the sons' shares after partition, to realize a debt which had been incurred by the father before the partition. As this does not appear to be an entirely independent decision by the learned Judges, I do not feel called upon to discuss this case. Its authority is shaken by the

(8) A. I. R. 1924 Mad. 682=47 Mad. 621.
(9) [1918] 41 Mad. 136=33 M. L. J. 519=6 M. L. W. 549=43 I. C. 225=(1918) M. W. N. 55.
(10) A. I. R. 1938 Bom. 232=52 Bom. 376.
(11) [1913] 40 Cal. 407=16 C. L. J. 311=17 I. C. 257=17 C. W. N. 102.
(12) A. I. R. 1925 Pat. 688=4 Pat. 469.
(13) [1899] 22 Mad. 519=9 M. L. J. 127.

fact that the Madras cases on which it relied, have been overruled by the Madras High Court itself.

Coming to the cases in our own High Court, we find that in *Sita Ram* v. *Beni Prasad* (6) a partition took place during the pendency of insolvency proceedings against the father of a joint Hindu family. The sons' share, in spite of the partition was held to be liable to be taken hold of by the receiver to realize the father's debts. The point at issue was stated to have been:

"Whether a Hindu father is entitled or not to property obtained by his sons on a division of joint ancestral property, when he desires to satisfy his debts out of the proceeds of such property?

It was held that he (the father) was so entitled and that, therefore, the receiver was right in seizing the sons' share, for the purpose of realization of the father's debts. In a latter case, however, a contrary view was taken: vide *Gaya Prasad* v. *Murlidhar* (7). This case proceeds on the view that the liability of the sons existed only so long as the family remains joint and disappears when the family is divided. Ashworth, J., based his opinion on a statement of law contained in Mulla's Hindu law, in the passages quoted by the learned Judge. With all respect for the learned Judge, the statement of law quoted does not bear on the question that was before him and did not purport to consider the case of a separation at a date when simple debts of the father existed. Mulla in his book on Hindu law (Edition of 1929, Edn 6, pp. 343 and 344) discusses the law as to sons' liability to pay the father's debt which existed before the partition. He contents himself with pointing out that the Madras, Allahabad (earlier), Bombay and Calcutta cases take the view that the liability of the sons can be enforced even after partition and that the Patna Court held to the contrary on the authority of Madras cases which have since been overruled. Having held that the liability of the son to pay his father's debt continues only so long as he lives jointly with the father, the learned Judge (Ashworth, J.,) proceeds to consider whether S. 53, T. P. Act would apply. S. 53, T. P. Act, had, of course, no application. The other learned Judge hearing the case with him, Kendall, J., thought that if the appellant's contention before them was allowed, it would be tantamount to holding that the personal debt of the father created a charge on the joint family property. With all respect, as I have shown above, there is no question of a charge. The learned Judge purported to follow the case in *Peda Venkanna* v. *Sreenivasa* (9) already mentioned and a case in *Krishnasami* v. *Ramaswami* (13), both of which have been overruled by the Madras Court itself. The case in our High Court was decided on 17th May 1927 and the Madras, Bombay cases were published later; but the Calcutta case and the previous ruling of our own High Court in *Sita Ram* v. *Beni Prasad* (6) appear not to have been cited before the learned Judges. There being a conflict of opinion in this Court, we may choose which case to follow.

As shown above, this Court in an earlier case, the Calcutta, the Bombay and the Madras High Courts have taken the same view as I am taking, and the Chief Court of Lucknow has taken the same view in *Jageshar* v. *Mani Ram* (14).

I hold that the respondents' share, separated by the partition, is liable to be sold in execution of the appellant's decree against the respondents' father Babu Ram.

I would allow the appeal, set aside the decree of the Court below and dismiss the suit of the plaintiff-respondents with costs throughout.

R.M./R.K. *Appeal allowed.*

(14) A. I. R. 1927 Oudh. 180=2 Luck. 561.

A. I. R. 1929 Allahabad 735

SULAIMAN AND NIAMATULLAH, JJ.

Jagdeo Singh and *others*—Defendants—Applicants.

v,

Kesho Prasad Singh—Plaintiff—Opposite Party.

Civil Revn. No. 144 of 1928, Decided on 14th June 1929, against order of Dist. Judge, Ghazipur, D/- 11th February 1928.

Agra Tenancy Act (3 of 1926), S. 253—Revision—High Court has no power of revision except under S. 253—Expression "such revenue Court" does not include District

Judge—High Court has no power of revision of order by District Judge.

If revisiou is governed by the new Act the case must fulfil the provisions of S. 253 before a revision can be entertained. Under S. 264 of the new Act only selected provisions of the Code of Civil Procedure are made appiicable to cases under this Act and list I of Sch. 2 clearly excludes the provisions of S. 115, Civil P. C., from the Act. It is thus clear that the High Court has no power of revision except under S. 253. [P 736 C 1]

Considering the phrasealogy of S. 253 side by side with that of S. 252 there can be no doubt that "such revenue Court" does not include the District Judge mentioned therein. [P 736 C 2]

Therefore, it is clear that, however, unfortunate the result may be the High Court has not got any power of revision of orders passed by a District Judge, however, ultra vires, irregular or illegal they may be. [P 736 C 2]

A. P. Pandey—for Applicants.

Haribans Sahai—for Opposite Party.

Judgment.—This is an application in revision from an order passed by the District Judge on 11th February 1929, remanding a case to the Assistant Collector with directions to retry it. The Assistant Collector had on 2nd August 1927, held that the land in respect of which arrears were claimed had by an action of the river been transferred to another pargana and he had no jurisdiction to try the case. He accordingly ordered the plaint to be returned for presentation to the proper Court. An appeal was preferred to the District Judge who held that the revenue Court had jurisdiction to try the case. The suit related to years during which the land had not been so transferred. On behalf of the appellant it is contended that no appeal lay to the District Judge because so far as the question of the appeal is concerned the matter was governed by the old Tenancy Act under which no appeal from an order was allowed, but he contends that a revision lies under the new Act.

It was held by a Full Bench of this Court under the old Act that no revision lies from an order of the District Judge hearing the appeal. In the present case it is contended that revision is maintainable under the new Act. If the revision is governed by the new Act it has to be conceded that the case must fulfil the provisions of S. 253 before a revision can be entertained. Under S. 264 of the new Act only selected provisions of the Code of Civil Procedure are made applicable to cases under this Act and list I of Sch. 2 clearly excludes the provisions of S. 115, Civil P. C., from the Act. It is thus clear that the High Court has no power of revision except under S. 253. This conclusion is further fortified by the language of S. 230 under which the exception is confined to "appeal or revision as provided in this Act." Now under S. 253 the High Court may call for the record of any case which has been decided by any subordinate revenue Court and in which an appeal lies to the Court of the District Judge and in which no appeal lies to the High Court if such revenue Court appears to have exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested or to have acted in the exercise of its jurisdiction with illegality or material irregularity. The question to consider is whether the expression "such subordinate revenue Court" means only a first revenue Court of original jurisdiction or includes the Court of a District Judge. Considering the phraseology of S. 253 side by side with that of S. 252 there can be no doubt that "such revenue Court" does not include the District Judge mentioned therein. Furthermore, any doubt that one may have on this point is made clear by the definition of "the revenue Court" in S. 3, sub-Cl. (12). That definition is the same as that gtven in the United Provinces Land Revenue Act of 1901 where under S. 4, sub-Cl. (8) the District Judge would be excluded from its scope. It is thus clear that however unfortunate the result may be, the High Court has not got any power of revision of orders passed by a District Judge, however, ultra vires irregular or illegal they may be. If the order passed by the trial Court is open to objection it can be revised.

It is the appellant's case that the order passed by the trial Court was perfectly right. We have, therefore, no power to interfere with the order of the District Judge. The application is accordingly rejected with costs including in this Court-fees on the higher scale.

R.M./R.K. *Application rejected.*

A. I. R. 1929 Allahabad 737

NIAMATULLAH, J.

Mt. Sahodra—Plaintiff—Appellant.

v.

Badri Prasad and *others*—Defendants—Respondents.

Second Appeal No. 2181 of 1927, Decided on 6th June 1929, against decree of Addl. Sub-Judge, Shahjahanpur, D/- 25th June 1927.

(a) Deed — Construction — On partition village *X* given to one cosharer *A* — Agreement that *A* should pay certain amount from profits annually to other sharers and that the sharers had right to recover same from whoever was in possession (for the time being) of *X*—Payment regarded as "Malikana"—Agreement created not mere personal liability—It was not only charge but created interest in land.

At the time of partition, village *X* was given to one cosharer and in order to equalize the shares it was arranged that this cosharer should pay a certain sum from its profits annually to the other cosharers. It was agreed that the sum should be paid by the person in possession (for the time being) of village *X* and that the other cosharers had a right to recover the sum. This payment was regarded as malikana in this village *X*.

Held : that this agreement did not create merely a personal liability. It was even not only a mere charge on the profits of the village, but it was more than such a charge i. e. it created an interest in the land itself : 9 *All.* 591, *Rel. on.* [P 738 C 1, 2]

(b) Wajib-ul-arz — Wajib-ul-arz of 1873 used as piece of evidence — Its genuineness not in dispute —It not being repeated in subsequent wajib-ul-arz does not detract from its value.

If the wajib-ul-arz of 1873, which is an official record of relations subsisting among certain cosharers, is to be used as a piece of evidence, and if its genuineness is not in dispute, the fact that the entry was not repeated in the subsequent wajib-ul-arz cannot detract from its value. [P 738 C 1]

(c) Deed—Construction.

Where a fund is indicated for payment of a certain allowance, the latter must be deemed to be a charge on the former.

[P 739 C 1]

(d) Transfer of Property Act, S. 41—Person pleading equitable estoppel must prove that he took reasonable care to ascertain that his transferrer had power and that he acted in good faith.

Section 41 makes it incumbent on the party pleading the estoppel of the particular kind contemplated by it to prove that he took the transfer in question after taking reasonable care to ascertain that the transferrer had power to make the transfer and that he himself acted in good faith. [P 739 C 1]

(e) Transfer of Property Act, S. 41—Scope.

(*Query*) It is open to question whether, if the vendor possessed lesser interest than what he sold, the vendee's position would be better only because he was ignorant of the real state of his vendor's title. It is likewise open to question whether S. 41, T. P. Act, in terms applies to a case of this kind.

[P 739 C 2]

Mushtaq Ahmad—for Appellant.

G. Agarwala—for Respondents.

Judgment.—The plaintiff-appellant brought the suit, which has given rise to this appeal, for recovery of what has been called malikana allowance and interest payable by defendants 1 to 5 (contesting respondents in this Court), as the present holders of village Katia. The Court of first instance decreed the suit but the lower appellate Court dismissed it. The claim has reference to an agreement alleged to have been entered into among five brothers, one of whom was Ragha Singh, plaintiff's deceased husband, at the partition of ancestral property which consisted of shares in several villages, including the village Katia which was allotted to another of the five brothers, namely Umrao Singh with an important reservation to be presently mentioned. Umrao's interests passed to defendants 1 to 5 by private purchase from his heirs. No formal deed of partition or agreement appears to have been drawn up, but the terms of it are clearly stated in the wajib-ul-arz of village Katia prepared at the settlement of 1873. The relevant portion of the wajib-ul-arz is translated below :

"At the time of partition of zamindari villages regard was had to the profits of each. On the villages (named) being alloted to Ragha Singh cosharer and those (villages named) being allotted to Puran Singh there was deficiency in the profits (of their shares). It was, therefore, agreed that the cosharers to whom Katia was assigned should pay Rs. 58-11-0 a year as detailed below, that is Rs. 56 to Puran Singh and Rs. 2-11-0 to Ragha Singh, that these sums should be paid by the person in possession of this village (for the time being) and that Puran Singh and Ragha Singh have a right to this profit (is munafia ka ikhtiyar hasil hai), for this reason, the payment is regarded as malikana in this village."

It should be noted that the village Katia was part of the joint property and was brought into hotchpot. That the entry in the wajib-ul-arz, quoted above, is good prima facie evidence of the agreement recited therein cannot be

questioned. Indeed, the lower appellate Court has accepted it as such, but has refused to give effect to it on the ground that malikana was not a charge on the village enforceable against the transferees, as defendants 1 to 5 are. I am clearly of opinion that the malikana reserved to Puran Singh and Ragha Singh amounts to an interest in land and is a much higher right than a mere charge in their favour. The village Katia and other villages belonged jointly to the five brothers. As the effect of partition, exclusive ownership in village Katia (except the right to receive profits to the extent of Rs. 58-11-0 out of the total rental) was assigned to Umrao Singh. Correspondingly, the rights of Puran Singh and Ragha Singh the erstwhile joint owners, were put an end to except so far that they were entitled to receive profits amounting to Rs. 58-11-0 which should be regarded not as a new right conferred on them but as the residue left to them after adjustment at the partition. It is a proprietary interest differing from the ordinary ownership only in that it is a fixed amount and not being the profit of a definite fractional share does not admit of any variation. The position would not have been materially different if a fractional share say one anna had been reserved to Puran and Ragha Singh to make up the deficiency in their shares.

The judgment of the lower appellate Court proceeds on a variety of grounds some of which, in my opinion, afford no foundation for the view that it has taken. The comment of the learned Judge that the entry in the wajib-ul-arz of 1873 was not "confirmed by the wajib-ul-arz of the last settlement" is difficult to understand. If the wajib-ul-arz of 1873 which is an official record of relations subsisting among the cosharers, is to be used as a piece of evidence, and if its genuineness is not in dispute, the fact that the entry was not repeated in the subsequent wajib-ul-arz cannot detract from its value. As a matter of fact, we do not know whether a wajib-ul-arz was subsequently prepared and if it was prepared the agreement referred to in the earlier wajib-ul-arz was omitted therefrom. The remark of the learned Subordinate Judge is based on the circumstance that the plaintiff made no attempt to produce the wajib-ul-arz which he assumed was prepared at the next settlement.

Another objection taken by the lower appellate Court is that there is nothing to show that the shortage of profits in the shares allotted to Puran Singh and Ragha Singh at the partition made in the wajib-ul-arz of 1873, which was compensated by the malikana in question, continues up to date. I fail to see the force of this remark. The rights of parties to a partition are determined at that time once for all. Property allotted exclusively to one of the cosharers may yield more or less profits in future years and if one of the cosharers is fortunate enough to obtain enhanced income from the share allotted to him, he cannot subsequently be called upon to forgo any compensation that might have been given to him at the time of partition to make up a deficiency then existing.

The view of the learned Subordinate Judge that the agreement to pay Rs. 58-11-0 to Puran Singh and Ragha Singh was of a personal character and that the allowance thus agreed to be paid was not charge on the village Katia is based on three considerations: Firstly, it is said that the heirs of Puran Singh and Ragha Singh are not specifically mentioned; secondly, that the agreement makes no provisions for future fluctuations, and thirdly, that the plaintiff did not claim a decree for sale. I may say at once that none of these reasons appeals to me in support of the argument that the malikana is not a charge. As I have already stated in an earlier part of this judgment the malkana reserved to Puran Singh and Ragha Singh is a right of a higher character than a mere charge in their favour. Even if it were otherwise, there is no doubt that the terms of the agreement as detailed in the wajib-ul-arz do not create merely a personal liability. The wajib-ul-arz makes "the proprietor for the time being" liable to pay the malikana. Puran Singh and Ragha Singh have been given the right to recover the "profits" from the person in possession of the village (*qabiz gaon*) Assuming no interest in land was reserved to Puran Singh and Ragha Singh the profits of the village, out of which the malikana allowance is to be paid, are clearly charged with it.

Where a fund is indicated for payment of a certain allowance the latter must be deemed to be a charge on the former. The use of the word "malikana" is, in my opinion full of significance. In *Churaman* v. *Balli* (1) this Court had the occasion to consider a clause occurring in a sale-deed which reserved an annual payment of Rs. 25 to the vendor by the vendee. The allowance was styled malikana. It was held that the word should be construed as creating a perpetual and heritable charge upon the property. Indeed, the learned Judges observed that the use of the word "malikana":

"showed an intention that the payment of the Rs. 25 should be an annual charge upon the property and the profits arising therefrom analogous to that of a malikana reserved on a settlement by a Government Settlement Officer for a zemindari, that the use of the word was intended to reserve and create a perpetual and heritable charge upon the property and that the Court was not prevented from coming to this conclusion by the omission of the specific words of inheritance".

There are numerous other cases decided by the Calcutta High Court which support the same view. They are fully discussed in the case above referred to.

The learned Subordinate Judge has held that defendants 1 to 5 cannot be regarded as having constructive notice of the existence of the charge. On this point he observes that:

"unless the settlement of 1873 was in force when these defendants came into possession by transfer it was not obligatory on them as prudent men to look into the papers of a settlement which had proceeded the last one of 1896-97, if the papers of the last settlement did not contain references to those of the preceding one. In the absence of evidence constructive notice of the contract cannot be fastened on the appellants."

I am unable to accept this view of law. Question of notice can only arise if the defendants put forward a plea based on the provision of S. 41, T. P. Act. I take it that para. 6 of their written statement raises such a plea. The section makes it incumbent on the party pleading the estoppel of the particular kind contemplated by it to prove that he took the transfer in question after taking reasonable care to ascertain that the transferrer had power to make the transfer and that he himself acted in good faith. The Court of first instance points out that the defendants led no evidence of any kind on this question and that the slightest enquiry on their part would have led to the discovery of the clause in the wajib-ul-arz. I do not consider it necessary to discuss whether it is open to the defendants to plead a bona fide purchase for consideration without notice in the circumstances of this case. It is open to question whether, if the vendor possessed lesser interest than what he sold, the vendee's position would be better only because he was ignorant of the real state of his vendor's title. It is likewise open to question whether S. 41, T P. Act, in terms applies to a case of this kind. I am content to rest my decision on the view that the defendants failed to adduce any evidence in support of their plea assuming that it is otherwise a good plea. For the reasons stated above, I set aside the decree passed by the lower appellate Court and restore that of the Court of first instance. The respondents shall pay the costs of the appellant in all the Courts.

S.N./R.K. *Decree set aside.*

(1) [1887] 9 All. 591=(1887) A. W. N. 121.

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* A. I. R. 1929 Allahabad 739

SULAIMAN AND PULLAN, JJ.

Phul Chand—Defendant—Appellant.

v.

Gobardhan Das and *another*—Plaintiff and Defendant—Respondents.

First Appeal No. 265 of 1926, Decided on 19th April 1929, against decree of Sub-Judge, Jhansi, D/- 20th April 1926.

(a) Agra Pre-emption Act, S. 4 (1)—Meaning of "entitled as proprietor" explained.

The expression "entitled as proprietor" means that a person must possess proprietary interest in the mahal and not merely possession over a share in the mahal. Merely possessory title would not make a person, whose name is recorded in the khewat as co-sharer entitled as proprietor to a share. [P 740 C 2]

*** (b) Hindu Law— Adoption.— Married Marwari Brahmin cannot be adopted in absence of proof of custom allowing such adoption.**

A married Marwari Brahmin cannot be validly adopted in the absence of proof of custom allowing such adoption and mere lapse of time of 30 years cannot cure illegality of such adoption of married person. [P 740 C 2]

(c) Hindu Law—Widow—Adverse possession against reversioners.

There cannot be adverse possession against reversioners during the lifetime of widow, [P 740 C 2]

(d) Hindu Law—Counting of degree is from common ancestor.

According to the view of the Allahabad High Court the counting of degrees is from the common ancestor : 32 *All.* 594 ; *A. I. R.* 1914 *P. C.* 1, *Rel. on.* [P 741 C 2]

T. B. Sapru and *Peary Lal Banerji* —for Appellant.

Iqbal Ahmad and *N. C. Vaish*—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for pre-emption brought to pre-empt the property sold under a deed dated 29th September 1924 by Mahadeo to Phul Chand the defendant-appellant. The sale consideration mentioned in the deed was Rs. 12,201. The plaintiff alleged that he was a cosharer in the village and the defendant vendee was a stranger and that the true sale consideration was only Rs. 10,000. The suit was defended by the defendant on various grounds. In the first place it was denied that the plaintiff was a cosharer and it was pleaded that the alleged adoption set up by him was invalid. It was further pleaded that the defendant had become a cosharer in the mahal by virtue of a gift taken on 17th December 1924 and was entitled to defeat the claim. It was further pleaded that the Bundelkhand Alienation of Land Act was a bar to the present claim. The learned Subordinate Judge has found all the issues against the defendant and has decreed the claim, giving the plaintiff half of his costs from the defendant.

The defendant has appealed and the plaintiff has filed a cross objection only as to costs. The question of consideration is not now in dispute before us. The plaintiff had sought to meet the defence as to the invalidity of the adoption by setting up a custom under which a married man could be validly adopted. The finding of the Court below on this point is against the plaintiff. In the oral evidence led on behalf of the plaintiff some instances were sought to be established and it was stated that in his caste such adoptions are allowed. The evidence no doubt was meagre and the Court below has rejected it. We are not prepared to reverse that finding.

The learned Subordinate Judge seems to have thought, to quote his actual words, "at all events he is a recorded cosharer and entitled to pre-empt." In our opinion this view is not correct. The present case is governed by the Agra Pre-emption Act No. 2 of 1922 and the rulings under the old law are not applicable. A cosharer is defined in S. 4, sub-Cl. (1), as meaning any person other than a petty proprietor entitled as proprietor to any share or part in a mahal or village whether his name is or is not recorded in the register of proprietors. The expression "entitled as proprietor" obviously means that he must possess proprietary interest in the mahal and not merely possession over a share in the mahal. It seems to us that merely possessory title would not make a person whose name is recorded in the khewat as cosharer entitled as proprietor to a share. The plaintiff therefore in order to succeed must show that he has got a proprietary interest in this mahal.

In the evidence the plaintiff's case was that he was duly adopted by the widow of Gobind Ram under authority from her husband. It is an admitted fact that he was about 21 or 23 years of age and was married and in fact had children alive at the time when he was adopted. The fact of adoption is fully proved and that finding has not been challenged before us. The plaintiff is a Marwari Brahmin and without proof of a custom which would allow such an adoption the plaintiff's adoption cannot be accepted as valid. The learned Subordinate Judge seems to think that the adoption having been an accomplished fact of about 30 years standing it should be accepted but mere lapse of time cannot cure the illegalily of it. We are therefore constrained to hold that in spite of the fact that this adoption has remained unchallenged for such a long interval of time the plaintiff cannot claim proprietary title on its basis. It is also quite clear that the plaintiff had not acquired proprietary title by prescription when he brought the suit. Admittedly Mt. Kesar Kuar died on 27th November 1913 within 12 years of the suit and there could be no adverse possession against the reversioners whilst she was alive Before the full period of 12 years expired the plaintiff had not become a proprietor by means of adverse possession and therefore had no locus standi to sue. It therefore seems to us that the plaintiff cannot succeed on any supposed adverse possession. He can-

not mature his title during the pendency of the suit.

He, however, falls back on his evidence that he himself is the next reversioner and heir to the estate of Gobind Ram whose widow purported to adopt him. Unfortunately no clear issue on this point was framed by the Court below and this matter was supposed to be covered by issue, 7 "Has the plaintiff a title to sue." The plaintiff went into the witness-box and recited his pedigree and stated that he was an heir in the family and that in Govind Ram's family there was no other reversionary heir except him. He gave a long pedigree which he said he had learnt from his father. Another witness Pahlad Das Bhat was produced who proved a book said to contain the full pedigree of this family. The full extracts from it are printed in the supplemental record and an abstract pedigree was given by the witness in his deposition. According to that pedigree the plaintiff was in the thirteenth degree from the common ancestor Devakaran including both the common ancestor and the plaintiff, and Gobardhan whose widow purported to adopt him was in the 14th degree including both the common ancestor and himself. There was no rebutting evidence nor did the defendants set up any other person as being a nearer heir. There was further the circumstantial evidence that the plaintiff's adoption ceremony took place some 30 years ago and no one has come forward to challenge its validity. There is the additional fact that for nearly 12 years since the death of the widow he had been in exclusive possession of the estate and no prompt steps were taken to oust him. There is no suggestion that even during the pendency of the suit any claimant has come forward to recover the estate. Having regard to this state of the evidence the Court below recorded a finding :

"The plaintiff has filed a book called Bansawali showing that the plaintiff and Govind Ram were descendants of the same common ancestor Devakaran. In this respect aiso he becomes an heir to Govind Ram."

This in our opinion is a finding that he is the next heir to the estate of the deceased. In the absence of any evidence to the contrary we are not prepared to upset this finding. We accordingly hold that the plaintiff is a proprietor and therefore a cosharer within the meaning of S. 4, sub-Cl. (1).

In the argument it was suggested that the 14th degree ought to be counted from the propositus and not from the common ancestor. The view of this High Court has consistently been that the counting is to be from the common ancestor. We may in this connexion refer to the case of *Ram Baran Rai* v. *Kamala Prasad* (1) where a collateral thirteen degrees removed from the ancestor was held to be a heritable heir. This view is somewhat confirmed by the ruling of their Lordships of the Privy Council in the case of *Ram Chandra* v. *Vinayak Venkatesh* (2) where also the counting for the sapinda relationship was taken from the common ancestor and not from the propositus (p. 312).

We further think that there is no force in the plea that there is anything in the Bundelkhand Alienation of Land Act (No. 2 of 1903) which defeats the claim. It has been ruled in the case of *Phul Chand* v *Ram Nath* (3) that a person is not entitled to pre-empt land in Bundelkhand if he is not entitled to purchase it, but under S. 3 of the Act a person who desires to make a permanent alienation of his land shall be at liberty to make such alienation where an alienor is not a member of an agricultural tribe. S. 4 lays down how the Local Government by notification in the Gazette may determine what bodies of persons in any district or sub-division of a district should be deemed to be agricultural tribes for the purposes of this Act. The Local Government by Notification No. 1977-1779 F (U. P. Gazette 27 June 1903, Part 1 p. 490) has declared that all persons ordinarily residing in any of the districts and sub-divisions of a district to which the Bundelkhand Alienation of Land Act extends and belonging to any one of the tribes specified in the schedule annexed are to be deemed to be agricultural tribes. The necessary condition of this obviously is that the person must ordinarily reside in the district or in a sub-division of it. In the present case the learned Subordinate Judge has rightly noted that even

(1) [1910] 32 All. 594=6 I. C. 698=7 A. L. J. 802,
(2) A. I. R, 1914 P. C. 1=42 Cal. 384=41 I. A. 290 (P. C.).
(3) A. I. R. 1928 All. 186=50 All. 430.

the witnesses for the defendants have not had the courage to go to the length of stating that Mahadeo did not reside in Gwalior. Their statement was that for some months in the year he also resided in Bundelkhand. This evidence is not satisfactory. In the sale-deed he has given his residence as Gwalior. He is admittedly a jagirdar and Honorary Magistrate in Lashkar, and the learned Subordinate Judge has pointed out that it is highly improbable that he resides permanently in Aupara. We accept the finding that his ordinary residence is at Lashkar and not in Bundelkhand. The Act therefore has no application and there is nothing to prevent the plaintiff from pre-empting the property.

The last plea is that by virtue of the gift dated 17th December 1924 the defendant has become a cosharer on the same footing as the plaintiff. It has been held by a Full Bench of this Court in the case of *Ram Saran Das* v. *Bhagwat Prasad* (4), that a gift taken during the pendency of the suit can defeat the claim. But obviously it must be a gift of proprietary interest which would make the defendant a cosharer. The learned Subordinate Judge has found that this gift was a fictitious gift and that as a matter of fact no proprietary interest had been left over after the sale-deed to be gifted. Under the sale-deed dated 29th September 1924 (p. 53) the entire 16 annas of the new mahal which corresponded to 14 annas 2 pie, 20 cowrie share of the old mahal was sold "with the exception of a grove in the village." No number of this grove was given nor was its area mentioned. As it stood it suggested that the entire mahal was sold but the rights of the grove-holder in a certain grove were reserved. That this was the intention of the parties is made abundantly clear by their subsequent conduct. On 5th November 1924 an application for mutation of names was filed in the revenue Court in which the amount of the property was described as 14 anna 2 pie 20 cowrie former share 16 anna mahal ; that is to say the present share being 16 annas (p. 57.) On 22nd November 1924 Phul Chand was examined in the revenue Court and stated :

"I purchased the property of Mahadeo amounting to a 14 anna 2 pie and 20 cowrie share former 16 anna mahal."

and also said :

"There is khudkasht land of more than 12 years standing and it is in possession of Mahadeo....."

A settlement has been arrived at between the parties "as regards rent." Similarly Ram Prasad the karinda of Mahadeo was examined and stated that Mahadeo had sold his 16 anna share and that there was khudkasht land of more than 12 years standing and a settlement about rent had been arrived at between the parties. He further stated :

"My employer is in possession of the khudkasht land and it should be the exproprietary holding of my employer."

Kalka Prasad, patwari, also was examined and deposed that there was khudkasht land of more than 12 years standing in possession of Mahadeo, and that a decision about rent had been arrived at between the parties, and that the name of Phul Chand should be entered in the papers in place of Mahadeo against 16 annas. Tne revenue Court accordingly ordered that the name of Mahadeo be removed and the name of Phul Chand be entered against a 16 anna share entered in the khewat. The Assistant Collector noted that exproprietary tenancy had accrued, and remarked that proceedings relating to it would be taken separately.

It is quite clear from these proceedings in the revenue Court that everybody understood that the entire 16 anna share in the mahal had been transferred and that only the exproprietary right or tenancy right had been left about which there was some agreement as regards rent and which the Collector was to assess subsequently. There was no suggestion in these proceedings that any part of the proprietary interest in the mahal had been excluded from the sale. Had that been so the name of Mahadeo could not have been removed altogether. On 29th November 1924, the rent of this cultivatory holding appears to have been assessed at Rs. 25.

On 11th December 1924 the present suit was instituted and on 17th December 1924 Mahadeo purported to make a gift of the grove which had been excluded from the sale and described it as representing 15 cowrie, 2 dant share in the mahal. On the basis of this gift (p. 67) an application for mutation of names was made (p. 69) and there was also an application for correction of papers (p. 71)

(4) A. I. R. 1929 All. 53 (S.B.).

filed on 7th January 1925. The case put forward now was that a share in the mahal amounting to 15 cowrie and 2 dant and representing the grove which covered an area of 4.09 acres had been left out of sale and was subsequently gifted to Phul Chand and that the previous assessment of rent was due to an error. The pre-emptor appears to have intervened and objected to this application. On 15th January 1925 the Tahsildar reported (p 73) pointing out under what circumstance the mutation of names had been effected with regard to the entire 16 annas. The Assistant Collector, however, held on 4th March 1925 (p. 75) that the rights of Mahadeo in the grove had been excluded from the sale and they were rightly transferred by the gift and he ordered Phul Chand's name to be entered as against 4·09 acres haqqiyat mutafarriqe (miscellaneous property). This order was confirmed on appeal (p. 77). The learned Collector held that a definite portion of the property had been reserved and the same could have been gifted. He, however, held that the reserved portion was not and should not be shown as a fraction of the 16 anna mahal but merely as a miscellaneous property.

It seems to us that the view of the learned Subordinate Judge that the entire zemindari rights in the 16 anna share had been sold is correct. The language of the sale-deed as well as the subsequent proeeedings all go to show that only cultivatory rights or rights of a grove-holder were reserved and it was understood that rent would be assessed on that land but no proprietary interest was excluded from the sale. The idea of making a gift of it only arose after the institution of the pre-emption suit and the gift was a mere device to find an excuse for defending the claim. We agree with the Court below that under this deed of gift no proprietary interest in the mahal was validly transferred so as to place the vendee on a footing equal to that of the plaintiff. The defendant accordingly cannot succeed on its basis. The result, therefore, is that this appeal is dismissed with costs. The cross-objections as to costs have not been pressed before us. There is a deficiency in the amount paid by the respondents for translation and printing. The decree will not be prepared till that deficiency has been made good.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 743

SULAIMAN AND NIAMATULLAH, JJ.

Bhola Nath—Defendant—Applicant.

v.

Raghunath Das Mithan Lal and *others*—Plaintiff and Defendants—Opposite Parties.

Civil Revn. No 49 of 1928, Decided on 11th June 1929, from an order of Munsif, Shikohabad, D/- 31st January 1928.

(a) Civil P. C., S. 115—"Case" explained—Order superseding arbitration is revisable.

The word "case" does not necessarily mean suit but can mean a proceeding. If any proceeding in a suit has terminated, it is a case decided within the meaning of S. 115, although the suit itself has not been finally disposed of. Thus the order superseding the reference to arbitration on an application made for the purpose amounts to an order deciding a case and as no appeal lies from it, it is open to revision: *A.I.R.* 1921 *All.* 1 (*F.B.*), *Discussed*, *A. I. R.* 1925 *All.* 610 (*F.B.*). and 36 *All.* 354, *Rel. on.* [P 744 C 2]

(b) Civil P. C., S. 151—Court has inherent power to intervene and supersede arbitration but it can intervene only if its intervention is urgently necessary for ends of justice or to prevent abuse of process of law—Court not applying its mind as to necessity of intervention—Court then acts with material irregularity and order can be interfered with in revision—Civil P. C., S. 115.

There is an inherent jurisdiction in a Court to intervene and supersede the arbitration on grounds other than those mentioned in Sch. 2, Rr. 5, 8 and 15, if the case fell under S. 151 of the Code, viz., where such an order is necessary for the ends of justice or to prevent the abuse of the process of the Court. But it can intervene only if it is satisfied that the ends of justice urgently require its intervention or that without such intervention there would be an abuse of the process of the Court. That being so, if the Court has not applied its mind to the extent of its own jurisdiction and has not recorded any finding that the ends of justice requires its intervention or that the process of the Court is likely to be abused, but has merely superseded the reference on the ground that one of the parties thereto has an apprehension that he would not be fairly treated, the Court, if it has not actually acted without jurisdiction, has certainly acted with material irregularity in the exercise of its jurisdiction, and the High Court will interfere in revision. [P 744 C 2, P 745 C 2]

Hazari Lal Kapoor—for Applicant.

U. S. Bajpai, *G. Agarwala* and *K. N. Katju*—for Opposite Parties.

Judgment.—This is an application in revision from an order superseding a reference to arbitration before the award was delivered. Defendants 1 and 2 applied to the Court that the reference

should be superseded on the ground that the umpire was related to the plaintiff and that the uncle of the umpire's son-in-law had sued the defendants at Kasganj and the plaintiff had an apprehension that the fact might influence the mind of the umpire in deciding the case. The learned Munsif after taking evidence came to the conclusion that it was not proved that the umpire was in any way related to the plaintiff but considered that defendants 1 and 2 might very well apprehend that the umpire would not treat them fairly. He himself did not record any finding that in his own opinion there was an apprehension that justice would not be done and that his immediate intervention was called for. He superseded the reference and fixed a date for the disposal of the suit. Defendant 3 has applied in revision from this order and has impleaded the other parties as respondents.

A preliminary objection is taken on behalf of defendants 1 and 2 that no revision lies and reliance is placed on the Full Bench case of *Buddhu Lal* v. *Mewa Ram* (1). In our opinion this objection is not well founded. In the Full Bench case the trial Court had recorded its finding on one of the issues relating to the question of jurisdiction. The learned Judges thought that the word 'case' in S. 115 was wide enough to include any particular question in issue between the parties to the suit, but two other learned Judges took the view that the expression "case decided" meant "suit decided" and that no revision could lie from an interlocutory order. The fifth Judge, viz., Ryves, J. confined his judgment to the question whether the decision on a single issue by a Subordinate Court while the suit was still pending in that Court was a case decided within the meaning of S. 115, and came to the conclusion that it was not. It therefore seems to us that the Full Bench case is an authority only for the proposition that no revision lies from a finding recorded by the trial Court on one or more issues out of several that are before it for disposal. There was no majority in favour of the broad proposition that no revision lies from an interlocutory order. We may note that a revision from an order restoring a case has been held by another Full Bench to be open to revision, *Ram Sarup* v. *Gaya Prasad* (2).

It seems to us that the word "case" does not necessarily mean "suit" but can mean a proceeding. If any proceeding in a suit has terminated it is certainly a case decided within the meaning of S. 115, although the suit itself has not been finally disposed of. In the present case there was a reference to arbitration, then there was an application for supersession which has been finally disposed of and the reference has come to an end. That proceeding has terminated and the case is now restored on its original number and is ordered to be disposed of by the Court. The order superseding the reference to arbitration in our opinion, amounts to an order deciding a case and as no appeal lies from it, it is open to revision. This was the view taken by a Bench of this Court in the case of *Chaturbhuj* v. *Raghubar Dayal* (3), in which the revision from an order superseding an arbitration was actually entertained and allowed. We therefore think that there is no force in the preliminary objection.

On the merits we would have no jurisdiction to interfere under S. 115, unless the Court below acted without jurisdiction or acted with material irregularity in the exercise of its jurisdiction. Sch. 2, Civil P. C., provides for several contingencies in which a reference to arbitration may be superseded by the Court. We may refer to Rr. 5, 8 and 15 of that schedule. There is no express provision which empowers a Court to supersede an arbitration on grounds other than those mentioned in it. It may, however, be said in favour of the respondent that there is an inherent jurisdiction in a Court to intervene and supersede the arbitration if the case fell under S. 151 of the Code, viz., where such an order is necessary for the ends of justice or to prevent the abuse of the process of the Court. That such an inherent jurirdiction exists has been laid down by the Bombay High Court and by a single Judge of the Patna High Court, and has also been assumed by the learned Judges in the case of *Chatarbhuj* v. *Raghubar Dayal* (3). But as pointed out in the latter case this inherent

(1) A. I. R. 1921 All. 1=43 All. 551 (F.B.).

(2) A. I. R. 1925 All. 610=48 All. 175 (F.B.).

(3) [1914] 36 All. 354=23 I.C. 758=12 A.L.J. 529.

jurisdiction of the Court, if it can be called into play, should be cautiously and sparingly exercised and only when it is obvious that the ends of justice would not be met by requiring the dissatisfied party to wait and see what the award might be and then to assail it on the ground of corruption or misconduct and the Court should be satisfied that the applicant would suffer some irreparable injury if prompt action is not taken (p. 360). The Court has not an absolute power and discretion to supersede all references to arbitration. It can intervene only if it is satisfied that the ends of justice urgently require its intervention or that without such intervention there would be an abuse of the process of the Court. Beyond that narrow scope the Court has no general power of setting aside arbitrations. The mere fact that the aggrieved party might have a right to challenge this order under S. 105, sub-Cl. 1, subsequently in an appeal from the decree finally passed, does not debar us from interfering at this stage so as to prevent an unnecessary waste of time of the Court in recording evidence and the additional expenses to which the parties would be subjected.

If the Court has not applied its mind to the extent of its own jurisdiction and has not recorded any finding that the ends of justice requires its intervention or that the process of the Court is likely to be abused, but has merely superseded the reference on the ground that one of the parties thereto has an apprehension that he would not be fairly treated, the Court, if it has not actually acted without jurisdiction, has certainly acted with material irregularity in the exercise of its jurisdiction The case of *Chatarbhaj* was also very similar to the present case where the trial Court had superseded the reference on the ground that the applicant had lost confidence in the fairness and impartiality of the arbitrator.

If any fraud has been practised on the defendant and knowledge was deliberately concealed from him or any bias or prejudice is established after the award is delivered that may be a ground for setting aside the award when objection is taken to it. It is too early to presume that the umpire would act with a prejudice against the defendant merely because an uncle of his son-in-law has sued the defendant. We accordingly allow this revision, set aside the order of the Court below dated 31st January 1928 which superseded the arbitration and send the case back to that Court with directions to refer the matter again to the arbitrators in pursuance of the agreement entered into by the parties. The applicant should have the costs of this proceeding from defendants 1 and 2.

P.N./R.K. *Revision allowed.*

A. I. R. 1929 Allahabad 745

IQBAL AHMAD, J.

Mt. Janak Dulari—Defendant—Appellant.

v.

Bishambher Nath and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 308 of 1928, Decided on 26th June 1929, from a decree of Addl. Dist. Judge, Cawnpore, D/- 25th November 1927.

(a) Interpretation of Statutes — Retrospective effect—Suit instituted before but decided after Agra Tenancy Act (3 of 1926) —Appeal is governed by old Agra Tenancy Act—Agra Tenancy Act (1926).

A suit which was instituted before the coming into force of Agra Tenancy Act (13 of 1926) but was decided after it had come into operation is in the matter of appeals governed by Agra Tenancy Act (2 of 1901) : *A. I. R.* 1928 *All.* 437, *Rel. on.* [P 746 C 2]

(b) Agra Tenancy Act (3 of 1926), S. 231 —Specific section in Tenancy Act providing for applicability of Limitation Act, S. 5—It is not intended by that section to exclude applicability of rest of Limitation Act to suits and proceedings under Tenancy Act.

By S. 231 all that the legislature intended to and did provide was that the provisions of S. 5, Lim. Act. would apply to all suits and proceedings under that Act, and the mere fact that there is a specific section in the Tenancy Act providing for the applicability of S. 5, Lim. Act, does not lead to the conclusion that it was intended by that section to exclude the applicability of the rest of the Limitation Act to suits and proceedings under the Tenancy Act. Thus a person in computing the period of limitation for the appeals filed by him in the Court of the District Judge is entitled to exclude the time taken in obtaining certified copies of judgments and decrees.: *A. I. R.* 1928 *All.* 708, *Ref.* 10 *A. L. J.* 535, *Rel. on.* [P 746 C 2, P 747 C 1]

K. N. Laghate—for Appellant.

S. N. Seth—for Respondents.

Judgment.—This appeal is connected with Second Appeal No. 309 of 1928. Both the appeals are by defendant and

arise out of two suits for profits filed in the revenue Court under S. 164, Agra Ten. Act, Act 2 of 1901. The trial Court ultimately passed decrees in both the suits in the plaintiff's favour on 8th March 1927. Both the suits were valued at more than Rs. 100 but at less than Rs. 200. On the date of the institution of the suit the old Agra Tenancy Act, (Act 2 of 1901) was in force but on the date of the decision by the Assistant Collector, the New Agra Tenancy Act (Act 3 of 1926) had come into force. By the former Tenancy Act an appeal was allowed to the District Judge against the decree of an Assistant Collector of the first class in any of the suits included in Group A and Group B of that Act in which the amount of the value of the subject matter exceeded Rs. 100. A suit for profits under S. 164 was included in Group B of that Act and as such an appeal against a decree in such suit, the valuation of which exceeds Rs. 100, lay to the District Judge under the old Act.

By the new Act an appeal in a suit for profits against the decree of an Assistant Collector of the first class is allowed in the Court of the District Judge, provided the amount of value of the subject matter of the suit exceeds Rs. 200.

It would thus appear that if the right of appeal was governed by the present Tenancy Act, the defendant had no right to appeal against the decrees of the Assistant Collector in the suits giving rise to the present appeal in the Court of the District Judge. But if the right of appeal is governed by the old Act, the defendant had undoubtedly a right of appeal. The learned District Judge on appeal by the defendant held that inasmuch as the decree of the Assistant Collector appealed against was passed after the coming into force of the present Tenancy Act, the right of appeal must be governed by that Act, and inasmuch as the valuation of the suits did not exceed Rs. 200, he was not competent to entertain the appeals. Holding this view he dismissed the appeals filed by the defendant. The learned counsel for the defendant-appellant assails the decree of the learned District Judge on the ground that he was wrong in holding that the appeals filed by the defendant were not governed by the former Tenancy Act. This contention of the learned counsel is well founded and is supported by the recent Full Bench decision of this Court reported in *Rama Singha* v. *Shankar Dayal* (1). It was held in that case that a suit which was institututed before the coming into force of the new Act but was decided after it had come into operation, was in the matter of appeals, governed by the old Act. Accordingly I hold that the learned District Judge was competent to entertain and hear the appeals, and the view of the law taken by him is erroneous. The learned counsel for the respondents has not supported the decree of the District Judge on the ground that no appeal lay to him, but his contention before me is that the decree of the learned District Judge dismissing the appeals filed by the defendant should be upheld on the ground that the appeals filed by the defendant were filed beyond the expiry of the period of limitation. His argument is that though the right of appeal is a substantive right, no one has a vested right in a period of limitation and he argues that the Indian Limitation Act not having been made applicable to suits and proceedings under the new Agra Tenancy Act, Act 3 of 1926, the defendant is not entitled, in the computation of the period of limitation for filing an appeal to the exclusion of the time taken in obtaining certified copies of the judgment and decree of the learned Assistant Collector. In support of this contention he has placed reliance on the decision of *Baijnath* v. *Doolarey Hajjam* (2). It was held in that case that the rules of limitation are prima facie rules of procedure and that rules applicable to an appeal must be rules of limitation which are in force at the time when the appeal is filed. He has also placed reliance on S. 231, Agra Tenancy Act, and has argued that the provisions of that section lead to the conclusion that no section of the Indian Limitation Act except S. 5 of that Act has been made applicable to suits and proceedings under the Tenancy Act.

I am unable to agree with the contention of the learned counsel for the respondents. By S. 231, Act 3 of 1926, all that the legislature intended to and did provide was that the provisions of S. 5, Lim. Act, would apply to all suits and proceedings under that Act. The necessity for enacting that section must have

(1) A. I. R. 1928 All. 437=50 All. 965 (F.B.).
(2) A. I. R. 1928 All. 708=50 All. 865.

been occasioned by the provision in S. 5, Lim. Act that that section may be made applicable by any enactment for the time being in force to applications other than those enumerated in that section. Further S. 5, Lim. Act, does not apply to suits, and it seems that in this respect the framers of the Agra Tenancy Act wanted to extend the scope of that section and to apply it to suits as well. The mere fact that there is a specific section in Act 3 of 1926 providing for the applicability of S. 5, Lim. Act, does not lead to the conclusion that it was intended by that section to exclude the applicability of the rest of the Limitation Act to suits and proceedings under the Tenancy Act. It will be noticed that neither the old nor the present Tenancy Act prescribes any period of limitation for appeals preferred in the Court of District Judges against the decrees of Assistant Collectors of the first class and as pointed out in the case of *Ram Lal* v. *Amar Chand* (3) :

"As a matter of recognized practice, limitation for appeals to District Judges has always been taken to be one month from the date of the decree."

It was further held in that case that inasmuch as the provisions of the Code of Civil Procedure, with certain modifications and exceptions, have been made applicable to all suits and other proceedings under the Tenancy Act so far as they are not inconsistent therewith, an appeal against a decree of an Assistant Collector to the District Judge is governed by the procedure prescribed by the Code of Civil Procedure and that Art. 152, Lim. Act, is the article applicable to such appeals.

In my judgment the defendant in computing the period of limitation for the appeals filed by him in the Court of the District Judge was entitled to exclude the time taken in obtaining certified copies of judgments and decrees, and it is agreed by the learned counsel for the respondents that if that time is excluded the appeals filed in the Court of the District Judge were within time. For the reasons given above I allow these appeals, set aside the decrees of the learned District Judge in both appeals and send the cases back to him with direction to re-admit the appeals to their original number and dispose them of according to law. Costs here and hitherto shall be costs in the cause and shall abide the result.

P.N./R.K. *Appeals allowed.*

(3) [1912] 10 A. L. J. 535=17 I. C. 653.

A. I. R. 1929 Allahabad 747

MUKERJI AND NIAMATULLAH, JJ.

Baijnath—Defendant—Applicant.

v.

Dhani Ram — Plaintiff — Opposite Party.

Civil Revn. No. 265 of 1927, Decided on 26th April 1929, from an order of Munsiff, Agra, D/- 10th August 1927.

(a) Civil P. C., Sch. 2, R. 14—Judge, who was also constituted sole arbitrator, ought to admit review of his judgment if much of what is said in his judgment is not to be found in operative part of it.

Where a Judge is constituted also the sole arbitrator, the fact that both the capacities of a Judge and of an arbitrator are constituted in the same person should not deprive a party of his right of getting the matters set right which he can ordinarily do by asking Court to remit the award to the arbitrator. And so in such a case the Judge ought to admit a review of his own judgment if much of what is said in his judgment is not to be found in the operative part of it : 38 *Cal.* 421, *Expl.*

[P 748 C 2]

(b) Practice—Arbitrator.

Practice of some Judges of accepting also the post of an arbitrator is strongly deprecated, for Civil Procedure Code nowhere contemplates such procedure. [P 748 C 2]

B. Malik and *Baleshwari Prasad*—for Applicant.

S. C. Das—for Opposite Party.

Judgment.—In this case the defendant is the applicant before us. A suit was instituted by the plaintiff-respondent in the Court of the Munsif of Agra with respect to a wall which divided the houses of the parties. The prayers were: (a) a declaration that the wall belonged to the plaintiff, (b) an order for removal of certain encroachments, (c) a perpetual injunction. After the case went to trial, the parties agreed that the Munsif should decide the case on an inspection of the documents filed by the parties and on an inspection of the locality and they further agreed to accept the decision of the learned Munsif. The result was that the Munsif was constituted, so to say, an arbitrator of the case. The learned Munsif wrote a judgment and decreed the suit in part. There was an appeal by the defendant which was dis-

missed by the learned District Judge and we have to-day dismissed the second appeal *Baijnath* v. *Dhani Ram* (1).

The defendant, although he filed an appeal, also filed an application for review of judgment, before the learned Munsif. His grounds are stated at pp 5 and 6 of the paperbook prepared in this revision case. The first point was that the decision of the suit was very vague and indefinite. The rights of the parties have not been made clear and even the dispute has not been decided. The second point was :

"The order is contrary to judgment and it does not decide the points which were to be decided."

The third point was :

"The judgment shows that the wall at some places belongs to the defendant, but the order is contrary to that."

There were also other points taken. The learned Munsif fixed 26th March for hearing of the case. In the meantime, it was discovered, that there was a deficiency in the Court-fee and the defendant was asked to make good this deficiency. In the meanwhile, the record of the case went before the District Judge before whom the appeal was and nothing further was done in the matter of the review. On 26th March 1927, the plaintiff appeared before the Munsif and filed his objection to the defendant's application for review of judgment. The record came back to the Munsif after the dismissal of appeal, but it is not clear on what date. The order that we find below the appellate order on the order sheet, is the order of 10th August 1927. which is complained of. It does not appear at all that the counsel for the parties were given notice of this date or were heard.

The question before the learned Munsif was whether he should allow a review of his judgment. The learned Munsif, in dismissing the application stated that he was an arbitrator, that his decision was binding on the parties. Having said so, he said:

"Application for review does not lie as there is no sufficient cause for review."

We are of opinion that the learned Munsif never applied his mind to the application at all. If he had looked into the application, he would have found that there was abundant matter to which his attention could validly be directed. His own decision is not reflected clearly in the concluding portion of the judgment, which is the operative portion The decree as it stands does not make it clear as to what he found. In these circumstances we must hold and do hold that the Judge did not apply his mind to the application and too summarily dismissed it. He must now apply his mind and decide it.

The learned counsel for the respondent took the objection that it was not open to the Munsif to admit an application for review because he was an arbitrator. The learned counsel has relied on the case of *Baikantha Nath* v. *Sita Nath* (2). We have considered that case. It is not clear on what matter the learned Munsif had admitted a review of judgment. It may be, and very likely that was the case, that he admitted a review of judgment on the merits and gave a judgment which was, to some extent at any rate, contrary to the judgment which he had given at the earlier stage. If that was all that the case decided, we need not disagree with it; but if it really went further, we should, with all respect, disagree with that view.

The Munsif, in accepting the position of an arbitrator, had a two-fold capacity. He was an arbitrator, but he was also the Court. If the arbitrator left anything undecided, the parties would be entitled to go to the Court and to ask the Court to remit the award to the arbitrator. The fact that the two capacities were constituted in the same person, should not deprive a party of his right of having matters set right. We thoroughly deprecate the practice of some officers accepting the position of an arbitrator without the previous sanction of his superior officer : vide para. 1292 of the Manual of Government Orders, Ch. 42, Part 7. The position that has been created by the learned Munsif's act, is very awkward indeed. It tends to deprive a party of taking exceptions to the award on grounds enumerated in para. 14, Sch. 2, Civil P. C. It makes or at least tends to make the provisions in paras. 12 or 15 besides para. 14 nugatory. The Civil Procedure Code does, nowhere, contemplate that a Court may give up its own duties and take up those of an arbitrator, in a suit before it. If an officer should accept such a position,

(1) A. I. R. 1929 All. 577.

(2) [1911] 38 Cal. 421=9 I. C. 296.

he should act after the case has gone to some other Court. In that case, his own proceedings will be subject to all the rules in Sch. 2, Civil P. C. and the arbitration will be regular and legal, and the anomalous position that now has arisen will never arise. We trust that our remarks will be borne in mind by the subordinate officers and they would refuse to be constituted the sole arbitrator, even where the parties want to constitute them the sole arbitrator.

We have considered the judgment of the learned Munsif and the operative portion of it and we do find that a good deal of what is said in the judgment, is not to be found in the operative part of it. We do not say anything more, for we are remitting the whole matter to the learned Munsif himself. It may be that when the case goes back, it will be found that the officer has left the place. If that be the case, the fact that a notice was issued by the learned Munsif who decided the case, will give his successor jurisdiction to hear the application when the case goes back. On the other hand, if the learned Munsif himself is still the presiding judge of the Court, no difficulty whatsoever may arise. We allow the application in revision, set aside the order of the learned Munsif dated 10th August 1927 and direct him to take up the application afresh and consider it on the merits. Costs here and hitherto will abide the result.

S.N./R.K. *Case remanded.*

A. I. R. 1929 Allahabad 749

SULAIMAN AND NIAMATULLAH, JJ.

Secy. of State and *another* — Defendants—Appellants.

v.

Nand Ram Chhotey Lal—Plaintiffs—Respondents.

Second Appeal No. 760 of 1926, Decided on 10th June 1929, from decree of Addl. Dist. Judge, Agra, D/- 20th January 1926.

Railways Act, S. 72—Person suing Railway Company for damages—Some packages consigned to him under two risk-notes in form B lost—Waggon containing bags having no lock but only tin shackle—Theft not on running train— Sufficient evidence held established to support finding of fact of wilful neglect and consignee was entitled to damages.

A person brought a suit against a railway company for damages. Some of the packages of sugar consigned to him under two risk-notes in form B were lost. The waggon in which the bags were loaded had no lock on it at all but a tin shackle had been put on it which could be broken by any instrument. There had been many thefts on the line and it was followed that the theft did not take place on the running train.

Held : that there was sufficient legal evidence to support finding of wilful neglect and it being a finding of fact was binding in second appeal and that the person was entitled to damages as complete packages were lost : *A.I.R.* 1926 *All.* 369 (*F. B.*), *Rel. on.* [P 750 C 1]

U. S. Bajpai—for Appellants.

K. N. Katju—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit for damages brought against the East Indian Railway Company. 126 bags of sugar were consigned to the plaintiff under two risk-notes in form B, out of which 18 were found missing on arrival and two bags which did not belong to the plaintiffs were also tendered by the railway company, of which the plaintiff's munib refused to take delivery.

The plaintiff alleged that there was a wilful neglect on the part of the railway Company and that the plaintiff's packages having been lost he was entitled to damages as well as interest. The defence taken by the railway company was that there was no wilful neglect on their part and that it was a case of robbery from a running train and the company was, therefore, protected. The lower appellate Court has conceded in favour of the company that the burden of proving wilful neglect was on the plaintiff but held that the burden of proving a robbery from a running train was on the defendant company. It has held that there was no satisfactory evidence in this case to prove theft from the running train. As regards wilful neglect, it has found that the wagon in which the bags were loaded had no lock on it at all but a tin shackle had been put on it, which could be broken by any instrument. It has further found that there have been many thefts on this line. The finding that there was no theft on the running train also led to the conclusion that the theft took place at a time when the train was not running but was standing at some station or in some yard. Having regard to all these circumstances, the learned Judge has recorded a finding that wilful neglect has been established in this case. In our opinion it is impossible to say that there was no legal

evidence to support the finding. The finding is really a finding of fact, and must be accepted in second appeal: see *Bindraban* v. *G. I. P. Ry* (1).

The learned Judge is quite right that, complete packages having been lost, the plaintiff is entitled to damages. It has not been argued before us that the interest allowed on the claim was not justified. The appeal is dismissed with costs, including in this Court on the higher scale.

P.N./R.K. *Appeal dismissed.*

(1) A.I.R. 1926 All. 369 (F.B.).

A. I. R. 1929 Allahabad 750 (1)

YOUNG, J.

Mansa Singh—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 283 of 1929, Decided on 5th June 1929, made by Sess. Judge, Cawnpore, on 18tth April 1929.

(a) Motor Vehicles Act (1914)—U. P. Rules R. 32—Words "if any person is injured" in R. 32 govern whole clause.

Rule 32 was made in order to provide for cases where people are injured and the words "if any person is injured" in R. 32 govern the whole of the rest of the clause and the other construction of R. 32, viz., on the occurrence of any accident, if there is no police officer present, the driver or person in charge of the motor vehicle shall report the accident without delay at the nearest police station, though possible, cannot be accepted as correct. [P 750 C 2]

(b) Interpretation of Statutes Construction.

Where there are two possible constructions it is the duty of the Court to use the common-sense construction. [P 750 C 2]

M. Waliullah—for the Crown.

Judgment.—In this case the only question for the decision of this Court is the proper construction to be put on R. 32 of the rule framed by the U. P. Government under the Motor Vehicles Act of 1914. The rule runs as follows:

"On the occurrence of any accident the driver and the person in charge of any motor vehicle concerned in the accident shall, if any person is injured, render to such person all such assistance as may be reasonably necessary, and shall, if there be no police officer present, report the accident without delay at the nearest police station."

There are two possible constructions of this rule, neither of which would offend against the rules of construction or of grammar. The first is that the words "if any person is injured" govern the whole of the rest of the clause. The other construction possible is that on the occurrence of any accident, if there is no police officer present, the driver or person in charge of the motor vehicle shall report the accident without delay at the nearest police station. In my opinion, the first construction is the correct one. I think the words "if any person is injured" govern the whole of the clause. I agree with the learned Magistrate that the second construction he puts upon the clause is a possible one, but where there are two possible constructions, it is the duty of the Court to use the common sense construction. I think that this rule was made in order to provide for cases where people are injured, and that the other construction would put an impossible burden upon the motoring public, and incidentally have the effect of putting upon the High Court some time or other the duty of defining or limiting the use of the word "accident," otherwise, if the second construction is placed upon this rule, any motorist or any person in charge of a motor vehicle would be under the danger of fine if he did not report to the police any one of the hundred various things of no importance which might happen to him, but which might very well be defined as an accident. I accept the reference and set aside the conviction and fine. The fine, if paid, shall be refunded.

P.N./R.K. *Conviction set aside.*

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* A. I. R. 1929 Allahabad 750 (2)

SULAIMAN AND PULLAN, JJ.

Angad Singh and *others*—Plaintiffs—Appellants.

v.

Bahadur Singh and *others*—Defendants—Respondents.

First Appeal No. 358 of 1926, Decided on 25th June 1929, from a decree of Sub-Judge, Jaunpur, D/- 6th April 1926.

*** Hindu Law—Alienation—Suit by sons for setting aside sale-deed executed by their father—Vendee never in possession of property—Suit is governed by Limitation Act, Art. 120.**

Where a suit was brought by certain Hindus for setting aside a sale-deed executed by their father and where the property was in the possession of the mortgagee even at the

time of the institution of the suit and the vendee had never obtained possession, the suit is to be regarded as merely a declaratory suit and Art. 120 and not 126 applies for alienee did not get possession : *A. I. R.* 1927 *All.* 702 ; 41 *Mad.* 650; 70 *P. R.* 1914, *Ref.*

[P 751 C 2]

N. P. Asthana—for Appellants.

Haribans Sahai—for Respondents.

Judgment.—This is a plaintiffs' appeal in a suit brought by certain Hindus for setting aside a sale deed executed by their father. The suit was dismissed by the lower Court on the plea of limitation and counsel have argued this point only before us. It is conceded that the property is still in the possession of the mortgagee and the vendee has never obtained possession. The date of the sale is 27th November 1913, and the suit was brought within 12 years. No doubt the plaintiff was under the impression that Art. 126, Lim. Act, applied to the case. But that article gives the period from which limitation begins to run as being "when the alienee takes possession of the property." The view taken by the lower Court and pressed upon us by the respondent is that where the alienee has not taken possession Art. 126 cannot apply, and if that article does not apply the only article applicable is 120 which prescribes a period as six years, and in that case the suit would be barred. A similar case came before a Bench of this Court and is reported in *Bindeshri Upadhia* v. *Sital Upadhia* (1). The view taken by the Judges was that the article could apply to a case where the alienee gets possession. It is true that a reference is made in the judgment to a decision of the Madras High Court reported in *Munia Goundan* v. *Ramasamy Chetty* (2) but we have read that judgment very carefully and we do not consider that it can be taken as an authority either for the proposition advanced by the appellant or for that relied upon by the defendant. The only other judgment to which we have been referred and which in our opinion is in point is one of the Punjab Chief Court, *Dev Raj* v. *Shiv Ram* (3) where the Judges said :

"It seems to us clear that to ask for a thing to be set aside implies a prayer for immediate relief, and not for a mere declaration that on the happening of a future contingency certain results will follow."

In this case there is no prayer for an immediate relief and if there were it could not be granted because the alienee is not in possession. This must be regarded as a merely declaratory suit and the only article of the Limitation Act which applies is in our opinion Art. 120. The suit therefore was rightly dismissed as being barred by time and we dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1927 All. 702=50 All. 163.
(2) [1918] 41 All. 650=34 M. L. J. 528=8 M.L.W. 28=45 I. C. 867=(1918) M.W.N. 448.
(3) [1914] 70 P. R. 1914=260 P. L. R. 1914=25 I. C. 463=165 P. W. 1914.

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* A. I. R. 1929 Allahabad 751

DALAL, J.

Jeot Ram Chaudhari — Defendant—Appellant.

v.

Mt. Lauji and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 313 of 1928, Decided on 28th June 1929, from a decree of Dist. Judge, Gorakhpur, D/- 6th December 1927.

*** Hindu Law — Maintenance—Father-in-law gifting portion of his self-acquired property to one of his sons—Widow-daughter-in-law is entitled to maintenance out of such property.**

Father-in-law is under a moral obligation to maintain a widow of a pre-deceased son and this moral liability becomes a legal obligation in the hands of his surviving sons who inherit father's estate ; and no distinction should be drawn in this respect between property which is inherited from the father-in-law and property which is gifted by him. Thus if father-in-law gifts a portion of self-acquired property to one of his sons, daughter-in-law is entitled to maintenance out of such property : 25 *Bom.* 263, *not Foll.*; *A. I. R.* 1924 *Cal.* 364 ; 11 *All.* 194 and 22 *Mad.* 305, *Rel. on.* [P 752 C 1, 2]

S. P. Sinha—for Appellant.

D. P. Malaviya—for Respondent.

Judgment.—This appeal involves a question of law which has not so far been specifically decided by this Court. The plaintiff Mt. Lauji is the widow of a pre-deceased son of one Abhilakh who owned 2 annas self-acquired property Admittedly this property was acquired by Abhilakh subsequent to the death of Dubri, husband of Mt. Lauji, the plaintiff. Abhilakh left him surviving three sons Palakdhari, Jeot Ram and Sheo Govind. During his lifetime he gifted an 8 pie share to Jeot Ram and Sheo

Govind each, while the balance of 8 pie was inherited by Palakdhari. Such appears to be the fact, though it is not explained why the 8 pie share outside the two gifts was not inherited by all the three brothers. The moral obligation of Abhilakh to maintain the widow of a predeceased son cannot be denied. It is well established in this Court since 1888 in the case of *Janki* v. *Nand Ram* (1) where a Full Bench of this Court held in favour of the moral liability of the father-in-law which became a legal obligation in the hands of his surviving son who inherited the father's property. The right, therefore, of Mt. Lauji to recover her maintenance allowance which has been fixed at Rs. 9 per month from the 8 pie share left by Abhilakh at the time of his death is admitted. In this second appeal Jeot Ram has raised the argument that his 8 pie share which he received by gift was not liable. He has in his favour a Bench judgment of the Bombay High Court in the case of *Bai Parvati* v. *Tarwadi Dolatram* (2). It was held there that the widow of a predeceased unseparated son had no right to maintenance from a person to whom her father-in-law had bequeathed the whole of his self-acquired property. This judgment, however, appears to have been arrived at laboriously after distiuguishing the previous Bombay case of *Yamunabai* v. *Manubai* (3). The authority of both the Calcutta and Madras High Courts is in favour of the plaintiff. In *Gopal Chandra Pal* v. *Kedambini Dasi* (4) a Bench of two Judges including Sir Asutosh Mookerjee held that no distinction should be drawn between property which is inherited from the father-in-law and property which is gifted by him. At p. 237 of the report they dissented from the Bombay ruling and observed :

"But we are unable to accept the contention that the daughter-in-law is not entitled to maintenance out of the property in the hands of a donee or devisee. If the contention of the appellant were to prevail, it would be possible for the father-in-law to evade his moral obligation and protect his estate after his death from the claim of the daughter-in-law, which, according to well established rules, at this stage ripens into a legal claim. It is on this principle that a contrary view has been maintained in the cases of *Yamunabai* v. *Manubai* (3) and *Rangammal* v. *Echammal* (5)."

The Bombay High Court pointed out that in the Madras case referred to in the Calcutta ruling the remarks of the learned Judges were mere obiter dicta on which the judgment distinctly stated it was not necessary to found a decision. In the Madras case, however, the opinion, whether necessary for the decision of the case or not, was expressed by such a great Hindu jurist as Subramania Ayyar who delivered the judgment. The learned Judge observed at p. 307 of the report :

"The better conclusion is, perhaps, that the party whose moral claim becomes a legal right would not be affected by testamentary dispositions in favour of volunteers made by the person morally bound to provide the maintenance. No doubt, if the title of the female claiming the maintenance were dependent on the volition of such a testator he could, by his will, have directed that she should get no maintenance out of his estate. But in cases like this, her claim to maintenance, originating from the status acquired by her marriage, becomes a legal right independently of his volition and comes into existence at the same moment as the dispositions in favour of the volunteer become operative. It is consequently difficult to see how the latter could affect the former."

My opinion, therefore, is that the view of law taken by the subordinate Courts is correct. Mr. Sinha expressed the apprehension that Mt. Lauji will recover the entire maintenance allowance from his client Jeot Ram, the appellant, as she was living with Palakdhari. This difficulty can be easily solved. The decree can be split up. I direct that the plaintiff shall recover Rs. 3 from every one of the three brothers Palakdhari, Jeot Ram and Sheo Govind, and that their liability shall not be joint. The maintenance for one year, Rs. 108, for the year prior to the institution of the suit shall also be recoverable separately from every brother at the rate of Rs. 36 from each. This amendment shall be made in the decree of the lower appellate Court ; otherwise the appeal is dismissed. The defendants shall jointly pay costs of the two subordinate Courts, while in this Court the parties shall bear their own costs.

P.N./R.K. *Appeal dismissed.*

(1) [1889] 11 All. 194=(1889) A. W. N. 56 (F.B.).
(2) [1901] 25 Bom. 263=2 Bom. L. R. 894.
(3) [1899] 23 Bom. 608=1 Bom. L. R. 95.
(4) A. I. R. 1924 Cal. 364.

(5) [1902] 25 Mad. 305=9 M. L. J. 14.

* A. I. R. 1929 Allahabad 753

BENNET AND IQBAL AHMAD, JJ.

(*Bohra*) *Kanhaiya Lal*—Plaintiff—Appellant.

v.

Girwar and *others*—Defendants—Respondents.

Second Appeal No. 904 of 1926, Decided on 28th June 1929, against decree of Sm. Cause Court Judge, Agra.

(a) Adverse possession—Onus lies on claimant.

The burden of proving title by adverse possession lies upon the person claiming to have acquired title by such possession. [P 753 C 1]

*** (b) Limitation Act, Art. 144—Art. 144 applies to suit for possession of immovable property on basis of title.**

The article applicable to a suit in which the plaintiff sues for possession of immovable property on the basis of his title is Art. 144 and if in such a suit the plaintiff proves his title, he is entitled to a decree, unless the defendant succeeds in establishing his adverse possession for a period of more than 12 years: *A. I. R.* 1928 *All.* 412; *A. I. R.* 1928 *P. C.* 146, *Disc.* and *Dist.*; *A. I. R.* 1916 *P. C.* 21; 41 *All.* 669; *A.I.R.* 1925 *All.* 454, *Rel. on.* [P 753 C 1, 2]

*** (c) Limitation Act, Art. 142—Art. 142 is restricted to cases in which relief sought is based on possessory title.**

Article 142 is restricted to cases in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title and the burden of proving the fact that the plaintiff was in possession and was dispossessed within 12 years of the date of the suit lies on the plaintiff and on proving these facts, the plaintiff is entitled to a decree unless the defendant establishes that he is the true owner of the property in dispute.

[P 753 C 1]

S. K. Dar—for Appellant.

G. Agarwala—for Respondents.

Judgment. — This appeal must be allowed. It is impossible to contest the proposition that the onus of establishing title by reason of possession for a certain requisite period lies upon the person asserting such possession. In other words, the burden of proving title by adverse possession lies upon the person claiming to have acquired title by such possession. The findings of the lower appellate Court in the present case are that the plaintiff's title to the property in dispute has been proved, and that the evidence of both parties as regards possession is worthless. On these findings, in our judgment, the plaintiff was entitled to a decree.

The article applicable to a suit in which the plaintiff sues for possession of immovable property on the basis of his title is Art. 144, Sch. 1, Lim. Act. and if in such a suit the plaintiff proves his title, he is entitled to a decree unless the defendant succeeds in establishing his adverse possession for a period of more than 12 years. To cases in which the plaintiff claims relief on the basis of his title Art. 142 has no application That article applies to suits in which the plaintiff claims possession of property on the ground that while in possession he was dispossessed, or his possession was discontinued by the defendant. In other words that article is restricted to cases in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title. Every person is entitled to have his peaceful possession protected and no one has a right to take the law in his own hands and disturb the peaceful possession of another. Possession is in itself title and good against everybody except the true owner. In short, there may be cases in which a person, though not the true owner, has been in peaceful possession of property and his possession is disturbed. In such cases the person dispossessed has a right to claim to be restored back to possession on proving the fact of his possession and his dispossession or discontinuance of his possession by the defendant within a period of 12 years prior to the institution of the suit. To such cases Art. 142 applies, and the burden of proving the fact that the plaintiff was in possession and was dispossessed within 12 years of of the date of the suit lies on the plaintiff and, on proving these facts, the plaintiff is entitled to a decree unless the defendant established that he is the true owner of the property in dispute.

Another class of cases are those in which the plaintiff sues for possession of immovable property both on the ground of his title and on the ground of his possession having been disturbed by the defendant. In such cases if he proves his title, the burden of establishing title by adverse possession for more than 12 years lies upon the defendant and if he succeeds in proving that fact, the suit must fail; otherwise the plaintiff is entitled to a decree. To this extent Art. 144 will apply to such a suit. But it may be that the plaintiff, though not able to substantiate his title, is in a

position to prove his possession and dispossession by defendant within 12 years. If that be the case, Art. 142 will apply and burden will lie on the plaintiff. In short, suits for possession based both on the plaintiff's title and possessory title invite the application of Arts. 142 and 144, according to the varying circumstances of each case.

The view that we take is in consonance with the view of their Lordships of the Judicial Committee in *Secy. of State* v. *Chellikani Rama Rao* (1) and the decisions of this Court reported in *Jaichand* v. *Girwar Singh* (2) and *Ali Hammad* v. *Ghur Pathar* (3). The learned advocate for the respondents has placed reliance on the case of *Sita Ram Dube* v. *Ram Sundar Parsad* (4) and *A. I. R.* 1928 *P. C.* 146 and 165. In our opinion, neither of these cases have any bearing on the controversy before us. All that was decided in the case reported in *Sita Ram* v. *Ram Sundar* (4) was that, where a purchaser in execution has obtained delivery of possession, in accordance with law, that would, as between the parties to the proceedings or delivery of possession, give a new start for the computation of limitation and the auction purchaser is entitled to a decree for possession provided he brings his claim within 12 years from the date of delivery of such possession. No one can controvert that proposition of law, but that proposition has no application to the facts of the present case.

The case of *Kamakhya Narayan Singh* v. *Ram Raksha Singh*, *A. I. R.* 1928 *P. C.* 146 also has no bearing on the question before us. In that case the claim of the plaintiff, whose predecessor-in-title had granted a lease, as against the assignee of the lessee was dismissed on the ground that no contract of tenancy between the lessor and the assignee of the lessee had been established and that the lessee had established his title by adverse possession for a period of more than 12 years. Similarly in the last case cited by the learned counsel for the respondent the claim of the plaintiff was dismissed as against the defendant on the ground that the plaintiff having obtained a decree for possession against the defendant of that suit had taken no step for a period of 12 years to enforce that decree and to obtain possession of the property. It is manifest that from the date of the decree for possession the possession of the defendant of that suit was in fact and in law adverse to the plaintiff of that suit and, as such, the view expressed by their Lordships of the Judicial Committee in that case in no way militates against the view taken by us in the present case. For the reasons that we have given we allow this appeal, set aside the decrees of the Courts below and decree the plaintiff's suit with costs in all Courts.

P.N./R.K. *Appeal allowed.*

(1) A. I. R. 1916 P. C. 21=39 Mad. 617=43 I. A. 192 (P.C.).
(2) [1919] 41 All. 669=52 I. C. 366=17 A. L. J. 814.
(3) A. I. R. 1925 All. 454=47 All. 389.
(4) A. I. R. 1928 All. 412=50 All. 813.

A. I. R. 1929 Allahabad 754

SULAIMAN AND NIAMATULLAH, JJ.

Balbhaddar Prasad—Defendant—Applicant.

v.

Mt. Bitto—Plaintiff—Opposite Party.

Civil Revn. No. 120 of 1928, Decided on 13th June 1929, against order of Sub-Judge, Cawnpore, D/- 14th January 1928.

Transfer of Property Act, S. 83 — Money deposited to credit of two mortgagees—One of them dead—Court has jurisdiction to consider who was mortgagee at time of application for withdrawal of deposit—Refusing inquiry is failure of exercise of jurisdiction.

Where money is deposited to the credit of two mortgagees and one of them is dead the Court is competent to consider who the mortgagee was at the time when the application was made, that is to say, whether the applicant alone is entitled to withdraw the money. A Court refusing to make such inquiries fails to exercise jurisdiction which is vested in it.

[P 755 C 1]

S. N. Seth—for Applicant.

Judgment.—This is an application in revision from an order, dated 14th January 1928, refusing to allow the applicant to withdraw the money deposited under S. 83, T. P. Act, by the mortgagor. The money was deposited in favour of the present applicant and his father on 16th October 1922. An application was made on 9th December 1922, on behalf of the present applicant alone, which was consigned to the record room on the ground that both the mortgagees had not joined. Later on, a fresh application wae made by the applicant, alleging that his father had not been heard of for more than seven years, and must be presumed to be

dead. The learned Judge has considered that he is not competent to make enquiries into the death of the applicant's father, and has thought that without the consent of the mortgagor he cannot order the money to be paid to only one of the mortgagees.

In our opinion, the Court below has failed to exercise jurisdiction which was vested in it. The amount was deposited to the credit of the two mortgagees ; but the Court was competent to consider who the mortgagee was at the time when the application was made, that is to say, whether the present applicant was alone entitled to withdraw the money. This may be so, because he is now the sole surviving member of the family, or it may be that he is the karta of the Hindu family or otherwise authorized to withdraw the money. We accordingly set aside the order and send this case back for disposal according to law.

R.M./R.K. *Case remanded.*

A. I. R. 1929 Allahabad 755

SULAIMAN AND PULLAN, JJ.

Ganeshi Lal—Plaintiff—Appellant.

v.

Chob Singh and *others*—Defendants—Respondents.

Second Appeal No. 1725 of 1927, Decided on 9th July 1929, from a decree of District Judge, Aligarh, D/- 15th August 1927.

(a) Agra Pre-emption Act, S. 5—Record recognizing right of pre-emption—Wajib-ul-arz is conclusive evidence of custom of pre-emption.

Once plaintiff shows that there was a wajib-ul-arz prepared relating to a mahal which contained the record recognizing the right of pre-emption, whatever its extent and in whatever form expressed, the Court ought to presume under S. 5 of the Act that there is a custom of pre-emption. From that moment the entry in the wajib-ul-arz ceases to be of any significance. [P 755 C 2]

(b) Agra Pre-emption Act, S. 12—Petty proprietor has preference over cosharers if he is coparcener in the very interest sold.

Under S. 12 a petty proprietor has preference over cosharers if he is a coparcener in the proprietary interest sold. But he must be a coparcener in the very interest which has been sold and not merely a petty proprietor of any other hand. [P 755 C 2]

N. P. Asthana—for Appellant.

Baleshwari Prasad—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for pre-emption. The plaintiff owns khewat 7 which consists of an isolated plot which is a resumed muafi. The property sold consists of plots in khewat 18 which also are resumed muafi lands. The learned Judge has found that these are petty proprietary interests and do not represent zamindari shares in the mahals.

The plaintiff produced a wajib-ul-arz of 1872 which contains a record of custom. The lower appellate Court has gone into the provisions of the wajib-ul-arz and discussed its various clauses and then come to the conclusion that the entry in it did not relate to these muafi lands. He has further found that the plaintiff's case would fail on the terms of the wajib-ul-arz. As regards S. 12, Pre-emption Act, he has thought that the question did not arise in this case. He has accordingly dismissed the suit.

In our opinion the judgment of the Court below is wrong on both ths points, though the decree is right. Once the plaintiff showed that there was a wajib-ul-arz prepared relating to this mahal which contained a record recognizing a right of pre-emption, whatever its extent and in whatever form expressed, the Court ought to have presumed under S. 5 of the Act that there was a custom of pre-emption. From that moment the entry in the wajib-ul-arz ceased to be of any significance. The custom which is presumed to exist is the custom which is specified in S. 12 of the Act and no other custom. Under S. 12 of the Act a petty proprietor has preference if he is a coparcener in the proprietary interest sold. In such cases he is given preference over even cosharers. But he must be a coparcener in the very interest which has been sold and not merely a petty proprietor of any other lands. In the present case the plaintiff is not a coparcener in the interest which has been sold, namely the plots in khewat 18. He does not come under Cl. 1 specified in the section. On this point the suit should have been dismissed. The appeal is accordingly dismissed with costs including in this Court fees on the higher scale.

R.M./R.K *Appeal dismissed.*

A. I. R. 1929 Allahabad 756 (1)

BOYS AND BENNET, JJ.

Jai Jai Ram and *others*—Plaintiffs.

v.

Janki and *others*—Defendants.

Misc. Case No. 157 of 1929, Decided on 15th April 1929—Reference from Commissioner Allahabad Division, D/- 30th January 1929.

Practice—Appeal should lie to Court to which it lay when suit filed in spite of subsequent change in law.

An appeal should lie to the Court to which an appeal lay at the time the suit was filed in spite of subsequent change in the law applicable to the case, whether the Act provides for an appeal or not : (1905) *A. C.* 368 and *A. I. R.* 1928 *All.* 437 (*F. B.*), *Rel. on.*

[P 756 C 2]

Judgment.—This is a reference by the Commissioner of the Allahabad Division under S. 267, Act 3 of 1926 on a question of jurisdiction. The suit in question was brought by the plaintiffs who claimed to be exproprietary tenants of a holding, and they sued the defendants for ejectment under S. 58, Agra Tenancy Act, 2 of 1901, alleging that the defendents were their sub-tenants. The defendants claimed to hold as khudkasht and not as sub-tenants. The Assistant Collector decided that the defendants held the land as khudkasht and not as sub-tenants of the plaintiffs, and he dismissed the suit on these grounds. The plaintiffs filed an appeal against this order in the Court of the District Judge of Cawnpore. The respondents objected that an appeal did not lie to the District Judge. The District Judge held that under S. 271, Expln. 2, Act 3 of 1926, a question of proprietary right did not include the question whether land in the actual possession of a proprietor thereof was held by such proprietor as his *sir* or khudkasht or as a tenant or sub-tenant, and accordingly he held that no question of proprietary right was raised in the appeal in his Court, and therefore the appeal lay to the Commissioner and not to the District Judge. It is clear that under Act 2 of 1901 an appeal in the present case would have lain to the District Judge, because there was no proviso in that Act similar to S. 271, Expln. 2, Act 3 of 1926. The sole question is whether the procedure for the appeal should be under Act 2 of 1901 or under Act 3 of 1926. It has been laid down by a Full Bench of this Court in *Rama Singha* v. *Shankar Dayal* (1) that an appeal is a mere continuance of the original proceedings initiated by the filing of the plaint, and the right to continue that proceeding by way of an appeal cannot be affected by a new Act unless that Act expressly makes provision to that effect. Right of appeal is a substantive right and not a matter of procedure. The District Judge has doubted the application of this ruling to the present case, and he considers that its application is limited to a case where the new Act provides no appeal at all. But in the ruling quoted reference is made to the case of the *Colonial Sugar Refining Co. Ltd.* v. *Irving* (2).

"In that case ordinarily an appeal lay to their Lordships af the Privy Council from an order of the Supreme Court. While the matter was pending in that Court the law was amended so as to allow an appeal to the High Court. Their Lordships of the Privy Council held that the new Act could not deprive the party of his right to appeal to the Privy Council."

The present case is similar to the *Colonial Sugar Refining Co. Ltd.* v. *Irving* (2). As it is also a case where a new Act is changed, the Court to which the appeal lies is the Court of the District Judge. We consider, therefore, that according to the Privy Council ruling an appeal should lie to the Court to which an appeal lay at the time the suit was filed, i. e., to the Court of the District Judge. We accordingly return this reference, and we direct the District Judge to admit this appeal under its original number and dispose of it according to law. A copy of this order will be sent to the Commissioner, and the record will be sent direct to the District Judge. Costs will abide the result.

S. N./R.K. *Reference answered.*

(1) A. I. R. 1928 All. 437=50 All. 965 (F. B.).
(2) [1905] A. C. 369=74 L. J. P. C. 77=21 T. L. R. 513=92 L. T. 738.

A. I. R. 1929 Allahabad 756 (2)

SEN, J.

Ata Karim—Plaintiff—Appellant.

v.

Municipal Board, Fatehpur and *another*—Defendants—Respondents.

Second Appeal No. 205 of 1928, Decided on 27th June 1929, against decree of Sub-Judge, Fatehpur.

(a) Jurisdiction — Bar of — Municipal Board—Act of, can be questioned by a civil Court if power not given by law is assumed—

U. P. Municipalities Act (2 of 1916), Ss, 318 and 321.

If a Municipal Board assumes a power or authority which the law has not given, or acts illegally under cover of and in excess of its statutory powers its action can be challenged in a civil Court but if it confines itself within its statutory powers such exercise of the powers cannot be questioned in a civil suit: 4 *Myl. Cr.* 249; 2 *A. L. J.* 222, *Rel. on.* [P 757 C 2]

(b) U. P. Municipalities Act, S. 178—Powers of Board.

The Board has controlling voice not only in cases of erection of new building or new part of a building but also in cases where a building was sought to be re-erected or a material alteretion was to be made. [P 758 C 2]

M. A. Aziz—for Appellant.

S. N. Seth—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit in which the following relief was prayed for: The plaintiff prays that the Municipal Board be ordered not to offer any sort of interference and not to restrain the plaintiff from making constructions in respect of the mosque in question, shown in the annexed map, and not to enforce the District Magistrate's order, dated 12th September 1927, for the demolition of the said mosque.

The plaintiff came into Court on the allegation that he owned a mosque in mohalla Danrya in ward Chandiana within the Municipal limits of Fatehpur, that the mosque being in a dilapidated condition, he applied to the Municipal Board for leave to re-erect the mosque on 6th June 1927, that the Municipal Board granted him permission on 2nd July 1927, that later on, two persons namely, Amar Nath clerk to B. Bans Gopal Vakil and one Basdeo made an application in the Court of the District Magistrate by way of an appeal and that the District Magistrate by his order dated 12th September 1927, allowed the appeal and directed that the Municipal Board should pull down the portion of the mosque which had been built up afresh.

The suit was originally directed against the Municipal Board of Fatehpur. The Court of first instance dismissed the suit on the ground that having regard to the provisions of S. 318 and S. 321, United Provinces Municipalities Act (Act 2 of 1916, Local), the suit was misconceived and that the civil Court had no jurisdiction to entertain the suit. The lower appellate Court has affirmed this decision. It is contended by the plaintiff in second appeal that the civil Court had jurisdiction to entertain the suit as brought.

There can be no manner of doubt that the suit launched by the plaintiff was a suit of a civil nature and that under S. 9, Civil P. C,, the Court had jurisdiction to entertain all suits of a civil nature excepting suits of which their cognizance was either expressly or impliedly barred:

"If a Municipal Board assumes a power or authority which the law has not given, its action can be challenged by a suit in a civil Court but if it confines itself within its statutory powers, such exercise of the powers cannot be questioned in a civil suit: *Fremin* v. *Lewis* (1) and *Abdul Aziz* v. *Municipal Board of Pilibhit* (2)."

It may also be conceded that where the Municipal Board acted under cover of a statutory enactment but illegally and in excess of its statutory powers, any person aggrieved by the said act was competent to seek his remedy such as was open to him under the general law except so far as the general law was restricted, limited or controlled by statutory enactment.

The plaintiff had applied to the Board for permission to erect or to re-erect a building within the meaning of S. 178, Municipalities Act. S. 180 of the Act provides as follows:

"(1) Subject to the provisious of any bye-law, the Board may either refuse to sanction any work of which notice has been given under S. 178 or may sanction it absolutely or subject to (a) any written directions that the Board deems fit to issue in respect of all or any of the matters mentioned in the sub-head (b) of heading A of S. 298, or (b) a written direction requiring the set back of the building or part of a building to the regular line of the street etc.; (3) should the Board neglect or omit for one month after the receipt of a valid notice under S. 178 to make and deliver to the person who has given such notice an order of the nature specified in sub.S. (1) in respect thereof, such person may by a written communication call the attention of the Board to the omission or neglect, and if such omission or neglect continues for a further period of 15 days, the Board shall be deemed to have sanctioned the proposed work absolutely. (4) Provided that nothing in sub-S. (3) shall be construed to authorize any person to act in contravention of this Act or of any bye-law. (5) No person shall commence any work of which notice has been given under S. 178 until sanction has been given or deemed to have been given under this section."

It was, therefore, not competent to the plaintiff to commence the construc-

(1) 4 Myl. Cr. 249.

(2) [1905] 2 A. L. J. 222=(1905) A. W. N. 79.

tion of the building in dispute without being armed with the sanction within the purview of S. 180 of the Act.

Section 318 of the Act provides as follows:

"Clause (1). Any person aggrieved by any order or direction made by a Board under the powers conferred upon it by Ss. 180 (1) and 186 . . . . . or under a bye-law made under heading G of S. 298, may within 30 days from the date of such direction or order exclusive of the time requisite for obtaining a copy thereof, appeal to such officer as the Local Government may appoint for the purpose of hearing such appeals or any of them, or failing such appointment to the District Magistrate: Provided that if, in the latter case the District Magistrate be himself a member of the Board, the appeal shall lie to the Commissioner."

It was in pursuance of S. 318 of the Act that Basdeo appealed to the District Magistrate. It is not questioned in appeal to this Court that the District Magistrate was not the proper forum for the appeal. S. 321 provides that:

"No order or direction referred to in S. 318 shall be questioned in any other manner or by any other authority than is provided therein.

"Clause (2). The order of the appellate authority confirming, settling aside or modifying any such order or direction shall be final provided that it shall be lawful for the appellate authority, upon an application and after giving notice to the other party, to review any order passed by him in appeal by a further order passed within three months from the date of his original order."

The District Magistrate as the appellate authority under S. 318 having set aside the order of the Municipal Board according permission to build, the order of the District Magistrate was final under Cl. (2), S. 321. The policy of the legislature seems to have been to give a finality to the orders promulgated by a municipal authority in pursuance of definite statutory provisions. In *Mannua* v. *Emperor* (3), Piggott, J., observes as follows:

"Under the United Provinces Municipalities Act (Act 2 of 1916) the jurisdiction of the civil Courts is limited by the provisions of Ss. 318 and 321 of the said Act. I have no doubt that under these sections the only remedy of a person who considered himself aggrieved by a bye-law made under S. 298 of the Act heading G (which is the heading dealing with offensive and dangerous trades) would be by way of appeal to the higher authority referred to in S. 318, but it is by no means equally clear that a suit would not lie for an injunction to compel a Municipal Board to grant the plaintiff a license for carrying on a particular trade upon a particular spot provided always that the plaintiff was prepared to take out the license subject to all the conditions prescribed by the bye-laws and could satisfy the Court that the Municipal Board had refused the license for reasons wholly unconnected with the public health, safety or convenience."

(3) [1919] 17 A. L. J. 976=52 I. C. 785=20 Cr. L. J. 705.

The plaintiff contends that his application to the Municipal Board was not for the erection of a building but for the re-erection of the mosque which at one time existed on the plot in dispute and that under the terms of the Municipal bye-laws neither the Municipal Board nor the District Magistrate in appeal was competent to forbid the construction of the building or to direct the demolition of such portion of the mosque as had already been re-erected. The bye-laws framed by the Municipal Board of Fatehpur are not before me. I am not in a position to say whether the Fatehpur Municipality intended to make a distinction between the erection and re-erection of a building which was sought to be made by any citizen. It does not, however, seem to square with common sense that any restrictions sought to be imposed by the Municipal Board as regards the erection of a building could have been intended to be limited to a building which was intended to be put up for the first time upon the site and were not intended to be extended to the cases of re-erections of buildings. S. 178, Municipalities Act clearly indicates that, the Municipal Board was to have the controlling voice not only in cases of the erection of a new building or new part of a building but also in cases where a building was sought to be re-erected or a material alteration was intended to be made in an existing building. The learned advocate for the appellant has not been able to show that the act of the District Magistrate in either entertaining the appeal of Basdeo or in directing the demolition of the portion which had already been built was either ultra vires or in any way in excess of his statutory authority. Under S. 186, Municipalities Act the Board was competent at any time by a written notice to direct the owner or occupier of any land to stop the erection, re-erection or alteration of a building or part of a building or the construction or enlargement of a well thereon etc. It appears that the powers of the Court of appeal

in this respect were not different from the powers which were possessed by the Municipal Board itself. I have not the slightest doubt in my mind that the case has been properly decided by the Courts below that the suit is misconceived and that the civil Court had no jurisdiction to entertain the suit or to grant the reliefs prayed for in the plaint. The result is that this appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 759 (1)

SULAIMAN AND NIAMATULLAH, JJ.

Ram Ratan—Defendant—Applicant.

v.

Ram Lal Singh and *another* —Plaintiff and Defendant—Opposite Parties.

Civil Revn. No. 200 of 1928, Decided on 14th June 1929, from order of Munsif of Banda, D/- 17th March 1928.

(a) Oaths Act (10 of 1873), Ss. 9 and 11—Statement on oath by witnesss is conclusive and binding on party offering to be bound by it.

Where a party offers to be bound by the oath of a witness and the evidence is given, the evidence so given shall as against the person who offered to be bound is a conclusive proof of the matter stated. [P 759 C 2]

(b) Oaths Act (10 of 1873), S. 9— Offer to decide case in accordance with particular witnesses deposition is binding.

The offer that the case should be decided in accordance with the statement of a witness undoubtedly amounts to an offer to be bound by his deposition. [P 759 C 2]

(c) Oaths Act (10 of 1873), Ss. 9 and 11—Evidence is binding against parties offering to bind.

Sections 9 and 11 do not require that all parties in a suit should agree to be so bound. The evidence given is binding as against those parties who have offered to be bound. [P 759 C 2]

G. K. Shinde—for Applicant.

Ram Nama Prasad—for Opposite Parties,

Judgmnet.—This is an application in revision by the defendant Ram Ratan. His mother Mt. Dukhni was also a defendant whom the plaintiff in his amended plaint had alleged to be a pro-forma defendant who had no interest in the property. At the trial the plaintiff and the defendant Ram Ratan agreed to abide by the statement of one Bihari Singh on oath before the Court. Bihari Singh made his statement on oath and the trial Court pronounced its judgment in accordance with the statement of Bihari Singh. On appeal the District Judge has held that inasmuch as there was no such agreement on behalf of Mt. Dukhni the case should be disposed of on the merits as against her.

Ram Ratan wants that the whole case should be retried and should not be bound by the statement of Bihari Singh. In our opinion the case fell under Oaths Act. Under S. 9 the defendant Ram Ratan had offered to be bound by the oath of any witness and under S. 11 the evidence so given shall, as against the person who offered to be bound, be conclusive proof of the matter stated. It is therefore clear that Ram Ratan cannot be allowed to resile from that position. His offer that the case should be decided in accordance with the statement of Bihari Singh undoubtedly amounted to an offer to be bound by his deposition. Ss. 9 and 11 of the Act do not require that all the parties in a suit should agree to be so bound. The evidence given is binding as against those parties who have offered to be bound

The view taken by the learned District Judge was correct and there is no ground for interference in revision. The application is dismissed with costs including in this Court fees on the higher scale.

V.B./R.K. *Application dismissed.*

A. I. R. 1929 Allahabad 759(2)

SULAIMAN AND NIAMATULLAH, JJ.

Collector of Ballia—Defendant—Appellant.

v.

Benaik Pershad Pandey and *others*—Plaintiffs—Respondents.

Second Appeal No. 80 of 1928, Decided on 24th June 1929, against decree of Addl. Sub-Judge, Ballia, D/- 8th September 1927.

(a) Court of Wards Act, S. 16— After person's estate is taken over by Court of Wards he cannot contract debt.

A person, after his estate has been taken over by the Court of Wards is not competent to contract a debt and any money advanced to him is not legally recoverable. [P 760 C 2]

(b) Court of Wards Act, S. 16—S. 16 is imperative.

Section 16 is imperative and the presumption under it is not rebuttable. [P 760 C 2]

(c) Court of Wards Act, S. 16—Notification regarding assumption of superintendence relating to entire estate—Superintendence of only part of minor's property cannot be assumed.

It is wrong to say that the Court of Wards can under the law assume superintendence of part of the property of the minors and not be

deemed to have assumed superintendence of another part when the notification regarding assumption of superintendence relates to the entire estate and the mere fact that the Collector has omitted to take possession and custody of part of the property would not in any way take that property out of the superintendence of the Court of Wards : 25 *All.* 195 ; *A. I. R.* 1924 *Oudh* 438, *Rel. on.* [P 760 C 2]

U. S. Bajpai—for Appellant.

P. L. Banerji and *K. Verma*—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit for recovery of an amount from the estate of Banke Bahadur Singh, deceased. The plaintiffs impleaded the minor sons of Banke Bahadur Singh under the guardianship of their mother, Mt. Janki Kunwar. She declined to act as guardian, and ultimately the Collector, as the manager of the Court of Wards, was appointed the guardian ad litem of the minors. One of the pleas raised in defence was that the minors were the wards of the Court of Wards and could not be sued in their personal capacity without impleading the Collector. The Court of first instance overruled this plea on the view that the presumption under S. 16, Court of Wards Act of 1912 was rebuttable and it was established by evidence that the Court of Wards had not in fact taken possession of some of the properties of the wards. An appeal was preferred by the Collector of Ballia on behalf of the minor defendants, and that appeal has been dismissed by the Judge, although he did not accept the interpretation of S. 16, as put upon it by the trial Court.

The whole of the Nagra estate of which some properties form part which are stated to be still in the possession of the wards and not in the possession of the Court of Wards, was taken over by the Court of Wards in 1904 when the defendants' grandfather was alive. Subsequently, the estate was released from its superintendence on 6th August 1920, and with effect from the same date there was a fresh assumption of superintendence under S. 12 of the new Court of Wards Act 1912, and there was a notification published in the Gazette in that month. Banke Bahadur Singh, the father of the present defendants, was declared to be a ward of the Court, and the entire estate was brought under the superintendence of the Court of Wards.

Between 1920 and 1922, the plaintiffs advanced some money to Banke Bahadur, who executed a sarkhat, dated 1st December 1922, which is the basis of the present suit. Banke Bahadur died in 1924, and the present suit was instituted against his sons in 1925. It is quite clear that Banke Bahadur, after his estate had been taken over by the Court of Wards was not competent to contract a debt and any money advanced to him was not legally recoverable. It is quite obvious that the view of the learned Munsif that the presumption under S. 16 was a rebuttable presumption is wrong. The section provides that the whole of moveable or immovable property of the ward shall be deemed to be under the superintendence of the Court of Wards. That section is imperative, and the presumption is not rebuttable.

Both the Courts below are wrong in thinking that the Court of Wards can under the law assume superintendence of part of the property of the minors and not be deemed to have assumed superintendence of another part when the notification related to the entire estate. The mere fact that tht Collector has omitted to take the possession and custody of part of the property, assuming that this is the case here, would not in any way take that part of the property out of the superintendence of the Court of Wards. This point is well settled, and we may only refer to *Lachmi Narain* v. *Fateh Bahadur* (1), which has been followed by the Oudh Court in the case of *Hari Kishun Das* v. *Mohd. Shafi Jan* (2). S 55 of the Act also enjoins that :

"No wards shall sue or be sued nor shall any proceedings be taken in the civil Court otherwise than by and in the name of the Collector in charge of his property or such other person as the Court of Wards may appoint in this behalf."

The present suit was, therefore, defective. The estate of Banke Bahadur Singh had devolved by inheritance on the minors, and they could not possibly have been sued in their personal capacity without impleading the Collector as a party.

An objection is taken on behalf of the respondents that the appeal as preferred to the Court of the District Judge was not competent, inasmuch as it was filed by the Collector who was not a party to the suit. This objection is, in our opinion, not tenable. The Collector was

(1) [1903] 25 All. 195=(1903) A. W. N. 8.
(2) A. I. R. 1924 Oudh 438=28 O. C. 34.

made the guardian ad litem of the minors, and he preferred the appeal on behalf of the minors. It may either be taken as an appeal by the guardian ad litem of these minors or an appeal under S. 65, Court of Wards Act, from a decree passed against a minor who was a ward. In this view of the case the appeal was rightly preferred to the District Judge, and a second appeal to this Court also lies. The result of our view is that the decrees of the Courts below cannot be maintained. We accordingly allow this appeal, and setting aside both the decrees, dismissed the suit with costs in all the Courts, including costs in this Court on the higher scale.

P.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 761 (1)

SULAIMAN AND NIAMATULLAH, JJ.

Collector of Ballia—Applicant.

v.

Liladhar Bhagat—Opposite Party.

Civil Revn. No. 60 of 1928, Decided on 24th June 1929, against order of Addl. Sub-Judge, Ballia, D/- 21st October 1927.

Civil P. C., S. 115 — Indispensable party not brought on record—Court's act is illegal or materially irregular and so revisable.

Where contrary to the imperative provisions of S. 55, Court of Wards Act, the Collector who is an indispensable party in a suit for money against certain minors, is not brought on record the Court acts illegally in the exercise of its jurisdiction or at least there is material irregularity in the exercise of jurisdiction and as such it is a case in which the High Court can interfere under S. 115 : *A. I. R.* 1926 *P. C.* 142, *Ref.* [P 761 C 2]

U. S. Bajpai—for Applicant.

L. M. Roy—for Opposite Party.

Judgment.—A preliminary objection is taken to the hearing of this revision, namely, that no revision lies inasmuch as the District Judge has at best only committed an error of law and has not acted without jurisdiction or committed any irregularity or illegality in the exercise of his jurisdiction. The suit was brought to recover a sum of money from certain minors, whose estate was under the Court of Wards of which the Collector was the manager, on a sirkhat executed by the deceased father of the defendants who also in his time had been a ward of the Court. The Collector was not impleaded as a party to the suit. The imperative provisions of S. 55, Court of Wards Act, were not complied with.

"No ward shall sue or be sued nor shall any proceedings be taken in the civil Court otherwise than by and in the name of the Collector in charge of his property or such other person as the Court of Wards may appoint in this behalf."

It was obvious that in the absence of the Collector the suit was wholly defective and improperly constituted and could not have been decreed. Both the Courts below have decreed it.

We think we have jurisdiction under S. 115, Civil P. C., to interfere in this case. The indispensable party in whose absence the suit could not have been entertained was not impleaded and the decree against the minors would be a nullity. The Court below has acted illegally in the exercise of its jurisdiction in entertaining and decreeing the suit contrary to the imperative provisions of S. 55. At the least there has been a material irregularity in the exercise of jurisdiction because the person who was an indispensable party was never brought on the record. We refer to the recent case decided by their Lordships of the Privy Council *Umad Mal* v. *Chand Mal* (1) where the omission to implead Mt. Fatima the necessary party was considered to be a material irregularity.

The other points raised in this revision are covered by our judgment in *S. A. No.* 80 *of* 1928 (2). We accordingly allow this revision and setting aside the decree of the Court below dismiss the suit with costs in all Courts.

R.M./R.K. *Revision allowed.*

(1) A.I.R. 1926 P.C. 142=54 Cal. 338=53 I. A. 271 (P.C.).

(2) A.I.R. 1929 All. 759 (2).

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* A. I. R. 1929 Allahabad 761 (2)

DALAL, J.

Mt. Dulari—Defendant—Appellant.

v.

Edward Thelwal and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 219 of 1928, Decided on 1st July 1929, against decree of Dist. Judge, Philibhit, D/- 4th November 1927.

(a) Practice — When issue cannot be reopened, decision thereon must be accepted without inquiry.

When an issue cannot be reopened, the decision thereon must be accepted without in-

quiry whether the Court which arrived at the decision was wide awake at the time or not and whether it had properly considered all the evidence and the law arising in the matter. [P 762 C 2]

* (b) **Civil P. C., S. 11—Exparte decree acts by way of res judicata quite as much as decree passed on proper contest.**

All that S. 11 requires is that the issue has been heard and finally decided. It does not prescribe the method of hearing and the character of decision in order to make it binding in a subsequent suit so that an exparte decree where the Court has not brought its mind to bear properly on the merits of the issue, is as binding by way of res judicata as a decree of any other kind : 24 *All.* 138 ; 24 *All.* 282 ; 7 *A. L. J.* 401 ; 12 *A. L. J.* 206 ; 12 *A. L. J.* 1011, *Rel. on.*; [P 762 C 2 ; P 763 C 1]

(c) **Practice — Grounds of appeal abandoned in first appeal cannot be raised in second appeal.**

Whether the grounds of appeal be grounds of law or fact once they are abandoned in the Court of first appeal they cannot be raised in the Court of second appeal. [P 762 C 1]

Shiva Prasad Sinha—for Appellant.

U. S. Bajpai and *L. M. Chatterji*—for Respondents.

Judgment.—I think that both the Subordinate Courts have gone wrong on the question of res judicata. I have refused to entertain grounds of appeal other than the first because they were abandoned in the Court of first appeal, and whether they be grounds of law or fact, once they are abandoned in the first Court they could not be raised in the Court of second appeal. There were three brothers Edward, Richard and John. Edward is the plaintiff of this suit and John is defendant ; Richard is dead, and the defendant Mt. Dulari is his widow. The father of these sons owned 200 bighas of cultivation in a certain village along with other property and bequeathed them to Richard for his life with reversion to Edward.

On 8th February 1922, subsequent to the father's death and after the will came into operation Edward executed a deed of release in favour of Richard of this area of land. Richard then considering himself to be the full owner of this land executed a deed of gift thereof bequeathing half and half to John and Mt. Dulari. We need not refer to Richard's will as I have refused to consider grounds of appeal other than the one covering the question of res judicata. After the death of Richard Mt. Dulari sued both John and Edward for partition of the 200 bighas and stated in her plaint that Edward was only nominally a defendant as he had no right to the property in respect of which partition was asked for by her because of his release dated 8th February 1922. Both John and Edward entered into defence, and Edward pleaded that the deed of release was not good at law. The same counsel was appointed to represent both brothers. The issue, therefore, arose between Mt. Dulari and Edward as to whether the deed of release was valid or not. Two issues were framed, the first and second, with respect to that deed. Before any evidence had been recorded John and Mt. Dulari compromised the suit in terms of the plaint that the land should be divided between them and the actual partition made subsequently by the patwari. The Court granted a decree in the following words :

"That a decree be prepared in terms of the compromise. The decree is ex parte in the same terms against the absent defendant (meaning Edward)."

This decree was passed on 12th October 1925. On 25th August 1926 Edward filed the present suit against John and Mt. Dulari for recovery of the 200 bighas of land on the ground that the deed of release of 8th February 1922 was invalid and not binding on him.

The two Subordinate Courts held that the decree of 12th October 1925 did not act by way of res judicata because it was passed by the Court without that Court bringing its mind to bear judicially on the question whether the deed of release of 8th February 1922 was good at law or not. They overlooked the fact that the ex parte decree involved a decision in favour of Mt. Dulari that the release was good at law. An ex parte decree acts by way of res judicata quite as much as a decree passed on proper contest. The learned Judge of the lower appellate Court has gone to the trouble of examining the evidence on which the Court in the previous suit arrived at a decision against Edward. I do not think that he was entitled to inquire into the basis of that decision. When an issue cannot be reopened, the decision thereon must be accepted without inquiry whether the Court which arrived at the decision was wide awake at the time or not and whether it had properly considered all the evidence and the law arising in the matter. All that S. 11 requires is that the issue has been heard and finally decided.

It does not prescribe the method of hearing and the character of decision in order to make it binding in a subsequent suit.

The ruling of the Calcutta High Court quoted by the learned Judge is not in point. He relies merely on some expression of opinion in that ruling not arising from facts similar to the facts of the present case. Any way there cannot be the slightest doubt that repeatedly since 1897 it has been held in this Court that an ex parte decree, where the Court has not brought its mind to bear properly on the merits of the issue, is as binding by way of res judicata as a decree of any other kind. A Bench of two Judges held in January 1897 in *Behari Lal* v. *Majid Ali* (1) that the principle of res judicata does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts. A defendant-respondent cannot avoid the application of the principle of res judicata by saying that he did not appear at the trial of the suit, and a plaintiff who has got an ex parte decree on proof of his title or on failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he had obtained by the fact that the defendant did not appear in Court to protect his own interest.

Another Bench of two Judges arrived at a similar decision in 1902 in *Sheoraj Singh* v. *Kameshar Nath* (2). Those were execution proceedings. Objection was made to the first application for execution, but the judgment-debtor did not support it, and it was dismissed. In a subsequent application for execution it was held by this Court that the judgment-debtor could not plead limitation when he failed to support that plea when the prior application was filed and his objection had been dismissed in default. In 1910 in *Murli Dhar* v. *Goma* (3) a certain order was passed in execution proceedings to sell certain properties in a certain order. It was held that this order was binding in a subsequent proceeding by reason of the principle of res judicata though the former order was passed ex parte. Similarly in *Oman Prasad* v. *Durlab Shankar* (4) a single Judge of this Court held an ex parte order in a previous execution preceeding to have the effect of res judicata when the same question was raised in a subsequent judicial proceeding. Lastly comes the very important judgment by Sundar Lal, J. in *Ganga Bishan* v. *MeharIlahi Khan* (5) where this view of law has been supported by English authorities. He quoted with approval a judgment of Vaughan Williams, J. :

"It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercisod a judicial discretion in the matter."

Strangely enough the learned Judge who has referred to English cases and cases of other High Courts made no reference to cases of this Court in which opinion similar to his has been affirmed over and over again. I hold that it is no longer open to the plaintiff Edward to raise the question that the deed of release of 8th February 1922 is bad in law. I set aside the decrees of both the Subordinate Courts and dismiss the plaintiff's suit with costs of all the Courts.

P.N./R.K. *Decree set aside.*

(1) [1897] 24 All. 138=(1897) A.W.N. 29.
(2) [1902] 24 All. 282=(1902) A.W.N. 63.
(3) [1910] 7 A.L.J. 401=5 I.C. 210.
(4) [1914] 12 A.L.J. 206=23 I.C. 286.
(5) [1914] 12 A.L.J. 1011=25 I.C. 224.

A. I. R. 1929 Allahabad 763

SULAIMAN AND NIAMATULLAH, JJ.

Sharafat Ali—Applicant.

v.

Mt. Bhagwati and *others*—Opposite Parties.

Civil Revn. No. 67 of 1928, Decided on 11th June 1929, from order of Munsif, Moradabad, D/- 6th July 1927.

(a) Civil P. C., Sch. 2, Para. 1—Application for reference need not be signed.

The omission of signature of the decree-holder causes no defect in an application for reference to arbitration as para. 1, sub-para. 2, Sch. 2, does not require the application to be actually signed : *A. I. R.* 1915 *P. C.* 79, *Ref.* [P 764 C 1]

(b) Civil P. C., Sch. 2, Para. 1—Person choosing to remain absent is not necessarily person not interested—Test is whether he is a necessary party.

A person who has chosen to remain absent and allow ex parte proceedings to be taken against him is not necessarily a person not interested in the subject matter of the suit. An important test is to consider whether he is a necessary party or such that if not originally impleaded the Court would direct him to be joined under O. 1, R. 10. [P 765 C 1]

Ambika Prasad—for Applicant.

Shabd Saran—for Opposite Parties.

Sulaiman, J.—This is an application in revision from an order directing a decree to be prepared in terms of the award and exempting the applicant. The applicant, Sharafat Ali, was a co-judgment-debtor with Jagpal, against whom Hamid Uddin had obtained a money decree. Certain property was attached in execution of that decree, and Mt. Bhagwati objected on the ground that it was her property and not of Jagpal. Her objection was disallowed and she instituted the suit, out of which this revision has arisen, for a declaration that the property was her property. She impleaded the decree-holder, judgmentdebtor Jagpal and the Official Receiver of the estate; and she also impleaded Sharafat Ali. Sharafat Ali did not put in any appearance. The parties before the Court referred the dispute to arbitration, and an award was delivered under which it was held that the property did belong to Mt. Bhagwati. The Court below has passed decree in terms of the award, and has exempted Sharafat Ali.

The applicant contends before us that reference to arbitration was invalid. The first objection raised here, which was not taken in the Court below, is that the application for reference to arbitration was not signed by the decree-holder. There is no suggestion that the decree-holder had not consented to it, and it is patent that he appeared before the arbitrator. The omission of the signature caused no defect in the application, as para. 1, sub-para. 2, Sch. 2 does not require the application to be actually signed: *Umed Singh* v. *Sobhag Mal* (1).

It is also clear that, if Sharafat Ali had been a party interested in the matter in difference, which was referred to the arbitrator, the mere fact that he had not put in appearance and had not contested the suit would not have cured the defect. I do not think that an interested party would cease to be a party within the meaning of this paragraph merely because he did not put in an appearance and file a written statement. If the plaintiff discloses that he is not merely a pro forma defendant, he should be joined in the application, for it is obvious that the suit cannot be determined by means of the award as between some of the parties and on its merit by the Court itself as against the others. The non-appearance does not in any way involve a confession of judgment.

The main question to be considered in this case is whether Sharafat Ali was an interested party. The dispute related entirely to the question of ownership of the property in suit, and that was between the decree-holder, Mt. Bhagwati and the judgment-debtor, Jagpal or his Official Receiver. Sharafat Ali was not interested in the question of ownership of the property. He had been impleaded merely as a pro forma defendant, and might not have been impleaded at all. At any rate it was open to the plaintiff to exempt him at any stage of the suit. He has, in fact, been exempted. The learned advocate for the applicant contends that Sharafat Ali was interested in the matter of difference, because if it was held that the property belonged to Jagpal and the attachment were to continue and the property were to be sold and sufficient money were to be realized, the applicant might not be called upon in the first instance to make repayment. This line of reasoning makes too many assumptions, and any of the contingencies which are supposed to take place may not actually come into existence. I do not think that in such a far-fetched view of the case the applicant comes within the meaning of the expression "party interested in the matter of difference." I, therefore, think that there was no defect in the reference and that the award was in no way vitiated.

Niamatullah, J.—I agree. It cannot be disputed that an application to refer the dispute in a pending suit to arbitration must be made by all the parties interested in the matter in controversy, otherwise the case has to be tried as between parties one of whom did not join in the reference—a mischief which it is the object of the rule to avoid. The question is whether the expression "parties interested" means only persons having an interest in the property in dispute, or includes those who happen to be parties, but have no interest in the property nor claim any, but are otherwise interested in the result of the suit. If a person has been impleaded as a defendant on the allegation that he has such an interest or, at least, claims to

(1) A. I. R. 1915 P. C. 79=43 Cal. 290=43 I. A. 1 (P.C.).

have it, there can be no question that he is a person interested within the meaning of that rule. There may, however, be cases in which a person has no interest in the property in dispute nor does he claim to have any interest in it and yet he may be interested in the sense in which that expression has been used in the aforesaid paragraph. It will depend on the circumstances of each case, having regard to the pleadings of the parties. An important test, to my mind, is to consider whether he is a necessary party or such that, if not originally impleaded, the Court would direct him to be joined under O. 1, R. 10, sub-R. 2, Civil P. C., that is, a person

"who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit."

The fact that in a remote contingency a defendant should be enabled to recover what may hereafter be found due to him from the principal defendant's property in dispute is not one that would justify his retention in the array of parties. On the other hand, I entirely agree with the view taken by my learned brother that the mere fact that a defendant who has chosen to remain absent and to allow ex parte proceedings to be taken against him is not necessarily a person not interested in the subject-matter of the suit. Cases are easily conceivable in which a person who is vitally interested in the result of a suit may not consider it worth his while to put in appearance, relying upon his co-defendant, who, he is certain would prosecute the defence common to himself and the absent defendant. It cannot be suggested that, if the contesting defendant behind the back of his co-defendant against whom proceedings have been ordered to be ex parte consents to arbitration, such a reference would be valid in law. For these reasons, I agree in dismissing this revision.

By the Court.—The revision is dismissed with costs.

R.M./R.K. *Application dismissed.*

A. I. R. 1929 Allahabad 765

SULAIMAN AND MUKERJI, JJ.

Kundan Gir—Defendant—Appellant.

v.

Jaswant Singh — Plaintiff—Respondent.

Second Appeal No. 108 of 1927, Decided on 12th July 1929, from decree of Sub-Judge, Budaun, D/- 14th September 1926.

Agra Pre-emption Act, Ss. 19 and 20—Even under S. 19 vendee must acquire indefeasible title—Ss. 19 and 20 should be consistently interpreted.

Sections 19 and 20 have to be interpreted so as to be consistent with each other. Even under S. 19 a vendee, in order to defeat the pre-emptor's claim, must possess an indefeasible title to the property acquired by him subsequently to the purchase, the subject-matter of pre-emption : *A. I. R.* 1927 *All.* 575, *Foll.*: *A. I. R.* 1929 *All.* 53 (*F.B.*), *Expl.* and *Dist.*; *A.I.R.* 1929 *All.* 703, *Appr.* [P 766 C 2]

Malik and *K. Verma*—for Appellant.

Harnandan Prasad and *Hariram Jha*—for Respondent.

Mukerji, J.—The facts of this case are briefly these. One Gulab Rai sold the property in suit to the appellant Kundan Gir on 24th August 1925 for the sum of Rs. 400. The respondent Chaudhri Jaswant Singh brought a suit for pre-emption. After the suit was filed Gulab Rai purported to make a gift of one kachwansi share of property in the same village in which the pre-empted property was situated, in favour of Kundan Gir. Having obtained this gift, Kundan Gir's contention is that he is in a position to defeat the claim of Jaswant Singh because Jaswant Singh has no better title than himself in the matter of purchase. The suit having succeeded in both the Courts below, this second appeal has been filed by the purchaser. In this Court, it is contended that in view of the Full Bench case of *Ram Saran Das* v. *Bhagwati Prasad* (1) S. 19 is the section of the Pre-emption Act which applies to this case and the plaintiff cannot succeed. On the other hand, the case of *Deonarain Singh* v. *Ajodhya Prasad* (2) is relied npon and it is contended that in order that the vendee may defeat the pre-emptor's claim the former should possess an "indefeasible" title to the property acquired by him, subsequently

(1) A. I. R. 1929 All. 53 (F.B.).
(2) A. I. R. 1927 All. 575=49 All. 696.

to the purchase of the property, sought to be pre-empted.

We have to decide whether we should follow the case fn *Deonarayan Singh* v. *Ajodhya Prasad* (2) or whether we should dissent from it, for if the case in *Deo Narain Singh* v. *Ajodhya Prasad* (2) applies, the decrees of the Courts below are correct. There can be no doubt that the Full Bench case quoted above, held that S. 19 had substantially reproduced the law, as it stood before the Agra Pre-emption Act was enacted; but it is also certainly the case that the Full Bench had not to decide the exact point that is before us. In order to find out what was the meaning of S. 19, the learned Judges looked into the state of the previous law and considered whether that law had been departed from or not. In arriving at the conclusion already mentioned, the learned Judges had no occasion to consider what should be the character of the subsequent acquisition of property, by the vendee, so as to enable him to defeat the pre-emptors' claim. That being the case, the Full Bench case of *Ram Saran* v. *Bhagwati Prasad* (1) has no bearing on the case before us.

The Full Bench held that S. 20 did not apply where the vendee acquired property after the institution of the suit, and that to such a case S. 19 would apply. They decided nothing more. Mr. Malik has contended that S. 19 does not contain the word "indefeasible" which has been used in S. 20 and, therefore, it would not be right to bring in that word in the interpretation of S. 19. There is some force in this contention, but if we accept that contention, we shall be interpreting Ss. 19 and 20 in a way which will make them entirely inconsistent, in principle. If we accept Mr. Malik's contention, we shall be holding that, while title, which is, itself, liable to be defeated, would be good enough to entail the dismissal of the pre-emptor's suit, if that title be acquired by the vendee after the institution of the pre-emption suit, but it would be of no avail to the vendee if the said title is acquired before the institution of the pre-emption suit. The language of S. 19 is as follows:

"No decree for pre-emption shall be passed in favour of any person, unless he has a substantial right of pre-emption at the date of the decree. . . . . ,

A pre-emptor has a substantial right of pre-emption at the time of the decree so long as the vendee does not acquire a right which is either equal or superior to that of the title of the pre-emptor. The title which the vendee has to acquire in order to defeat the plaintiff's title must be, for obvious reasons, a good title. If the title is likely to be defeated by any subsequent suit, that might be brought by anybody, it would be an act of injustice that the suit of the pre-emptor should fail, on the ground of such a frail title.

It is a fact in this case that the gift in the vendee's favour is by a Hindu father with sons and grandsons living as members of a joint family with him. We need not decide whether such a gift is altogether void or it is good till it is challenged by the sons and grandsons. Whether it is void or it is voidable, it is clear that the title of the vendee is not safe and secure till 12 years have passed and the vendee has acquired a title unimpeachable by the son or grandson of the donor. It would not, therefore, be right that the plaintiffs' suit should fail, because of such a title. After the dismissal of the pre-emption suit, the vendor may set up his own son to challenge the gift and the son may challenge it successfully. I may point out that the view taken in the case of *Deo Narain Singh* v. *Ajodhya Prasad* (2) has been affirmed in the unreported case of *Govind Singh* v. *Manga* (3). It will thus be seen that at least three learned Judges of this Court are committed to the view which is against the contention of Mr. Malik. I would be prepared to uphold this view on the principle of stare decisis alone where a question of substantial law is involved, even if I were not prepared to accept the view myself. But I find myself fully in agreement with this view. For reasons given above, I would dismiss the appeal with costs.

Sulaiman, J.—I agree. I have no doubt in my mind that Ss. 19 and 20 have to interpreted so as to be consistent with each other and that a vendee cannot defeat the pre-emptor's claim unless he acquires an indefeasible title. I do not wish to add anything to what was said by the Bench of which I was a member in the cases of *Deonarain* (2) and *Govind Singh* (3) referred to by my learned brother except that the facts of

(3) A. I. R. 1929 All. 703.

Naurang Rai v. *Ram Sumar Rai* A. I. R. 1926 *All.* 680 were not so strong as they were supposed to be in *Deonarain's* case (2). This has been explained in *Gobind Singh's* case (3). I still adhere to the views expressed in those cases.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 767

SEN, J.

Bhagwan Das—Plaintiff—Appellant.

v.

Town Mag., Budaun and *others*—Defendants—Respondents.

Second Appeal No. 804 of 1927, Decided on 27th June 1929, from decree of Dist. Judge, Budaun, D/- 18th January 1927.

(a) Tort—Nuisance—Person founding cause of action upon public nuisance must establish particular injury to himself beyond what is suffered by rest of public.

Public nuisance is not by itself an actionable wrong but a public nuisance may under certain conditions become a private wrong. A person founding a cause of action upon a public nuisance has to establish a particular injury to himself beyond what is suffered by the rest of the public. [P 768 C 1]

(b) Civil P. C., S. 100—Scope.

Where legal conclusions have been erroneously deduced from ascertained facts there is an error of law which can be challenged in second appeal. [P 768 C 1]

(c) Tort — Nuisance — Special damage — Every citizen having house adjoining public thoroughfare has legal right to make reasonable user of thoroughfare along its length and breadth for himself, his cattle and his conveyance leading from his door to any part of highway—Width of thoroughfare encroached upon by defendant—Plaintiff unable to utilize highway in same manner as he used to do before and to turn his cart round the road—Special damage held to have arisen to plaintiff and matter held actionable.

Every citizen having a house abutting on or adjoining a public thoroughfare has the legal right to make a legitimate and reasonable user of the thoroughfare along its length and breadth for himself, his cattle or his conveyance leading from his door to any part of the highway. His right in this respect should be protected and enforced so long as it is not inconsistent with the rights of other persons using the pathway for themselves for purposes of traffic. This right exists independently of prescription and is a sort of common law right. Thus if the width of the thoroughfare has been encroached upon by the defendant resulting in the plaintiff not being able to utilize the highway in the same manner as he used to do before and the plaintiff cannot turn his cart round the road on account of this obstruction a special damage has arisen to the plaintiff and the matter is actionable: *Marshall* v. *Ulleswater Steam Navigation Co.* 7 *Q. B.* 166; *A. I. R.* 1924 *All.* 715; *St. Mary Norwington Vestry* v. *Jacobs* 7 *Q. B.* 47; *Fritz* v. *Hobson*, 14 *Ch. D.* 542 and *Cock* v. *Bath Corporation* 6 *Eq.* 177, *Rel. on.* [P 768 C 1, 2]

(d) Specific Performance—Laches.

If claim is one of the nature of a specific relief, it may be dismissed upon the ground of delay or laches on the part of the plaintiff. The burden of proving delay is on the defendant. [P 768 C 2]

Baleshwari Prasad—for Appellant.

S. N. Verma—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for abatement of a public nuisance. The plaintiff owns a house numbered 151. Defendants 2 to 4 are the owners of a house numbered 143. Between these houses is a public thoroughfare, the exact width of which is not known. The defendants constructed a chabutra or platform on the public thoroughfare measuring six yards in length and two and a half feet in breadth. The plaintiff complains in para. 3 of the plaint that

"owing to this improper act on the part of defendants 2 to 4, the way has become narrow. The plaintiff's cart cannot be turned round after passing along it. On account of this, the plaintiff's right of easement is much jeopardized. The plaintiff has to unload his cart at a distance and to turn it back."

No relief has been claimed against Town Area of Gunnore which ranks as defendant 1 in the present action. There can be no doubt that a portion of the public thoroughfare has been encroached upon by defendants 2 to 4. It is remarkable that the Town Area of Gunnore have taken no steps to have the obstruction removed. This case is illustrative of the general slackness of local bodies in the proper administration and control of public rights.

Defendants 2 to 4 contested the suit on the ground that the platform had been in existence for more than 20 years and that the plaintiff's suit was liable to dismissal because he had not suffered any special damage beyond what he did in common with all other members of the public affected by the nuisance. The Court of first instanee held that the platform had been recently built but dismissed the plaintiff's suit on the ground that he had failed to prove special damage. The lower appellate Court affirmed the decree on the ground that the platform had not been recently built and that the

plaintiff had failed to prove special damage. Public nuisance is not by itself an actionable wrong but a public nuisance may under certain conditions become a private wrong. A person founding a cause of action upon a public nuisance has to establish a particular injury to himself beyond what is suffered by the rest of the public.

The law has been correctly stated by the Court below but an error appears to have been committed in applying the law to the facts admitted or proved. Where legal conclusions have been erroneously deduced from ascertained facts there is an error of law which can be challenged in second appeal.

The plaintiff's house admittedly adjoins a public highway. House No. 151 is his residential house. The plaintiff deals in grain and owns a shop which is located in a different building. The learned Judge assumed that the plaintiff had no right to take his bullock cart to and from his residential house and opined that the plaintiff was not damnified by the construction of the offending chabutra even though it rendered it impossible for the plaintiff to turn a large cart round in the public thoroughfare in the space which was now left.

"He (the plaintiff) alleges that owing to the erection of the platform by defendants 2 to 4 he is no longer able to turn a cart round, after it has unloaded at his house. It is admitted that at present the lane is only eight ft. three in. wide, and I am therefore prepared to accept that it is impossible to turn the large cart round in the existing space."

The learned Judge misses the resultant finding that a special damage has accrued to the plaintiff from the act of the defendant and this clothes the plaintiff with a right of action.

Every citizen having a house abutting on or adjoining a public thoroughfare has the legal right to make a legitimate and reasonable user of the thoroughfare along its length and breadth for himself, his cattle or his conveyance leading from his door to any part of the highway. His right in this respect should be protected and enforced so long as it is not inconsistent with the right of other persons using the pathway for themselves for purposes of traffic. This right exists independently of prescription and is a sort of common law right. The law on this subject has been thus stated by Copnall (Highway Law 1905 at p. 38) :

"An owner of land is entitled to enjoy all rights not inconsistent with the public right or passage along a highway and many premises could not be reasonably enjoyed without access to highway."

This view is amply supported by authority : *Marshall* v. *Ulleswater Steam Navigation Co.*, (1) and *Hanuman Prasad* v. *Raghunath Prasad* (2), decided by Mears, C. J., and Piggott, J. In *St. Mary Norwington Vestry* v. *Jacobs* (3), it has been held that a frontager is entitled to open a driving way in his fence and drive his carriages over a pavement by the side of the road. An owner or occupier has a right of suit for damages against a person who obstructs or interferes with a right of access by an unreasonable user : *Fritz* v. *Hobson* (4) and the obstruction may be restrained by an injunction: *Cock* v. *Bath Corporation* (5). It follows as a corollary from the above that if the width of the thoroughfare has been encroached upon by the defendant resulting in the plaintiff not being able to utilize the highway in the same manner as he used to do before and the plaintiff cannot turn his cart round the road, on account of this obstruction, a special damage has arisen to the plaintiff and the matter is actionable. The plaintiff not only pleaded special damage in his plaint : vide para. 3, but supported his plea by his sworn testimony and by other evidence. This evidence has not been discussed by either of the Courts below. I hold that the correct finding on the evidence is that special damage has been made out. I further hold that this finding is a legitimate inference from the facts ascertained by the Court below.

It has been contended by the learned advocate for the respondent that the plaintiff is not entitled to succeed as the relief claimed by him is founded upon a stale cause of action. It may be conceded that the claim is one of the nature of a specific relief and may be dismissed upon the ground of delay or laches on the part of the plaintiff. The defendant pleaded that the chabutra had been constructed about 20 years before suit. The lower appellate Court erred in putting the plaintiff to proof about the age of the

(1) [1909] 7 Q. B. 166=41 L. J. Q. B. 41=20 W. R. 144=25 L. T. 793.
(2) A. I. R. 1924 All. 715=46 All. 573.
(3) [1903] 7 Q. B. 47.
(4) [1880] 14 Ch. D. 542=49 L. J. Ch. 735=28 W. R. 722=42 L. T. 677.
(5) [1868] 6 Eq. 177.

chabutra. It did not find categorically how old the chabutra was and contented itself with the vague and unsatisfactory finding that it was not recent. It is desirable to have a clear finding. The Court below is accordingly directed to determine the following issue upon the materials already on the record :

When was the chabutra built by defendants 2 to 4? The Court below is requested to submit its finding within two months of the receipt of the record. Upon return of the finding the usual ten days' time is allowed for objection.

The finding of the lower appellate Court is that the chabutra was of two years' old at the time of the institution of the suit. The action is not a belated one. In view of the facts set out in my judgment, dated 21st January 1929, the plaintiff is entitled to a decree. The plaintiff is entitled to relief A as set out in the plaint. I direct the removal of the chabutra within three months from to-day. If defendants 2 to 4 fail to remove the chabutra within three months from to-day, the plaintiff will be entitled to have the chabutra demolished through the amin of the Court. The defendants are to pay the costs of the plaintiff throughout.

P.N./R.K. *Suit decreed.*

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* A. I. R. 1929 Allahabad 769

MUKERJI AND NIAMATULLAH, JJ.

Secy. of State— Defendant— Appellant.

v.

Bhagwan Prasad and *another*—Plaintiff—Respondents.

First Appeal No. 467 of 1926, Decided on 16th July 1929, from decree of Sub-Judge, Mirzapur, D/- 16th August 1926.

*** (a) Land Acquisition Act, Ss. 18, 19 and 20—Making of reference is act within jurisdiction of Collector—"Court" cannot go behind reference to see whether Collector acted rightly or wrongly.**

Making reference is an act within the jurisdiction and authority of the Collector. Having made the reference it is not open for the Collector or the Secretary of State to say that the reference was wrongly made, although ground for saying so may be that the application was belated by the owner. The "Court" does not sit on appeal over the Collector and the Land Acquisition Act does not give any authority to the "Court" either in express terms or by implication to go behind the reference: 32 *Cal.* 605, (*P.C.*) *Rel. on* ; 30 *Bom.* 275, *Diss. from*; *A. I. R.* 1926 *All.* 766, *Dist.* [P 771 C 1, 2]

(b) Land Acquisition Act, S. 18 (2) (B)—(*Per Mukerji, J.*), Limitation runs from the date of filing of award—Date of award is the date of filing award. (*Niamatullah, J.*, Contra.)

Per Mukerji, J.—The expression "date of award" being indefinite the legislature meant the date of the filing of the award to be the date contemplated in Cl. (b), sub-S. (2), S. 18. If limitation is to start it ought to start from the date of the filing of the award and not from the making of it : 22 *Bom. L. R.* 1136, *Rel. on.* [P 772 C 1]

Per Niamatullah, J.—The date of the award is not the date on which it is filed. A comparison of Ss. 11 and 12 will show that the date of making an award is meant by the Act to be different from the date on which the award is to be filed. S. 18 (2) proviso refers to the former. The date of award is the date on which a formal declaration is made by the Collector of the amount of compensation and of the person to whom the same is payable. [P 774 C 1, 2]

U. S. Bajpai—for Appellant.

N. Upadhiya—for Respondents.

Mukerji, J.—This is an appeal by the Secretary of State for India in Council and arises out of a decree of the learned Subordinate Judge of Mirzapur acting as the "Court" within the meaning of Cl. (d), S. 3, Land Acquisition Act, 1884.

The plea in appeal is that the reference by the Collector was made on a belated application of the respondents and the reference should have been thrown out by the learned Subordinate Judge.

The facts briefly are as follows : The award made by the Collector in the case bears the date 15th June 1923. It could not be traced, that at any rate is my reading of the judgment of the Court below and the learned Government Advocate has not been able to state the date when the award was actually filed in the office of the Collector. Notices were ordered to be issued, by the Collector, to the two owners on 30th October 1923. They were actually served on Bhagwan Prasad on 18th January 1924, and on Mt. Anandi Kunwar on 23rd January 1924. The owners applied for a reference being made to the Collector, within six weeks of the service of notice on them. A reference was accordingly made. A preliminary objection was taken on behalf of the Collector that the reference was time barred. The learned Judge re-

fused to entertain the plea of limitation raised by the present respondent and held that it was not open to him to consider whether the reference was barred by time and he investigated the case and decided what was the amount payable to the owners.

As I have already stated, the plea on behalf of the appellant is that the reference should have been thrown out by the learned Judge as barred by time.

On behalf of the respondents it has been urged firstly, that the learned Judge was right in holding that he could not throw out the reference and that, in any case, the reference was within time.

It will be noticed that under S. 18, Land Acquisition Act, an application by a person who has not accepted the award to make a reference to the Court must be made within a specified period. This period, in the case of the owners who were not present when the award was made is:

"within six weeks of the receipt of the notice ..... or within six months from the date of the Collector's award, whichever period shall first expire."

It is clear that the maximum period allowed for making a petition to the Collector is six months from the "date of the award." This maximum period is liable to be cut short, if there is a service of notice by the Collector, concerning the award, on a party interested in making the application. In the case of service, the time allowed is six weeks from the service, provided those six weeks do not go beyond the six months already mentioned, from the date of the award.

The contention of the learned Government Advocate is that the award having been made on 15th June 1923, the period of limitation for the application by the owners, expired on 15th December 1923, and the mere fact that notice on them was not served till after the expiry of the limitation was immaterial.

The first point that arises is whether the "Court" had any jurisdiction to review the proceedings of the Collector in making the reference.

The scheme of the Land Acquisition Act has been considered by their Lordships of the Privy Council in *Ezra* v. *Secy. of State* (1) vide pp. 628 and 629: This judgment and a consideration of all the sections of the Act will show that when the Government decides to acquire a piece of land, it is required to pay a price to the owner. That price is investigated by the Collector on behalf of the Government and as its agent. In making the award, the Collector offers a certain price to the owners of the property. It is for the owners to decide whether they would accept the price or they would require a judicial determination of the price by an independent authority, namely the Court: vide S. 12 and S. 18. On receipt of an application "by any person interested who has not accepted the award" the Collector is to decide for himself whether he would make a reference to the Court: vide S. 18. If he decides that he would make a reference, he has to proceed in the manner laid down in S. 19 of the Act. When the reference has been made, it would be the "Court's" duty to issue notice, after fixing a date for determination of the objections taken by the applicant before the Collector. In certain circumstances a notice will have to be given to the Collector also: vide S. 20. It will be noticed that neither Ss. 18 to 20 nor any other provision of the Land Acquisition Act, anywhere state that the Court is entitled to go behind the reference and to see whether the Collector acted or not properly in referring the matter to the Court. The Court is required to decide the grounds on which the applicant objects to the award: see S. 18 (2).

If we remember the scheme of the Act as declared by their Lordships of the Privy Council in *Ezra's* case (1), already quoted, the Collector is the agent or mouthpiece of the Government. After the notification as to acquisition has issued, it is for him to assess the value and offer it to the owner of the land. If the owner do not accept the offer and requires the Collector to make a reference to the "Court" for a judicial determination of the value of the land, the Collector has to see if, in the circumstances of the case, it is his duty as laid down in S. 18 of the Act, to make a reference. If the application is beyond time, the Collector need not make a reference. For the purpose of determination as to whether the application is within time, the Collector has to consider the facts and to come to a

(1) [1905] 32 Cal. 605=1 C. L. J. 227=2 A. L. J. 771 (P.C.).

decision. If he decides that the application is within time and otherwise in order, he will make a reference. It is entirely for him and him alone to decide whether he will make a reference. When he makes the reference, he makes it on behalf of the Government. Having made the reference, in my opinion, it is not open to the Collector or for the matter of that, the Secretary of State, to say that the reference was wrongly made, although the ground for saying so may be that the application by the owner was belated. The "Court" does not sit on appeal over the Collector and the Land Acquisition Act does not give any authority to the "Court" either in express term or by implication, to go behind the reference and to see whether the Collector acted rightly or wrongly. I am aware of the fact that sometimes the plea of limitation as in this case, is taken on behalf of the Collector or the Secretary of State, but in my opinion, such a plea should not be allowed to be taken.

No case has been cited to us in which the question, now before us, may have been considered, viz., whether it is open to the "Court" to sit in appeal, as it were, over the act of the Collector. No doubt, *in the matter of Government of Bombay* (2) it was held that where the Collector made a reference, on an application to him made beyond time, the reference was ultra vires of the Collector and the owner's objections could be dismissed. With all respect, I am unable to accept this view. I have already pointed out that to allow the Collector to plead limitation to his own reference, would be to allow him to blow both hot and cold, to quote a homely phrase. The learned Judge in 30 *Bombay*, says at the top of p. 288 :

"I am of opinion, therefore, that there was no substantial compliance by the claimants with the conditions for a reference prescribed in S. 18 of the Act; that the Collector had no power to make the reference and that it is ultra vires."

It was for the Collector and Collector alone to decide whether he should make a reference and the "Court" had no authority under the Act to throw out the reference on the objection of the very party making the reference. As regards the question of ultra vires, it cannot be denied that it is for the Collector and Collector alone to decide whether he would make the reference. Thus, the making of a reference is an act within the jurisdiction and authority of the Collector. No doubt, he has certain rules to guide him. If after considering the rules and the application before him, he decides to make a reference, the reference cannot be questioned by the Court. The Collector may make a mistake in the use of his discretion, but he is entitled to decide rightly or wrongly. If he decides to make a reference, his act is within his jurisdiction, for he is entitled to act either way, i. e., either to make a reference or not to make a reference. In my opinion, therefore, the action of the Collector cannot be said to be ultra vires. The case in *I. L. R.* 30 *Bom.*, 275 received, but scant support from the Calcutta Judges in *Mahananda Pal* v. *Secy. of State* (3).

In *Sukhbir Singh* v. *Secy of State* (4) two learned Judges of this Court held that a District Judge was entitled to refuse to adjudicate on a reference where the Collector had not been at all asked to make a reference and yet had made a reference on the assumption that a reference had been required. The appeal in this Court was on behalf of the owners themselves. They not having ever asked the Collector to make a reference, could, but with ill grace, say that the Judge was bound to hear the reference. The learned Judges did not consider what authority the District Judge (the Court) had to consider the propriety of the Collector's act which alone gives the Judge jurisdiction. This case is easily distinguishable.

I am of opinion that the decision of the Court below is entirely right, namely, it was not open to it to go behind the reference and to see whether the reference was made in pursuance of a belated application.

The second point taken on behalf of the respondents is that as a matter of right interpretation of S. 18, the petition of the respondents, under that section, before the Collector, was within time.

The argument is this. Under Cl (b), sub-S. (2), S. 18, the application has to be made within six months from the date of the award. I may remind here that by the Collector's own default, the

(2) [1906] 30 Bom. 275=7 Bom. L. R. 697.

(3) [1920] 24 C. W. N. 716=58 I. C. 631.

(4) A. I. R. 1926 All. 766.

issue of notice to the opposite parties was of no advantage to them, for the service was made after the alleged expiry of the period of limitation. To go back to the point under discussion, his question is, what is the date of the Collector's award? Is the date when the award is made, the date of the award or whether the date when the award is filed before the Collector, the said date? S. 11 of the Act requires the Collector to make an award under his hand. It is significant that it does not make any mention of the date of making the award. In other words, the section does not require the Collector to date the award. S. 12 requires that the award shall be filed in the office of the Collector and then provides that a notice would forthwith be issued to the persons interested. The notice is to issue only after the filing of the award. Then, the question is whether the starting point of limitation is the date of the making of the award or is the date of filing of the award? As already mentioned. Cl. (b), sub-S. 2, S. 18 is silent as to which would be the date of the Collector's award.

The Collector being an executive officer has to move about his district. It is impossible to say at what place he would prepare his award. He may take time after making the enquiry or he may make private enquiries after a more or less public investigation as to the value has been made. In *Ezra's* case (1) their Lordships of the Privy Council pointed out that it was open to the Collector to hold private enquiries as to the value of the land. It is, therefore, impossible always to require the Collector to make his award at the headquarters. The most important point therefore that the law considers is the filing of the award. When the award is filed in the Collector's office, it is open to inspection by any member of the public, at least by the persons interested. If the limitation is to start, it ought to start from the date of the filing of the award and not from the making of it. The expression, "date of the award" being indefinite, I am of opinion that the respondent is right in contending that the legislature meant the date of the filing of the award to be the date contemplated in Cl. (b), sub-S. (2), S. 18.

This view finds support from the case of *Kooverbai Sorabji Manekji* v. *Asst. Collector, Surat* (5):

The head note is as follows:

"An award made by a Collector . . . . . becomes final and binding only when it is filed under S. 12, Land Acquisition Act, the mere signing of the award by the Collector does not make it conclusive. Before filing an award, it is open to the Collector to destroy one which he has already signed and to substitute another in its place."

As already stated before, the date of the filing of the award could not be traced. Evidently, the award was not filed immediately after it was made, for we find that the notices were not ordered to be issued till 30th October 1923. In the absence of any earlier date, we must take 30th October 1923 as the date of the filing of the award and in that case, the applications of the respondents to the Collector to make reference were within time.

In the result, the appeal fails and I would dismiss it with costs.

Niamatullah, J.—The facts are fully stated in the judgment of the Hon'ble Mukerji, J. The award has the date "15th June 1923" endorsed on it. It is not, however, known when it was announced, or "filed" as required by S. 12, Land Acquisition Act, or, apart from the notice to be presently mentioned, when it was communicated to the respondents, to whose land (acquired under the Act) it related. Notices were ordered by the Collector to be issued to the respondents on 30th October 1923. They were served on Bhagwan Prasad and Mt. Anandi Kunwar, respondents, on 18th January 1924 and 23rd January 1924, respectively. Being dissatisfied with the amount of compensation awarded to them, they appealed under S. 18, Land Acquisition Act, to the Collector for making a reference to the District Judge, on 12th February 1924 and 4th March 1924, respectively, i. e., within six weeks from the service of the notices on them but more than six months from 15th June 1923, the date noted on the award.

On the facts stated above, two contentions have been put forward on behalf of the Secretary of State for India in Council, the appellant before us:

(1) The applications made by the respondents demanding reference under

(5) [1920] 22 Bom. L. R. 1136=59 I. C. 429.

S. 18, Land Acquisition Act were made to the Collector after the expiry of the limitation period prescribed therefor by S. 18 (2) proviso, and as a consequence thereof.

(2) The reference made by the Collector was without jurisdiction and should not have been entertained by the learned District Judge, whose decree passed in proceedings which followed is bad in law.

Provisions of the Land Acquisition Act immediately bearing on the questions raised by the aforesaid contentions are those contained in Ss. 18 and 20 of that Act. The former requires a person interested, who has not accepted the award, to apply to the Collector demanding a reference to the Court for the determination of the amount of compensation. As regards the period of limitation, the proviso to it lays down that the application for reference shall be made:

(a) If the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the Collector's award;

(b) In other cases, within six weeks of the receipt of the notice from the Collector under S. 12, sub-S. 2, or within six months from the date of the Collector's award, whichever period shall first expire.

As already mentioned, if the period of limitation applicable to the present case be taken to be six weeks from the receipt of notice, the application to the Collector was within time. But the section provides that the application should be made within six months from the date of the Collector's award, if it expired first. If "the date of the Collector's award" be taken to be the date found endorsed on the award, the applications made by the respondents under S. 18 were beyond limitation. The Collector did entertain the applications either ignoring the question of limitation altogether, or holding, rightly or wrongly, that they had been presented before him within limitation. S. 20 of the same Act provides that the Court shall, on receipt of the reference, cause a notice, specifying a day on which the Court will proceed to determine the objections and directing their appearance before the Court on that day, to be served on the applicants. Reading the two sections together, I am clearly of opinion that the Court has no alternative but to act on the reference made by the Collector. The provisions of S. 20 are mandatory, and the Court has no power to scrutinize the regularity of the proceedings before the Collector or the correctness of the view taken by the Collector, of the question of limitation relating to the application which moved him to make the reference. It was the province of the Collector alone to decide for himself whether he should make the reference or refuse to do so. If he decides the question of limitation one way or the other, the Act does not allow an appeal against his decision to the District Judge, the High Court or any other superior authority. If the Collector refuses to make a reference, holding that the application made to him for such reference had been made beyond the period of limitation prescribed, it is obvious that the aggrieved person, the owner whose land was acquired, could not have challenged his view before any tribunal. The Secretary of State, likewise, cannot question its correctness, if on the question of limitation the Collector's view is adverse to him and if he makes a reference to the Court. The functions which the Collector performs under the Land Acquisition Act are administrative and not judicial: *Ezra* v. *Secy.of State* (1). I am, therefore of opinion that the Court cannot go behind the reference to ascertain whether the applications in pursuance of which it was made were within limitation or otherwise, and consequently into the question whether the Collector should or should not have made the reference which he did. The reference having been made, a starting point is furnished to the Court, which must take proceedings as required by S. 20, Land Acquisition Act.

Assuming it is permissible for the Court to decide the question of limitation in reference to the application made by the owner of the land acquired under S. 18 of the Act, I agree with my learned brother that "the date of the award" has not been ascertained in this case. I am also of opinion that the expression "the date of the award" does not refer to the date endorsed on the document called award, as denoting the time when it was signed by the Collector. The words "the Collector's award

mean the act of the Collector awarding compensation. The word "award" as it occurs in S. 18 is an abstract noun. The date of the award, therefore, is the date on which the Collector awards to the claimant the compensation for the land acquired under the Act. The Collector may sign his award in his private office where he might have prepared it: but that will not be the date when he "awards" compensation. A certain amount of mutuality is implied in the act of awarding compensation to the person whose land has been acquired and who may accept it or refuse to do so. If the claimant is present before the Collector in person or is represented by an authorized agent when the award is made, i. e., when the amount of compensation is declared to him, the law provides reasonable period of six weeks: vide Cl. (a). If he is not to present, the law provides a longer period of six months from the "date of the award," i. e., the date on which a formal declaration is made by the Collector of the amount of compensation and of the person to whom the same is payable. This period, however, is curtailed if the six weeks following a notice required by S. 12 (2) expires before the expiry of the six months from "the date of the award."

Sections. 9 and 11 of the Act make it incumbent on the Collector to fix a date for enquiry and the "making of the award," of which date due notice must be given to all persons interested in the proceedings. It follows that the formal declaration of the amount awarded is to be made on a date made known to claimant, who can, if he chooses to be present to receive the award, and if he puts in appearance, the law gives him only six weeks, as already stated, but if he does not, an indulgence is given to him in the matter of limitation by giving the extended period of six months from the date the award is pronounced. It is not too much to expect that the person interested should turn up within a reasonable time after the date fixed for the making of the award, if he does not choose to be present on the date itself. With the utmost respect for my learned colleague, I am unable to agree with him that "the date of the award" is the date on which it is filed in accordance with the provisions of S. 12, Land Acquisition Act. A comparison of Ss. 11 and 12 will show that the date of making an award is meant by the Act to be different from the date on which the award is to be filed. S. 18 (2) proviso refers to the former.

It was contended on behalf of the respondents that the date of the award is the date on which the amount of compensation awarded is communicated to the owner of the land. I am unable to accept this contention either. There is nothing in the Act which justifies this interpretation of the simple words "the date of the award."

The record, as it stands, does not show whether the Collector had fixed any date for the proceedings and the making of the award of which due notice might have been given under S. 9 of the Act, nor does it appear that "he made an award" in the manner laid down by S. 11, which I take to imply that the Collector should formally declare the amount of compensation and other incidental matters referred to in S. 11, such declaration being the culminating stage of the proceedings to be taken under that section on the date fixed therefore. Under these circumstances, the appellant, the Secretary of State, has, in my opinion, failed to establish that the respondents made their applications under S. 18. Land Acquisition Act, after the expiry of the period of limitation prescribed for them.

For the reasons stated above, I concur in dismissing the appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 772

MUKERJI, J.

Karimullah—Applicant.

v.

Rameshwar Prasad—Opposite Party.

Civil Revn. No. 107 of 1928, Decided on 20th July 1928, from order of Addl. Dist. Judge, Moradabad, D/- 16th February 1928.

(a) Criminal P. C., S. 476—Civil Court.

A civil Court exercising jurisdiction under S. 476 does not cease to be a civil Court. [P 775 C1]

(b) Bengal N. W. P. and Assam Civil Courts Act (1887), S. 22—Transfer.

The District Judge is competent to transfer an appeal from an order under S. 476 to a Subordinate Judge: *A. I. R.* 1927 *All.* 555, *Foll.* [P 775 C1]

A. M. Khwaja and *Har Krishna Sahai* —for Applicant.

Iqbal Ahmad and *S. N. Seth*—for Opposite Party.

Judgment.—The only point urged in this application is whether the Court below had jurisdiction to hear the appeal.

It appears that the opposite party Rameshwar Prasad brought a suit on a bond for recovery of certain amount of money against Karimullah and others. Karimullah is the applicant in this Court. It was found that Karimullah had paid up a good deal of the amount claimed and the claim of Rameshwar Prasad was excessive. At the instance of Karimullah, the Munsif directed the prosecution of Rameshwar under S. 476, Criminal P. C. It being held by him that Rameshwar, was prima facie, guilty of the offences under Ss. 209 and 210, I. P. C., Rameshwar filed an appeal to the District Judge and the District Judge transferred the appeal to a Subordinate Judge. The Subordinate Judge heard the case and held that the Munsif's order directing the prosecution was not justified. He ordered the revocation of the complaint.

Mr. Khwaja has argued that the District Judge had no jurisdiction to transfer the case to the Subordinate Judge and he has cited two *Calcutta* cases

So far as this Court is concerned, it is firmly established now that a Court exercising jurisdiction under S. 476, Criminal P. C., does not cease to be a civil Court. The proceedings taken by the Court are of a civil nature, although not covered by the Civil Procedure Code. It has, therefore, been held that a revision can lie only under S. 115, Civil P. C. and S. 439, Criminal P. C., has no application.

An appeal is provided by the Criminal Procedure Code, S. 476-B, against an order passed under S. 476 of the same code. Such an appeal would be an appeal from an order of the Court. In this case, the appeal was against the 'order' of the Munsif. A District Judge is authorized under S. 22, Bengal N. W. P. and Assam Civil Courts Act, to transfer an appeal from an 'order' of a Munsif to the Court of a Subordinate Judge. It would follow, therefore, that it was competent for the District Judge to transfer the present appeal to the Court of the Subordinate Judge. The principle that the District Judge could transfer such cases to another officer of competent jurisdiction, was established by previous cases in this Court. The latest one is *Narain Das* v. *Emperor* (1). That was, however, a case in which a District Judge had transferred an appeal to an Additional District Judge. But the transfer was justified under S. 8, Bengal N. W. P. and Assam Civil Courts Act. The same principle applies when the transfer is made under S. 22, to the Court of a Subordinate Judge, the appeal being from an order of the Munsif.

I hold that the Subordinate Judge had jurisdiction to hear the appeal. This application, therefore, is without merits and fails and is hereby dismissed with costs.

S.N./R.K. *Application dismissed.*

(1) A. I. R. 1927 All. 555=49 All. 792.

A. I. R. 1929 Allahabad 775

SULAIMAN AND PULLAN, JJ.

Ram Saran Das—Plaintiff—Appellant.

v.

Bhagwan Singh and *others*—Defendants—Respondents.

First Appeal No. 320 of 1926, Decided on 2nd July 1929, from a decree of Sub-Judge, Bulandshahr, D/- 15th March 1926.

(a) Civil P. C., S. 11—Findings arrived at in representative suit enure to benefit of entire family.

Findings arrived at in a representative suit enure to the benefit of the entire family and can be taken advantage of by all the members of the family. Such findings are res judicata and cannot be re-agitated. [P 776 C 1, 2]

(b) Hindu Law — Partition — Immoral debts of father do not create charge on family property—Individual property of sons acquired by partition is not liable to attachment in execution of money-decree against father.

The debts due from a father tainted with immorality and not for legal necessity do not create any charge on the family property so as to make the separate shares of the sons liable after partition. The effect of a partition between sons and their father is to exempt their individual property acquired at partition from liability to attachment in execution of a money decree against the father: *A. I. R.* 1927 *All.* 714, *Rel. on*: *A. I. R.* 1927 *Mad.* 682, *not Appr.* [P 776 C 2]

(c) Limitation Act, Art. 116—Time runs from date of breach of contract—Where no date is fixed it runs from date of deed itself.

Under Art. 116 time begins to run from the date of breach of contract under a registered

instrument. Where no time is fixed for payment, it runs from the date of the deed itself and a suit brought more than six years after the date is barred by time.

[P 776 C 2, P 777 C 1]

U. S. Bajpai—for Appellant.

Shiva Prasad Sinha—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for recovery of money based on a deed which was originally a mortgage-deed and not for the enforcement of any security. Bhagwan Sing defendant 1 and his two brothers who were minors at the time executed a mortgage-deed on 17th January 1918 for Rs. 5,000 in favour of the plaintiff. A suit was instituted by the minor brothers of Bhagwan Singh for a declaration that the deed was not binding on them because they were minors and also that it was not binding on the family because it had been executed without any legal necessity and that the deed was tainted with the immorality of Bhagwan Singh. That suit doubtless was a representative suit brought in the interest of the whole family. The Court held that the debt did not create any charge on the family property because there was no legal or family necessity. As a matter of fact it found that Bhagwan Singh was a licentious man and was leading an immoral life and wasting the family property. It was further found that the creditor had not made any enquiry to satisfy himself whether there was any legal or family necessity. On these findings the suit was decreed and the bond was set aside. The creditor has now sued Bhagwan Singh and his two minor sons and left out Bhagwan Singh's brother. It is an admitted fact that before the present suit was instituted the sons of Bhagwan Singh had got their shares partitioned off and are no longer members of a joint family with Bhagwan Singh. The suit was brought more than six years after the date of the registered document but within six years of the date of the judgment under which the legal necessity was not found to be proved. The Court below has dismissed the suit on the ground that it was barred by limitation. Some issues, however, have been found in favour of the plaintiff.

It appears to us that the suit decided on 8th September 1919 was a representative suit and the findings arrived at in that suit against the present plaintiff Ram Saran Das were for the benefit of the entire family and could be taken advantage of by all the members of the family including Bhagwan Singh. The learned Judge in the present case therefore should not have gone into the question of legal necessity afresh as the matter was res judicata between Bhagwan Singh and Ram Saran Das. The question of legal necessity cannot be now re-agitated.

As regards the sons of Bhagwan Singh the matter is quite clear. Before their share could have been attached in execution of any decree in favour of Ram Saran Das they ceased to be members of the joint family and their shares were separated. The debt due from Bhagwan Singh did not create any charge on the family property so as to make the separate shares of Bhagwan Singh's sons liable after the partition. No doubt there has been some conflict of opinion on the point as is evidenced by the case of *Jagannatha Rao* v. *Visvesam* (1). There has, however, been a recent pronouncement by has a Bench of this Court in *Gaya Prasad* v. *Mulidhar* (2) where it has baen clearly laid down that the effect of a partition between the sons and their father is to exempt their individual property acquired at partition from liability to attachment in execution of a money decree against the father. The reasons given by the learned Judges of the Madras High Court do not appeal to us and we agree with the view expressed by our own High Court. It follows that the plaintiff cannot pursue his remedy against the sons of Bhagwan Singh now.

As regards Bhagwan Singh the claim is undoubtedly barred by time. The plaintiff knew from the very beginning that Ram Singh and Raghubir Singh were minors, indeed they were described as such in the document itself. It cannot therefore be said that their minority was discovered when the suit was fought out. Furthermore the contract by the minors was a void contract and was not only voidable. Nor can it be contended that the finding that there was no legal necessity for the debt gave a fresh start of six years to the creditor. The Court distinctly found that he had made no enquiry to satisfy himself that there had been such legal necsesity. Time began to run from the date of the breach of con-

(1) A. I. R. 1924 Mad. 682=47 Mad. 621.
(2) A. I. R. 1927 All. 714=50 All. 137.

tract under the registered document: Art. 116, Lim. Act. As there was no time fixed for payment it began to run from the date of the deed itself. The suit having been brought more than six years after that date it was barred by time. The appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 777

BENNET AND IQBAL AHMAD, JJ.

Sheo Nandan and *another*—Plaintiffs—Appellants.

v.

Mohammad Khalik and *others*—Defendants—Respondents.

Second Appeal No. 1210 of 1926, Decided on 10th July 1929, from a decree of Dist. Judge, Benares, D/- 28th April 1926.

(a) Transfer of Property Act, S. 72 (b)—Money spent for preservation of property from destruction can be added to principal—No interest is allowed where parties do not intend it should be paid.

Where there is an agreement that the mortgagee should fill up a pit and add the money to the principal, he is entitled to do so under S. 72. The rate of interest is usually the rate of interest payable on the principal, in absence of contract to the contrary. But where the mortgage-deed specifically provides for the addition of the expenses incurred to the principal money but does not provide for the payment of interest, no interest can be charged as the parties did not intend that interest should be paid. [P 778 C 2]

(b) Transfer of Property Act. S. 76 (d)—Mortgagee cannot claim repayment of money spent on necessary repairs.

Where a certain sum of money has been spent by the mortgagee on annual repairs due to flooding from adjoining river he cannot claim repayment of the sum as laid down in S. 76 (d). [P 778 C 1]

(c) Agra Tenancy Act, S. 17—Occupancy plot becoming grove can be transferred.

When at the time of transfer a plot though originally an occupancy plot has admittedly become a grove and there is nothing to show that the zamindar has made any objection to the transfer, the transfer must be regarded as valid so far as the particular case is concerned. [P 778 C 2]

(d) Agra Tenancy Act, S. 24—Occupancy plot becoming grove—Bandhu can succeed as heir.

If a plot is recorded merely as an occupancy plot a bandhu would not be entitled to succeed after the death of the owner but if the plot becomes the grove land he can be so entitled as an heir. [P 779 C 1]

B. Malik—for Appellants.

Mukhtar Ahmad and *Mushtaq Ahmad*—for Respondents.

Judgment.—This is a second appeal on behalf of plaintiffs 1 and 2 against the decree of the lower appellate Court, allowing redemption of a deed of mortgage by plaintiff 1 only and not by plaintiff 2, and on payment of a sum of money amounting to Rs. 858-8-0. The main points in appeal are that the sum of money should only be Rs. 125, the original mortgage money, and that redemption ought also to be allowed to plaintiff 2. We may mention here that during the hearing of this appeal we express our willingness to remit an issue to the lower appellate Court for a finding in regard to whether the expenditure was such as came under S. 72 or S. 76, T. P. Act. But the learned counsel for the respondents opposed the suggestion, and accordingly we proceed to dispose of the appeal by deciding the question under O. 41, R. 24. The facts are as follows:

There was a plot 28, area 2 bighas 8 biswas odd on which certain trees stood, which was mortgaged on 5th December 1892 to the predecessors of the defendants. The plot was recorded as an occupancy holding, but at the time there was besides the trees a large pit from which it is said that bricks had been taken. The plot was let for the purposes of a grove and the defendants claim to have levelled the ground and made a boundary ditch and a mud wall round it and planted a number of palm trees on it. In the written statement the defendants claim that on redemption of the usufructuary mortgage the following sums should be paid by the plaintiffs:

(a) Expenses incurred in levelling and beautifying the land mortgaged.	Rs.	286 6 0
(b) Interest on rupees 286-6-0 at the rate of Rs. 9 per cent per annum.	,,	447 2 0
(c) Value of the palm trees.	,,	175 0 0
(d) Mortgage money.	,,	125 0 0
Total	Rs.	1,033 8 0

Of these sums the lower appellate Court has allowed (a), (b) and (d). The appellants claim that (a) and (b) should not be allowed. The lower Courts have allowed (a) and (b) on the ground that the expenses in (a) were incurred by the

defendants under S. 72 (b), T. P. Act, that is, money spent for the preservation from destruction of the mortgaged property. The question before us is whether the lower appellate Court had legal evidence before it on which it could come to a finding that the whole amount of Rs. 286-6-0 was money spent in this manner under S. 72 (b), or whether it was money spent as necessary repairs of the property under S. 76 (d). In the former case a mortgagee is permitted to add the money spent to the principal money at the rate of interest payable on the principal, or, if no such rate is fixed at the rate of 9 per cent per annum, which has been allowed by the lower appellate Court. In the latter case the mortgagee cannot claim repayment of money spent on such necessary repairs from the mortgagor. The lower appellate Court accepted as correct and based its finding on an account-book which contains accounts of expenditure by the mortgagee from the year of the mortgage in 1892 up to 1915, that is for a period of 23 years. The mortgage-deed does refer to the existence of a pit, and provides that the mortgagee should level the ground and add that money to the mortgage money. The account-book in question mentions items for the first few years of the mortgage, which was executed in Sambat 1949, as follows:

Sambat 1949.

Rs.	2	4	3
,,	9	5	3
,,	7	14	0

Sambat 1950.

Rs.	17	0	0

Sambat 1956.

Rs.	33	3	0

All these items are entered as expenditure incurred in "filling in pits." Along with this account-book and in explanation of it there was the evidence of a defence witness Azimullah referred to on p. 12 of the paper-book in the judgment of the Court of first instance as personally supervising the levelling work, and he states that on account of floods the pits had to be filled more than once and the boundary walls had also to be repaired several times, as the plot in suit was situated close to the river Barna and only a little rise in the river would put the land in suit under water. It appears, therefore, that the evidence on the record was to the effect that at the beginning of the term of mortgage in Sambat 1994 and Sambat 1950 four items of expenditure were incurred on filling in pits, totalling Rs. 36-7-6. Then there was a gap of six years in which the account-book does not show any expenditure at all. Accordingly, read with the evidence of Azimullah we consider that the only evidence before the lower appellate Court showed that out of the total of Rs. 286-6-3, only the sum of Rs. 36-7-6 was spent on filling in the original pit. The remaining expenditure of Rs. 286-6-0 was clearly spent on annual repairs due to flooding from the adjoining river. In regard to the question of interest S. 72, T. P. Act, states that in the absence of a contract to the contrary the mortgagee may add such money to the principal money at the rate of interest payable on the principal. In the present case the mortgage-deed specifically provides for the addition of the money incurred on levelling the ground to the principal money, but it does not provide for the payment of interest. Accordingly we consider that the parties by this agreement did not intend that interest should be paid and, therefore, we allow only Rs. 36-7-6 on account of the claim in (a) to para. 8 of the written statement, and nothing on account of the claim for interest in (b).

The next point which was argued before us was whether plaintiff 2 should obtain a decree in addition to plaintiff 1. The lower Court has disallowed the claim of plaintiff 2, because the plot was an occupancy plot, and, therefore, the transfer by sale from plaintiff 1 to plaintiff 2 on 22nd May 1925, of the equity of redemption was invalid. We consider, however, that at the time this transfer was made the plot, though originally an occupancy plot, had admittedly become a grove, and accordingly as there is nothing to show that the zamindar made any objection to the transfer, we consider that so far as the present case is concerned the transfer must be regarded as a valid transfer. In arriving at this decision we do not make any decision as regards the rights of the zamindar. Accordingly we grant a decree to plaintiff 2.

The next point which arises for decision is in regard to the fact that during the pendency of the second appeal in this Court plaintiff 1 to whom the lower

appellate Court had granted a decree died. An application was made by one Tarhu as son of a daughter of the sister of plaintiff 1, and this application is supported by an affidavit, showing that there was no sapinda of the deceased plaintiff 1. Under these circumstances Tarhu is an heir to plaintiff 1 as a bandhu. If the plot were recorded merely as an occupancy plot, no doubt Tarhu would not be entitled to succeed plaintiff 1, but we must consider that the plot now is grove land, and accordingly Tarhu is entitled to succeed plaintiff 1 as his heir. Accordingly we grant a decree in favour of Tarhu as heir of plaintiff 1 and we grant a decree also in favour of plaintiff 2. Therefore we allow this appeal to the extent indicated, that is that Tarhu and plaintiff 2 will redeem the property in suit on payment of Rs. 125 within the period of six months from the date of this decree, otherwise their suit will stand dismissed. The defendants will deliver possession of the property in suit on receipt of Rs. 125. If the deposit is made within the period of six months allowed the plaintiff will obtain full costs in all Courts, and if the deposit is not made the suit of the plaintiff will stand dismissed with costs in all Courts.

R.M./R.K. *Appeal allowed.*

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* A. I. R. 1929 Allahabad 779

MEARS, C. J. AND BENNET, J.

Ram Chander and *others*—Plaintiffs—Appellants.

v.

Sher Ali and *another*—Defendants—Respondents.

Letters Patent Appeal No. 118 of 1926, Decided on 22nd June 1929, against judgment of Kendall, J., D/- 1st November 1926.

*** Easement Act, S. 4—Suit by *N* to restrain *M* from preventing *N* from using well water—Well situated in ground belonging neither to *M* nor to *N*—*N* proving right of easement to take water from well—*M* interfering with right of *N* by enclosing well with wall and preventing *N* from having access to well—House of *N* formed dominant tenement and ground in which well stood was servient tenement and *N* held entitled to decree ordering demolition of construction made by *M*.**

N brought a suit to restrain *M* from preventing *N* from using a certain well. The well was situated in ground which belonged neither to *N* nor to *M*. *N* proved that he had a right of easement to take water from the well and it was found that *M* had interfered with the right of *N* by enclosing the well with a wall and thus preventing *N* from having access to the well.

Held: that the house of *N* formed a dominant tenement and the ground in which the well stood was a servient tenement.

Held further: that it was not necessary for *N* to prove that the servient tenement was the tenement of *M* who had interfered with his right but it was sufficient for *N* to show that there was a dominant and a servient tenement and that he had the rights required by S. 4 in order that a right of easement should be established and *N* was entitled to a decree ordering the demolition of the construction made by *M*. [P 780 C 1]

P. L. Banerji—for Appellants.

K. N. Katju—for Respondents.

Judgment.—This is a Letters Patent appeal from a judgment in second appeal of a learned single Judge of this Court dismissing the suit of the plaintiffs. The plaintiffs are residents in mohalla Mubarak Shah in the town of Saharanpur and they brought a suit to restrain the defendants from preventing the plaintiffs from using a certain well in that mohalla. The plaintiffs claimed to be owners of the ground in which the well stood and on this portion of their claim the finding of fact of the lower appellate Court that they are not owners is conclusive. In para 7 of the plaint there is the following pleading:

"Apart from this, the plaintiff and their predecessors had always a right to take water from the pakka well; and the situation of the well is also such as to afford a right of easement to the plaintiffs as well as to other persons, of drawing water from it. The waste land also has been used by the plaintiffs for different purposes. For this reason also defendants 1 and 2 have no right to interfere with the plaintiffs using this pakka well or to demolish it, nor can they fill up or demolish the well, nor can they stop the taking of water from it."

This pleading, in our opinion, amounts to a claim that the plaintiffs had a right of easement to take water from this well on the ground that the well was adjacent to the residence of the plaintiffs in that mohalla. After remand there has been a finding of the lower appellate Court to the effect that the plaintiffs have a right of easement to draw water from that well, and that that right was not based on any custom. It was also found that the well was situated in land which was adjacent to the land of the defendants, but that it was not situated in the land

of the defendants. It had already been found by the lower appellate Court that the well was not situated in the land of the plaintiff. Apparently therefore the finding of fact of the lower appellate Court is that the well was situated in ground which belongs neither to the plaintiffs nor to the defendants. The learned Judge of this Court has allowed the appeal of the defendants on the ground that the plaintiffs are not shown to be the owners of a dominant heritage, and as an easement is a right which by its very definition appertains to the owner or occupier of certain land, it cannot be claimed that they have proved an easement in this case. Ill. B, S. 4, Easements Act, is as follows :

"*A* as the owner of a certain house, has a right to go on his neighbour *B's* land, and to take water for the purposes of his household out of a spring therein. This is an easement."

We consider that in the present case the house of the plaintiffs as in this illustration forms a dominant tenement and that the ground in which the well stands is a servient tenement. It is not necessary for the plaintiffs to prove that the servient tenement is the tenement of the particular defendants who has interfered with their right. It is sufficient for the plaintiffs to show that there is a dominant tenement and a servient tenement and that they have the rights required by S. 4 in order that a right of easement should be established. In the present case the lower appellate Court has found that the plaintiffs have proved that they have such a right of easement. It has also found that the defendant has interfered with that right of the plaintiffs by enclosing this well with a wall and thus preventing the plaintiffs from having access to this well. We consider, therefore, that the decree of the lower appellate Court was correct in ordering the demolition of the constructions made by the defendants, and accordingly we allow this appeal. As regards costs, owing to the fact that the cause of action was set out very vaguely and numerous supposed causes of actions were set out in the plaint, we disallow the plaintiffs any costs whatever up to and including 31st October 1923, the date of the decision of the Munsif. All costs on and after 31st October 1923 we allot to the plaintiffs and order the defendants to pay the same. The defendants are to understand that the three months time for the demolition of the erections and the restoration of the well to its former condition is a peremptory order issuing from this Court, and if it is disobeyed Sher Ali will receive notice to attend this Court to show cause why he should not be dealt with summarily for disobedience of its order.

P.N./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 780

SULAIMAN AND PULLAN, JJ.

Abdus Samad—Plaintiff—Appellant.

v.

Abdur Rauf and *another*—Defendants—Respondents.

Second Appeal No. 1569 of 1927, Decided on 2nd July 1929, from a decree of Addl. Sub-Judge, Janupur, D/- 22nd July 1927.

(a) Pre-emption—Pre-emptor can abandon claim as proprietor and sue for pre-emption as a cosharer.

Under certain circumstances there is nothing wrong in a person abandoning his claim to be the proprietor of a property in suit for the purposes of the particular case. He can certainly abandon his claim as a proprietor and sue for pre-emption as a cosharer without putting the vendee to the proof of the vendors' title. A claim for pre-emption is one for substitution in the place of vendee and the pre-emptor is entitled to admit that the vendor has title. [P 781 C 1]

(b) Pre-emption—Pre-emptor is liable to pay consideration not paid by the vendee.

Vendor is entitled to recover price fixed which is not actually paid by vendee, as part of his unpaid purchase money from the pre-emptor. [P 781 C 2]

S. M. Husain and *S. Majid Ali*—for Appellant.

Mukhtar Ahmad—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a pre-emption suit. It is undoubtedly a curious case which the lower appellate Court describes as a sort of a Chinese puzzle.

The vendor is the son of the plaintiff's father whom the plaintiff alleges to be an illegitimate son. The vendor claims to be the legitimate son and further claims that he has got the property under a gift from his father. The plaintiff did not admit these allegations but asserted in the plaint that the vendor was not the owner of the half share in the property transferred which also belonged to the plaintiff, but having stated

that, he went on to state that with a view to avoid the dispute he was prepared to sue for pre-emption in respect of the property sold. The statement of his counsel was also taken down and it was made clear on his behalf that although for other purposes he was not prepared to admit that the vendor had title he would admit his title for the purposes of the present suit and would not assert his own claim as a proprietor but confine his relief to one of pre-emption of the sale. The trial Court found in his favour that he was entitled to pre-empt and gave him a decree holding that the bulk of the consideration had never passed and was fictitious. The lower appellate Court has upheld the finding of the first Court so far as the question of title and the passing of consideration are concerned but has dismissed the suit on the ground that it is not maintainable. His findings are that the plaintiff claims to be and is certainly the owner and in possession of the property and that the bulk of the consideration mentioned in the sale-deed was false and fictitious and that nothing more than Rs. 76 were paid by the vendee which really went towards the purchase of the stamp paper. The learned Judge has therefore held that the sale is absolutely void and illusory and the plaintiff has got no right of pre-emption.

No doubt the plaintiff in order to safeguard his further rights in future was not prepared to admit absolutely that his half-brother was entitled to this property and abandoned his claim so far as the property in the present suit is concerned and never asserted it. Neither did the defendants admit that the vendor had no title at all. In these circumstances there was nothing wrong in the plaintiff abandoning his claim to be the proprietor of the property in suit for the purposes of this case. He can certainly abandon his claim as a proprietor and sue for pre-emption as a cosharer without putting the vendee to the proof of the vendor's title. A claim for pre-emption is one for substitution in place of the vendee and the plaintiff is entitled to admit, indeed in most cases bound to admit, that the vendor has title. The suit therefore was certainly maintainable.

The finding as regards the absence of consideration except for a small sum of Rs. 76 must be accepted.

It was further found by the trial Court which finding was not upset by the lower appellate Court, that although an item of Rs. 400 has not actually been paid by the vendee to the vendor, it was in fact a real consideration, so that the vendor would be entitled to recover it as part of his unpaid purchase money. As the vendee has not paid this amount to the vendor the liability for this payment will fall on the pre-emptor.

We accordingly allow this appeal with costs and setting aside the decree of the lower appellate Court decree the plaintiff's claim for pre-emption of the rights and interest .in the property on payment of Rs. 76 within six weeks from this date. The plaintiff will be further liable to pay Rs. 400 to the vendor when claimed. As regards the costs in the Courts below, we see no reason to interfere with the order passed by the lower appellate Court.

We dismiss the cross-objection with costs.

R M./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 781

ASHWORTH AND SEN, JJ.

Bhoopal Rai and *another*—Plaintiffs—Appellants.

v.

Shiam Sunder Lal and *others*—Defendants—Respondents.

Second Appeal No. 463 of 1926, Decided on 20th March 1929, from a decree of Dist. Judge, Budaun, D/- 26th January 1926.

(a) Agra Tenancy Act (2 of 1901), S. 161.

A suit for arrears of revenue by assignee of revenue only falls under S. 161. A suit instituted not by an assignee from Government but by an assignee of an assignee and not for arrears of revenue does not fall under S. 161. Assignee clearly means an assignee from Government. [P 781 C 1]

(b) Pensions Act (23 of 1871) Ss. 4, 5 and 6—Scope.

The jurisdiction of a civil Court and of a civil Court alone is limited by the terms of S. 4. It does not take away the jurisdiction of the Court of revenue to entertain a suit by the transferee of the assignee of the land revenue. Under S. 5 a suit relating to land revenue must be determined by a revenue Court in accordance with the rules laid down by the chief revenue authority. Under Ss. 4 and 6 a civil Court cannot entertain such a case except after receiving a certificate from the Collector authorizing it to try the case. [P 786 C 1]

(c) Transfer of Property Act, S. 6—Scope.

Section 6 does not prohibit the assignment

of a pension not granted or continued by the Government on political considerations or on account of past services or present infirmities or as a compassionate allowance : 30 *Mad.* 153, *Ref.* [P 786 C 2]

(d) Pensions Act (23 of 1871), S. 12—Scope — The word "pension" does not include grant of land revenue.

(*Per Sen, J.*)—A grant of land revenue as such cannot be comprised in the term "pension." A right to share in the Government revenue granted in perpetuity by sovereign power cannot be described either as a pension or as a political pension. Such a grant may be hereditary and partakes of the nature and character of a jagir. Its liability to resumption is dependent upon the terms under which it is created and upon the will of the sovereign power. When a gift of this description is created by contract or grant its transferability will in each case depend upon the terms of the contract or grant. The assignment of such grant is not prohibited by S. 12 Pensions Act. [P 786 C 2 ; P 787 C 1]

The word 'pension' in S. 12 does include a grant of land revenue and the assignment of such grant is null and void under S. 12 : (*Per Ashworth, J.* contra.) [P 787 C 2]

(e) Grant — Pension from generation to generation—Predecessor of each generation is Government.

Where a pension is granted from generation to generation one generation cannot be said to be the successor-in-interest of the last. At the very moment when the grant was made by Government a right arose in favour of each successive generation and the predecessor-in-interest of each successive generation is the Government and not the father. [P 788 C 1]

S. B Jauhari and *A. P. Pagchi*—for Appellants.

Narain Prasad Asthana — for Respondents.

Sen, J.—This is an appeal by two plaintiffs arising out of a suit for recovery of Rs. 296-14-6 on account of the arrears of revenue of mauza Lakhanpur, pargana Budaun for the years 1330 and 1331 F. at the rate of Rs. 148-7-3 per annum under S. 161, Act 2 of 1901. The plaintiffs also claimed interest.

The suit was directed against Hakim Shiam Sunder Lal and his brother Lala Babu, who were the sons of Hakim Jawahir Lal. The defendants contended that the revenue of mauza Lakhanpur had been assigned to their ancestors from the time of the Moghal Emperors, that ten biswas of muafi land of mauza Lakhanpur had been resumed by the Government in the year 1906 and regranted to the defendants about the year 1922, that the plaintiffs had no interest or concern with the right to the Government revenue, that the provisions of the Pensions Act (Act 23 of 1871) were applicable to the case and that a single suit for arrears of revenue situate in three mahals was not mantainable.

There has been considerable litigation with reference to the right to appropriate the revenue of the property

An ancestor of Hakim Shiam Sundar Lal was a physician attached to the Court of the Moghal Emperor Babar. The Emperor in recognition of, and as a reward for, his services granted to him and his heirs, in perpetuity, the revenues of a village called Mohammadpur Byar, and of ten biswas of mauza Lakhanpur. These villages were in the occupation of the zamindars. The zamindars were liable to pay the Government revenue to the State, but under the grant made by the Moghal Emperor, the arrangement was that they had to pay the Government revenue, not to the coffers of the State, but to the grantee and his heirs in perpetuity. This grant was recognized by the British Government, as would appear from a revenue extract of the year 1867, referring to the recognition by the Government on or about 30th July 1853. The transaction was entered in the revenue records as muafi.

The last male holder of this muafi was Hakim Dalpat Rai. On his death, it devolved upon his daughter, Mt. Ram Piari. Mt. Ram Piari was married to one Durga Pershad. She died on 24th June 1901, leaving a daughter Mt. Bhawaneshwari. One Jawahir Lal, a distant cousin of Dalpat Rai claimed a right to this property presumably in opposition to the rights of Mt. Bhawaneshwari, and his rights were declared and recognized by the Courts of law. As has already been noted, the defendants-respondents are the sons of Jawahir Lal aforesaid.

In 1272 F. Sheikh Chhiddu and Tarafat-un-nissa were the zamindars of Lakhanpur in unequal shares. Chhiddu owned 15 biswas and Tarafat-un-nissa was the owner of the remaining 5 biswas. Chhiddu sold his 15 biswas to Sharafuddin and to Hamiduddin. In 1902, the following persons were the recorded zamindars : Intizamuddin (son of Sharafuddin) $7\frac{1}{2}$ biswas ; Nur Mohammad, grandson of Hamiduddin $7\frac{1}{2}$ biswas and Taraf-un-nissa 5 biswas. The rights of the zamindars extended to the appropriation of the raqm siwai etc., and to collection of rents but they were liable to pay the revenue to certain muafidars whose names are detailed below :

Dalpat Rai was entitled to half of the Government revenue ; Mohammad Saeed Khan to 1/8th Saif Uullah Khan to 1/8th, Mt. Munna Begam to 3/20th and Maulvi Ali Bakhsh to 1/10th The Government revenue asseessed on the property was Rs. 1,150.

Dalpat Rai assigned his share of the revenue partly to Arzmand Ali and Muizuddin and partly to a zivarat. Arzmand Ali Khan and Muizuddin sold their rights to Khiyali Ram, who was the husband of Mt. Bilaso and father of the present plaintiffs. Mt. Bilaso brought a suit for the recovery of her share of the revenue for the years 1304 to 1306 F. against Nur Mohammad, the lambardar. Her suit was dismissed on the ground that it was misconceived and that she ought to have sued the heirs of Dalpat Rai. It was a remarkable decision. The grounds upon which the decision was based cannot be understood and it is further remarkable that the decision passed muster on appeal. Mt. Ram Piari brought a suit against Nur Mohammad for the revenue from Rabi 1304 to Kharif 1307 F. Her claim was substantially allowed by the appellate Court on 4th January 1901. In 1902, Mt. Bilaso sued in the Court of the Subordinate Judge of Shahjahanpur for a declaration of title to the revenue of village Lakhanpur and for the recovery of the arrears due. The suit was directed against seven persons, namely, Nur Mohammad, Mt. Bhawaneshwari, Durga Pershad, Jawahir Lal, Ram Dayal, Mathura Pershad and Itwari Lal. This suit was dismissed by the original Court on 1st December 1902, but the claim was partially allowed on appeal by Mr. Steel, the District Judge, by his judgment, dated 2nd March 1903. He held that Mt. Bilaso was entitled to a declaratory decree to the effect that she had a right to realise from Dalpat Rai's heirs Rs. 148-7-3 per annum being the assigned revenue of mauza Lakhanpur. This is another judgment which it is not possible to understand and the mistakes which have produced confusion in the present case begin from this date. Mr. Steel also granted a decree for Rs. 521-14 with future interest from the institution of the suit till realization at 6 per cent per annum. In 1904, Mt. Bilaso brought a suit in the Court of Mr. Cole, Assistant Collector, First Class, for the recovery of Rs. 536-6 for arrears of revenue for the years 1308, 1309 and 1310F. against Hakim Durga Pershad and others. On 5th April 1904, an ex parte decree was passed for Rs. 445-5-9 with interest. On 19th July 1905, Mt. Bilaso again obtained an ex parte decree against Hakim Durga Pershad and another for arrears of revenue. In 1914 Mt. Bilaso brought a suit against Hakim Shiam Sundar Lal, the present respondent, in the Court of an Assistant Collector, First Class, for recovery of arrears of revenue under S. 161, Act 2 of 1901. The defence gave rise to six issues, four of which are material :

(1) Whether the suit is cognizable by the revenue Courts ?

(3) Whether the plaintiff is entitled to sue ?

(4) Whether the plaintiff is a muafidar ? and

(5) Whether the suit is barred by Act 23 of 1871 ?

The Court held that the plaintiff as vendee of the assignee of the muafidar was entitled to sue in the revenue Courts under S. 161 coupled with S. 166, Agra Ten. Act. It also held that the suit was not barred by the provisions of Act 23 of 1871. It observed that :

"Section 9 of the said Act is quite clear. Had the suit been against Government it would have been quite a different thing."

This decree was affirmed by Rai Bahadur Babu Srish Chander Base, District Judge, on 5th December 1914. His judgment proceeded upon the grounds that Mt. Bilaso was a recorded cosharer and could maintain a suit under S. 161 Ten. Act, that in the former suits between the parties Jawahir Lal had not pleaded the bar of Act 23 of 1871, that Mt. Bilaso had obtained a decree from the revenue Court (decree No. 1 of 1905) for her share of the revenue from Jawahir Lal, and that for more than 12 years the assignees of Dalpat Rai had been in possession of the sub-muafi and that their title, if defective in the beginning, had become perfected by lapse of time and adverse possession. This decision was upheld by Sir George Knox in second Appeal No. 758 of 1915, decided on 20th June 1916. He maintained the decree of the Court below upon the ground that the decree passed in 1905 was fatal to the two contentions of Shiam Sunder

Lal, namely, that the suit was barred by Act 23 of 1871 and that the judgment and decree, dated 2nd March 1903, were null and void. The learned Judge observed :

"Whatever may be the merits otherwise of the case the passing of decree and the fact that Mt. Bilaso is a recorded cosharer in the revenue papers fully entitle her to bring the present case. The presumption is entirely in her favour."

On 20th May 1911, Hakim Shiam Sunder Lal appears to have brought a suit in the Court of the Subordinate Judge of Shahjahanpur against the Secretary of State for India in Council in which he claimed the following declaration and relief :

"It may be established and declared that the plaintiff has proprietary rights in ten biswas of revenue free grant in each of the three mahals Nur Mohammad, Farrahat Fatima and Intizam Uddin situate in mauza Lakhanpur, pargana and district Budaun, each of the three mahals having recently been formed into a twenty biswa mahal and that the plaintiffs owned ten biswas in each of them and the name of the Government may be expunged."

It appears that sometime before the institution of the suit, the Government had resumed the muafi. The suit was resisted on the ground that it was not maintainable under Ss. 5 and 6 of Act 23 of 1871. This plea was repelled by the Subordinate Judge, who decreed the suit. The High Court on appeal reversed this decision and dismissed the suit on the ground that the civil Court was not competent to make a declaration directly or indirectly affecting the liability of the Government to pay the revenue to the plaintiff. The Judicial Committee upheld the decision of the High Court with the following observations :

"As regards the suit itself, it appears to be clearly misconceived. A competent civil Court is authorized under S. 6, to take cognizance of a claim in respect of "pensions and grants made by Government of money or land revenue' only on receiving a certificate from the authority mentioned in the section "that the case may be so tried." The object of this provision evidently is that in cases of conflicting titles, the revenue authorities should grant to the unsuccessful applicant an opportunity for adjudication of his right by the regular Courts of justice but it expressly declares that "the civil Court shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly" . . . . . 'The High Court have not interfered with the finding of the Subordinate Judge that the plaintiff was the nearest male reversioner to Dalpat Rai but they were clearly right in setting aside the decree in so far as it affected the liability of Government in respect of the revenue of the muafi grant.'"

From the history of the previous litigations which have been referred to above, the following facts emerge with distinctness :

(1) That the status of the transferee of the original muafidars had been recognized by the Courts of revenue ;

(2) That the names of the legal representatives of the transferee had been recorded in the revenue papers ;

(3) That suits had been instituted by the heirs or legal representatives of the transferee aforesaid against the heirs of Dalpat Rai for arrears of revenue under S. 161, Agra Tenancy Act ; and

(4) That the suits were decreed, the plea of the defendants that the suit was barred under Act 23 of 1871 having been rejected.

There are certain other proceedings which may be incidentally mentioned. In a suit between Lal Bahadur plaintiff and Lala Babu, son of Jawahir Lal, a question arose as to whether the right to realize the Government revenue of mauza Mohammadpur Byar as assignees thereof was liable to be sold in pursuance of a mortgage decree. It was held by a Bench of this Court in Second Appeal No. 425 of 1923 decided on 20th February 1925 that the right of the mortgagors to the zemindari of this mauza was independent of the right to the realization of the Government revenue as assignees and that the latter right was not liable to be sold in execution of a mortgage decree. We are not called upon to make any pronouncement on this point as to whether we agree with this decision or we do not. The point does not arise in this case. There is an order of the Board of Revenue, dated 5th June 1922, passed on a petition from Shiam Sundar Lal and others praying for a restoration of the assignment of revenue of ten biswas of mouza Lakhanpur and for the payment of the arrears of revenue due to them. This petition was allowed in these terms:

"The Governor-in-Council has been pleased to direct that the petitioners may be again recorded as assignees of ten biswas of mauza Lakhanpur and be put in possession from the coming revenue year ; no arrears of revenue should, however, be paid to the assignees."

This order is capable of being interpreted as a fresh grant and we think that it should be so interpreted.

On 19th January 1922 a circular letter was issued by the Secretary to the Government of the United Provinces addressed to the Divisional Commissioners:

"I am directed to inform you that the Government is advised that assignments of remissions of revenue granted for periods limited to the lifetime of the grantees or their immediate successors are in the nature of political pensions and should be treated as non-transferable. The Government is accordingly pleased to declare that all such pensions and assignments of revenue are not transferable. In the case of remissions of revenue, the result of this decision is, that, if the grantee transfer his proprietary right, the full revenue will be imposed with effect from the date of the transfer etc. . . . ."

The above exhausts the vital documents produced in this case which directly or indirectly have a bearing upon the questions raised in this appeal.

The Court of first instance decreed the plaintiff's suit upon the grounds that the defendants were recorded in the revenue papers as muafidars (assignees) of the Government revenue and the plaintiffs as their (defendants') sub-muafidars and that the claim of the plaintiffs or their predecessors-in-title against the predecessors-in-interest of the defendants for recovery of arrears of revenue had been decreed in the year 1914.

The lower appellate Court has reversed this decision and dismissed the suit. It held that in view of the decision of the Privy Council dated 21st October 1919 in the suit between *Hakim Shiam Sundar Lal* and *others* v. *Secretary of State for India in Council* and of the decision of the High Court in Second Appeal No. 425 of 1923 dated 20th February 1925 which have already been referred to and

"in view of the very clear terms of the Pensions Act 23 of 1871, it is not . . . . . possible for this Court or for any revenue Court to entertain a suit of an assignee of Government revenue." 'Act 23 of 1871 is perfectly clear and I do not think that the equities of the case can require this Court to pass a decree requiring the revenue authorities to recognize an assignment, which is, under the substantive law illegal.'"

The decree of the lower appellate Court seems to be quite correct but the reasoning upon which the decree proceeds is clearly erroneous and cannot be supported. The case before the Privy Council was not one between the assignee of the muafidars and the muafidars. The present plaintiffs were no parties to the suit. The title of the present plaintiffs was not and could not have been litigated in this action. The pronouncement of the Privy Council is no more than this that the civil Court is competent upon fulfilment of certain conditions to take coguizance of a claim in respect of pensions and grants by a Government of money or land revenue where there is or has been a conflict of titles in respect of the same. The power of the revenue Court to adjudicate upon the claim advanced by the transferee of the original assignee under S. 161, Agra Tenancy Act, was not considered either in this case or in Second Appeal No. 425 of 1923. These decisions therefore are no authority for the proposition that the suit like the present is not maintainable in the Court of revenue under S. 161, Land Revenue Act.

Section 161 of this Act provides that a muafidar or assignee of revenue may sue for arrears of revenue due to him as such. S. 166 provides that the words . . . "muafidar or assignee of revenue" in this chapter include also the heirs, legal representatives, executors, administrators and assigns of such persons. The transferee of the original grantee is therefore an assignee within the meaning of S. 161 of the Act. Sch. 4, serial No. 10, indicates the forum in which a suit of this description should be instituted and prescribes that where the value of the claim exceeds Rs. 100 the suit is triable by an Assistant Collector of the First Class and an appeal lies to the civil Court.

This, however, does not advance the case of the plaintiffs. The suit contemplated under S. 161 of the Act is one against persons who are primarily liable for the payment of Government revenue. The defendants are not the zemindars. They are not primarily liable to the Sovereign power for the payment of Government revenue and a suit like the present is not within the purview of S. 161, Agra Tenancy Act.

Act 23 of 1871 is an Act to consolidate and amend the law relating to pensions and grants by Government of money or land revenue. S. 4 provides that :

"Except as hereinafter provided, no civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration of any such pension or grant, and whatever may have been the nature of the payment, claim, or right for which

such pension or grant may have been substituted."

This section does not take away the jurisdiction of the Court of revenue to entertain a suit by the transferee of the assignee of the land revenue. The jurisdiction of the civil Court and of the civil Court alone, is limited by the terms of this section. The nature of the limitation has been defined in the following two sections. S. 5 provides that

"any person having a claim relating to any such pension or grant may prefer such claim to the Collector of the District, or Deputy Commissioner, or other officer authorized in this behalf by the local Government, and such Collector, Deputy Commissioner or other officer shall dispose of such claim in accordance with such rules as the chief revenue authority may, subject to the general control of the Local Government, from time to time, prescribe in this behalf."

The words "any such pension or grant" clearly indicate any pension or grant of money or land revenue referred to in the preceding section. This section authorizes the Collector or the Deputy Commissioner or other officer specially empowered by the Local Government to entertain a claim with reference to the grant of land revenue conferred by the former Government. The Local Government has the authority to call for evidence in support of the grant and may either recognize the grant or refuse to do so. The proceeding before the officers referred to in this section is more administrative than judicial. S. 6 provides that

"a civil Court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a certificate from such Collector, Deputy Commissioner or other officer authorized in that behalf that the case may be so tried but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly."

This is an enabling section and empowers the civil Court to entertain a suit where conflicting claims are advanced with reference to the grant, upon the claimant producing a certificate from the officers specially named that the case may be so tried; but it bars a civil Court from making an order or decree in any suit whatever by which the liability of the Government to pay any such pension or grant is directly or indirectly affected. It is by reason of this section that the Privy Council held that the previous suit instituted by Shiam Sundar Lal and others against the Secretary of State for India in Council was not maintainable. This section does not forbid the institution of a suit by the transferee of the original grantee for recovery of arrears of revenue if instituted in a Court of revenue against a proper person against whom a claim could be lodged for arrears of revenue.

It is unfortunate that the original farman by which the grant was made by Emperor Babar is not forthcoming. No document has been produced in this case in which the terms of the said grant have been reproduced or even summarized. It is clear, however, that the right was conferred upon the grantee in perpetuity and there is nothing to indicate that it was restricted to the personal enjoyment of the grantee or his heirs. In the absence of any restrictions or limitations a right to appropriate the Government revenue payable by the zemindars is a proprietary right and is, as such, heritable and transferable. Under S. 6, T. P. Act, property of any kind may be transferred except those enumerated in Cls. A to I. Under Cl. (G) stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred. This section does not prohibit the assignment of a pension, not granted or continued by Government on political considerations, or on account of past services, or present infirmaties or as a compassionate allowance : see *Subraya Mudali* v. *Velayuda Chetti* (1). The word 'pension' has nowhere been defined, but it ought to be understood in its ordinary sense as implying periodical allowance on account of past service, consideration or merit or by way of compensation to dethroned princes, their families and dependents : *Secy. of State* v. *Khem Chand Jeychand* (2) (at p. 436) ; also *Lachmi Narain* v. *Makund Singh* (3) ; also *Rama Rao* v. *Kottipi Thimma Reddi*(4). A grant of land revenue as such cannot be comprised in the term 'pension.' A grant of Government revenue can in no case be created as a political pension which is a pension granted on political considerations for reasons of State. A right to share in the Government revenue granted in perpetuity by the Sovereign power cannot be described either as a pension or as a political pen-

(1) [1907] 30 Mad. 153.
(2) [1879] 4 Bom. 432.
(3) [1904] 26 All. 617=1 A. L. J. 333.
(4) [1920] 11 M. L. W. 393=54 I.C. 331.

sion. Such a grant may be a hereditary grant as in the present case and partakes of the nature and character of a jagir. Its liability to resumption would be dependent upon the terms under which it was created and upon the will of the Sovereign power. Where a right of this description is created by contract or grant, its transferability will in each case depend upon the terms of the contract or grant. The assignment of such a grant is not prohibited by S 12, Pensions Act. The rule of expendiency prohibiting the transfer of pension which is founded upon the idea of ensuring the enjoyment of the pension by the pensioners in comfort cannot be invoked in the case of an assignment of Government revenue which is not shown to partake the nature and character of a pension.

The suit of the plaintiffs, however, is clearly misconceived. It is not founded upon contract. There is no privity of contract between the parties to this action. It is not founded upon tort. There has been no violation of any legal duty which the defendants owe to the plaintiffs. Under these circumstances the lower appellate Court was justified in dismissing the plaintiffs' suit. The reasons, however, upon which the learned District Judge proceeded were clearly not justified. I would, therefore, confirm the decree of the Court below and dismiss this appeal.

Ashworth, J.—I concur in the dismissal of the appeal, but my reasons are somewhat different. The suit was one brought under S. 161, Agra Tenancy Act. That provides for a suit being brought by a muaifidar or assignee of revenue suing for arrears of revenue. This suit was not one of that character. It was brought not by an assignee of revenue, because assignee must clearly mean an assignee from Government. It was brought by the assignee of an assignee. Again, it was not brought for arrears of revenue. but for money due from the defendants not as persons bound to pay revenue but as persons who had, had until the assignment in favour of the plaintiff, a right to realize revenue, and who had continued to realize that revenue from the zamindars notwithstanding their having assigned their rights to the plaintiffs. The suit should, therefore, have been dismissed straight away on the ground that no cause of action was shown for bringing a suit under S. 161.

Again, the suit was a bad one, in my opinion, because it was a suit relating to a grant of land revenue, and such a suit under S. 5, Pensions Act, must be determined by a revenue Court in accordance with the rules laid down by the chief revenue authority. No invocation of any such rule was made by the plaintiff, nor did the trial Court purport to act under any such rule. When the appeal came before the District Judge, that appeal was heard by the District Judge as a civil Court. This would bring into operation Ss. 4 and 6, Pensions Act. The civil Court could not entertain the case except after receiving a certificate from the Collector authorizing it to try the case.

Again, the suit was based on an alleged assignment, which, in my opinion, was null and void under S. 12, Pensions Act. It has been suggested that the word "pension" in S. 12 will not include a grant of land revenue, but it appears to me that this is not so. The Pensions Act is divided into four parts. Part 2 is headed "rights to pensions" and deals under that heading with grants of land revenue. Part 4 is headed by the term "miscellaneous," and it appears to me that the word "pension" is used throughout in it as including the subdivisions of the general expression "pension," namely, pension, grant of money or land revenue, expressed in S. 4 of the Act. In other words, the word "pension" as used in the Act is at times used in a general sense to cover any form of recurring payment granted by Government and in other places is used to express only a species of the generic term.

I fully agree with my learned brother that if no other objection stood in the way of this appeal, what is fatal to the plaintiffs is that they have never shown any cause of action against the defendants. What they allege is that the defendants after transferring to them the right to realize the assigned revenue have continued themselves to realize it. The suit would no doubt be maintainable if the plaintiffs could invoke the provisions of the Transfer of Property Act applicable to the seller of immovable property; for a purchaser of an immovable property is entitled to sue the seller for mesne profits or damages at

the time of bringing a suit for obtaining possession on the basis of the sale. It is true that the definition of "immovable property" will include benefits to arise out of land. But a suit for mesne profits or for damages on account of trespass is not possible in the absence of unlawful retention of immovable property or trespass on immovable property. The plaintiffs in this case sue the defendants as persons unlawfully retaining or unlawfully seizing immovable property. The realization by the defendants of the revenue in this case does not appear to me to give any cause of action to the plaintiffs Plaintiff's proper course will be to sue the zemindar ignoring the fact that they had paid the defendants.

There is one aspect of the case to which reference may be made. It appears that in previous litigation it was held that the defendants were bound by decrees against their father or grandfather under the rule of res judicata. This appears to me clearly untenable. Where a pension is granted from generation to generation one generation cannot be said to be the successor-in-interest of the last. At the very moment when the grant was made by Government a right arose in favour of each successive generation and the predecessor-in-interest of each successive generation was Government and not the father. It is obvious that when a person entitled merely in himself to a life-interest contests a suit in respect of that life-interest he cannot be representing some one entitled to a successive life-interest.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 788

SULAIMAN AND PULLAN, JJ.

Sohan Lal—Plaintiff—Appellant.

v.

Bhagwan Singh and *others*—Defendants—Respondents.

Second Appeal No. 1718 of 1927, Decided on 8th July 1929 from a decree of Sub-Judge, Mainpuri, D/- 9th August 1927.

(a) Transfer of Property Act, S. 54—Bona fide settlement of doubtful claims is not transfer of property.

A bona fide settlement of doubtful claims is not a transfer of property at all but really a recognition of the title of the opposite party and an abandonment of all further claims to it. Such an arrangement cannot be considered a sale within the meaning of S. 54 although the registered document following upon the settlement takes the form of a sale deed so as to give right of pre-emption. [P 789 C 1]

(b) Transfer of Property Act, S. 54—Settlement of doubtful claim distinguished from sale.

Where a person, setting up his own title to property in order to estop claimant of property from further trouble pays him a certain amount and takes a document from him in the garb of a sale deed, that is in reality a bona fide settlement of a doubtful claim and not a sale. [P 789 C 1]

Baleshwari Prasad—for Appellant.

Panna Lal—for Respondents.

Judgment—This is a plaintiff's appeal arising out of a suit for pre-emption of an ostensible sale of 6th October 1925. The first Court decreed the claim, but the lower appellate Court has dismissed it. The latter Court has not expressed itself clearly in recording its findings which is the chief source of difficulty in this second appeal. But the facts found by it are clear enough and only one conclusion can be drawn from those facts. Mardan Singh the last owner died some 40 years ago and his widow Mt. Jeet Kunwar succeeded to the property. Jot Singh and others sued as the reversioners denying the widow's rights on the ground that she had not been legally married. The widow in her turn denied the relationship of the claimants. Without going into the question of the pedigree of the claimants the Court held that Mt. Jeet Kunwar had been the legally married wife of Mardan Singh. After this Mt. Jeet Kunwar remarried and yet continued in possession of the property for more than 12 years. From her second husband the contesting defendants were born. When Mt. Jeet Kunwar died, the representatives of the former claimants again put forward their claim as the next reversioners, but their relationship was disputed by the sons of Mt. Jeet Kunwar who further set up tneir own title based on her adverse possession. The lower appellate Court has distinctly found that it was not easy for the representatives of the former claimant to prove that they and Mardan Singh had been descended from a common ancestor, and has further found that the sons of Mt. Jeet Kunwar were honestly contesting the rights of the claimants to succeed to the property. He has also found that the value of the property was

Rs. 1,300 but the defendants took a document which was ostensibly a sale-deed for Rs. 600 from the claimants, and before the deed was actually registered an application was filed by the claimants in the mutation Court that they had renounced all their rights. The learned Judge has further found that "the sale was really a relinquishment of the rights of the claimants." Having regard to all these findings there is no doubt that what the learned Judge meant by his opinion quoted above was that this transaction was not in reality a sale transaction but was a mere relinquishment of the claim, that is to say, a settlement of the dispute between the parties.

The present plaintiff cannot pre-empt this property unless the transaction is one of sale. A bona fide settlement of doubtful claims is not a transfer of property at all but really a recognition of the title of the opposite party and an abandonment of all further claims to it. Such an arrangement cannot be considered a sale within the meaning of S. 54, T. P. Act. The mere fact that the registered document following upon the settlement took the form of a sale-deed is not by itself conclusive. In this view of the matter the transaction was not pre-emptable at all. The vendees were setting up their own title and in order to estop the claimants from further trouble paid them Rs. 600 and took a document from them in the garb of a sale-deed. This in reality was a bona fide settlement of doubtful claims and not a sale. The decree of the lower appellate Court must therefore be affirmed. Having regard to the vagueness of the findings we think that the appeal was not a frivolous one and direct that the parties should bear their own costs of the appeal.

P.N./R.K. *Decree affirmed.*

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* A. I. R. 1929 Allahabad 789

SEN AND PULLAN, JJ.

B. Shyam Lal and *others*—Defendants—Appellants.

v.

L. Badri Prasad—Plaintiff—Respondent.

Second Appeal No. 903 of 1926, Decided on 25th June 1929, against decree of Addl. Dist Judge, Agra, D/- 13th February 1926.

*** (a) Hindu Law — Alienation—Father—Antecedent debt—Alienation by father for paying off antecedent debt—Court cannot enquire into prior history of the debt.**

[P 789 C 2 P 790 C 1]

Where a father sold a piece of land for paying off certain money due on a prior mortgage this must be regarded as an antecedent debt and the Court cannot go backwards and find that only sum due as an antecedent debt was the original sum due on a promissory note prior to the execution of mortgage.

(b) Hindu Law — Alienation — Alienation by father for necessity—Application of consideration need not be looked to by vendee.

If it is once conceded that the sale by father was for legal necessity it is not for the vendee to pursue each and every item of the consideration and ascertain how it was applied ; *A. I. R.* 1927 *P. C.* 37 ; *A. I. R.* 1927 *P. C.* 246; 6 *M. I. A.* 393 (*P. C.*), *Rel. on.* [P 790 C 1]

K. N. Katju—for Appellants.

S. K. Dar—for Respondent.

Judgment. — This second appeal arises from a suit brought by a minor son of a Hindu for setting aside a sale of a house and a shop by his father Shankar Lal. It was alleged in the plaint that the father was of bad character and a vagabond who had been spending the income of the property for unlawful purposes. It is also alleged that the sale deed is fictitious and without consideration. It was found by the Court of first instance that the sale-deed was for Rs. 1,000 of which the consideration is made up of Rs. 525 paid to Chandmal on account of certain prior mortgages ; Rs. 100 paid in advance and Rs. 375 paid before the Sub-Registrar for expenses incurred in connexion with certain ceremonies required by the Hindu religion for the plaintiff himself and payment of other oral debts. The first Court held that there was overwhelming evidence adduced on behalf of the defendants that the sale-deed was executed for legal necessity "which consisted in paying off old debts and expenses for mundan ceremony of the plaintiff himself." In appeal the learned Additional District Judge reversed this order, and granted the plaintiff a decree on condition that he paid to the vendees a sum of Rs. 95 within 3 months. The main question to be decided in the case of this kind is whether the sale was for legal necessity, that is to say, was there a necessity for the sale of this property. In our opinion it was proved without doubt that a sum of Rs. 525 was actually due on the prior mortgages. This must be regarded as an antecedent debt and

the learned Judge of the Court below was in error that he believed that he could go backwards, and find that the only sum due as an antecedent debt was the original sum due on a promissory note prior to the execution of the mortgages. The sum of Rs. 575 had to be raised, and we are satisfied that it could only be raised by a sale. As to the rest of the consideration we have the clear findings of the first Court that it was for legal necessity. The lower appellate Court finds that the sum of Rs. 375 was actually paid before the Sub-Registrar but he declines to give a clear finding as to whether it was for legal necessity or not; possibly his finding may be taken to suggest that he thought that there was no legal necessity, or, at any rate, there was only a necessity for the advance of a smaller sum which he does not specify, but in our opinion in view of the recent decisions of the Privy Council this point is irrelevant. If it is once conceded that the sale was for legal necessity it was not for the vendee to pursue each and every item of the consideration and ascertain how it was applied. We would refer in particular to the decision of their Lordships of the Privy Council reported in *Srikrishna Das* v. *Nathu* (1) and their subsequent decision affirming that ruling and further explaining it, reported in *Gaurti Shankar* v. *Jiwan Singh* (2). These judgments merely interpret what Knight Bruce, L. J., said in the case of *Hanooman Peasaud Panday* v. *Mt. Babooee Munraj Koonweree* (3) (at p. 424):

"The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application."

In our opinion the plaintiff failed to establish his case that the sale by his father was not for legal necessity and can be challenged by his minor son. We, therefore, allow this appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs throughout.

P.N./R.K. *Appeal allowed*

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(1) A. I. R. 1927 P. C. 37=49 All. 149=54 I. A. 79 (P. C.).
(2) A. I. R. 1927 P. C. 246.
(3) [1855] 6 M. I. A. 393=18 W. R. 81=2 Suther 29=1 Sar. 552 (P. C.),

A. I. R. 1929 Allahabad 790

DALAL, J.

Sahdeo Singh and *another*—Defendants—Appellants.

v.

Ram Nawal Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 496 of 1928, Decided on 5th July 1929, against decree of Sub-Judge, Azamgarh, D/- 22nd February 1928.

(a) Civil P. C., S. 91—S. 91 is inapplicable to issues arising on encroachments on village roads kept open by right of easement—Suit lies without permission of Advocate General.

An encroachment on a village road raises questions of the right of easement of the residents and proprietary right of the zamindars and S. 91 would not be applicable to issues which arise on encroachments being made on a road of this nature. A suit therefore, lies without the permission of the Advocate General. [P790 C 2]

(b) Civil P. C., O. 1, R. 1—No misjoinder if two different sets of persons join to eject trespasser.

There is no misjoinder of parties in two different sets of persons joining together to eject a trespasser. [P 790 C 2]

K. D. Malaviya—for Appellants.

N. P. Asthana—for Respondents.

Judgment.—The view taken by the lower appellate Court is correct Roads in the village abadi belong to the zamindars and are kept open by reason of the right of easement acquired by the residents to use them as means of passage. Such roads are not entered as property of the Government in the village record. An encroachment on that road will raise questions of the right of easement of the residents and proprietary right of the zamindars, and S. 91 would not be applicable to issues which arise on encroachments being made on a road of this nature. The plaint has been carefully prepared. The plaintiffs declared themselves, some of them to be cosharers of the land in dispute, and others to be residents who have acquired right of easement to have the land kept open. A suit, therefore, did lie without any permission from the Advocate General.

As regards the third ground of appeal, I do not think that there is any misjoinder of parties in two different sets of persons joining together to eject a trespasser.

R.M /R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 791

BENNET AND IQBAL AHMAD, JJ.

Jugul Kishore—Defendant—Appellant

v.

Banwari Lal and *others*—Plaintiffs—Respondents.

Second Appeal No. 882 of 1926, Decided on 28th June 1929, against decree of 2nd Sub-Judge, Saharanpur, D/- 10th April 1926.

Transfer of Property Act, S. 55 (1) (g)—To make vendee liable for encumbrances section requires specific contract in sale-deed that property is sold subject to encumbrances.

Section 55 (1) (g) clearly means what it states, that there must be a provision in the sale-deed that property is sold subject to incumbrances and if that provision is not specifically set out in the sale-deed the vendor will be liable for all prior incumbrances.

[P 791 C 2]

P. L. Banerji and *K. C. Mital*—for Appellant.

N. C. Vaish and *Janaki Prasad*—for Respondents.

Judgment.—This is a second appeal by the defendant on a very simple point. The defendant bought certain property at an auction-sale on 20th December 1918, for a price which has not been disclosed but is said to be between Rs. 300 and 400. The same proclamation sets out that that property was subject to a prior mortgage of 28th June 1912.

The defendant sold the property to the plaintiff by a sale-deed dated 22nd June 1920 in which he stated that he was selling the property which he had purchased at the auction-sale of 20th December 1918. The sale consideration was Rs. 1,000. Subsequently a suit No. 9 of 1923 was brought by the mortgagee for Rs. 2,200 on the mortgage of 28th June 1912, and in that suit 20th May 1925 was fixed for sale. The plaintiff brought the present suit on 29th April 1925 asking for alternative reliefs either that the defendant might be directed to pay the amount due to the mortgagee or that the defendant might be directed to pay to the plaintiff the sale consideration of Rs. 1,000. The Court of first instance dismissed the suit, and the lower appellate Court decreed it. The point before this Court is very simple. Section 55 (1) (g), T. P. Act, states that the seller is bound, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing. There is no contract in regard to prior incumbrances in the sale-deed in question. It was argued by the learned advocate for the appellant that the section quoted means that the vendor is only liable if he stated in the sale-deed that he sold free from incumbrances. We cannot agree to this interpretation of the section. It appears to us that the section clearly means what it states, that there must be a provision in the sale-deed that the property is sold subject to incumbrances, and if that provision is not specifically set out in the sale-deed, then the vendor will be liable for all prior incumbrances. No authority was shown to us for the strange interpretation which the learned advocate for the appellant desired to place on this section. He referred to a ruling of the Privy Council, reported in *Bhagwati* v. *Banarsi Das* (1) in which in a slightly different case the Privy Council had held that the vendor was liable. The argument apparently was that because the facts of the present case are not precisely similar, therefore in the present case the vendor would not be liable. The argument is obviously unsound. A certain amount of argument was made in regard to the statement in the sale-deed that what the vendor sold was what he had purchased at the auction-sale of 20th December 1918, and it was argued that the vendee should have ascertained what was in the sale proclamation and have referred to the mortgage of 28th June 1912 which is mentioned in the sale proclamation. It was admitted by the learned advocate for the appellant that no copy of the sale proclamation or sale certificate was given to the vendee at the time of the sale to him. A further argument was made that it was open to the vendee to have ascertained by inquiry from the office of the Sub-Registrar that the incumbrances of 28th June 1912 did exist on this property. We consider that even if the vendee had ascertained from this source that incumbrances did exist, still that would be no answer for the provision in S. 55 (1) (g), which requires that there should be a specific contract set forth in the sale-deed that the property is sold subject to incumbrances, otherwise the vendor is liable to pay the incumbrances.

(1) A. I. R. 1928 P. C. 98=50 All. 371=55 I. A. 135 (P. C.).

We consider the finding of the lower appellate Court is correct and dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 792

YOUNG AND BENNET, JJ.

Darbari Lal—Defendant—Appellant.

v.

Damodar Das—Plaintiff—Respondent.

Second Appeal No. 824 of 1929, Decided on 4th July 1929, from a decree of Dist. Judge, Azamgarh, D/- 29th April 1929.

(a) Civil P. C., O. 21, R. 16—Transfer.

Transfer of a decree to a relative of a judgment debtor does not amount to a transfer to a judgment-debtor. [P 792 C 2]

(b) Contract Act S. 343—*N* and *K* in possession of property under same thikanama—In suit decree was passed jointly against *N* and *K* in accordance with their shares under thikanama—*N* paying amount of decree and *K* paying nothing—*K* is bound to contribute to extent of his share.

Where *N* and *K* were thikadars of certain property under a thikanama executed in favour of both of them, and where subsequently in a suit by the reversioner of the executant a decree was passed to the extent of one-third against *K* and two-thirds against *N* for mesne profits and where *N* paid the amount of the decree and *K* paid nothing, *K* is bound to contribute one-third as a joint judgment-debtor along with *N* and in a suit by *N* he is entitled to a decree to that extent : 40 *All.* 672, *Dist.* [P 793 C 1]

K. N. Katju and *M. L. Chaturvedi*—for Appellant.

Judgment.—This is a second appeal by the defendant against a decree of the lower appellate Court awarding the plaintiff one-third share of a sum of money, which he had paid under a decree, on the ground that the defendant was bound to contribute that one-third as a joint judgment-debtor along with the plaintiff. The facts are that the plaintiff and defendant were thikadars of certain zamindari property under a thikanama executed in favour of both of them, and subsequently reversioners of the executant sued the plaintiff and defendant for possession of the property and mesne profits, and on 31st March 1920, a decree was passed to the extent of one-third against the defendant and two-thirds against the plaintiff for mesne profits, interest and costs, amounting to Rs. 6,797-11-8 It has been found as a fact by the lower appellate Court that by 1st October 1923, the plaintiff had paid Rs. 2,400, and that between 1st August 1926 and 18th February 1927 the plaintiff paid Rs. 2,198-13-10 on this decree. Defendant has paid nothing. The first argument addressed to us was that limitation applied, because the first payment of Rs. 2,400 was more than three years beyond the date on which the suit was brought. But the plaintiff was bound to pay two-thirds of the total decretal amount, and the first payment of Rs. 2,400 was not in excess of his share of the total amount of decree total amount which was eventually paid. We consider that the cause of action to the plaintiff arose between 1st August 1926 and 18th February 1927, when he paid the sum of Rs. 2,198 odd, and that period is within three years from the date of the suit and, therefore, within limitation, according to Art. 99, Lim. Act. Time runs, according to that article, from the date of payment in excess of the plaintiff's own share. The suit is, therefore, clearly within the period of limitation. The next point argued was that under O. 21, R. 16 proviso, a decree should not be executed against the defendant and, therefore, the defendant has no liability. This article does not apply to the facts of the present case, because there was no transfer of the decree to either of the judgment-debtors. It has been found by the lower appellate Court that there was a transfer of the half share of the decree owned by Raghunandan to one Brindaban, who was a relative of the plaintiff; but that transfer does not amount to a transfer to a judgment-debtor. The next point argued was that the plaintiff and defendant being joint tort-feasors, no suit for contribution would lie between them. The authority for this proposition on which the learned counsel for the appellant relied, was *Nand Lal Singh* v. *Beni Madho Singh* (1). That case states that contribution was not allowed, because that case was not one of joint tort-feasors. In that case the facts were that the plaintiff was in possession wrongfully of a half share of property under a deed of gift, and that the defendant was in independent possession of the other half share of property under an entirely separate deed of gift. Accordingly, it was held that the plaintiff could not recover

(1) [1918] 40 All. 672=47 I.C. 989=16 A.L.J. 689.

the share of costs from the defendant, which he paid under the decree, although the costs were jointly against both parties. In the present case the facts are entirely different, because the plaintiff and defendant were both in possession under the same thikanama, and accordingly, the decree was passed jointly against the plaintiff and defendant, in accordance with their shares under that thikanama. We consider that the decree of the lower appellate Court is correct and we accordingly dismiss this appeal under O. 41, R. 11.

P.N./R.K. *Appeal dismissed.*

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*A. I. R. 1929 Allahabad 793

SULAIMAN AND NIAMATULLAH, JJ.

Mahadeo Prasad — Judgment-debtor —Applicant.

v.

Khubi Ram —Decree-holder—Opposite Party.

Civil Revision No. 162 of 1928, Decided on 14th June 1929, against the order of the Dist. Judge, Meerut, D/- 21st April 1928.

***Civil P. C., O. 21, R. 90—Objection by judgment-debtor under O. 21, R. 90 that decree-holders misled certain bidders by false representation, that fictitious bids were offered and property was sold for inadequate consideration — Court hearing judgment-debtor and dismissing objection without allowing him opportunity to produce evidence in corroboration—Appeal to District Judge dismissed—There is material irregularity and High Court will interfere in revision though appeal was preferred to District Judge—Civil P. C., S. 115.**

An objection under O. 21, R. 90 was filed by the judgment-debtor that the decree-holder had dishonestly misled certain bidders by false representation, that fictitious bids were offered and that the property was sold for an inadequate consideration, The Court took down the evidence of the judgment-debtor and dismissed his objection. He did not fix any date for its hearing and did not allow any opportunity to the judgment-debtor to produce any witnesses in corroboration of his testimony. An appeal was made to the District Judge who dismissed it. Revision was filed from the appellate order.

Held: that there was a material irregularity in the exercise of the jurisdiction and the fact that revision was described as one from the appellate order and that the District Judge declined to interfere in the matter could not preclude High Court from curing irregularity for S. 115 does not require that no appeal in the meantime should have been preferred to the District Judge or if preferred it is only the order of the District Judge that could be revised. [P 793 C 2]

B. S. Shastri for *S. D. Sinha*—for Applicant.

S. N. Gupta—for Opposite Party.

Judgment.—This is a revision by a judgment-debtor arising out of an auction sale. On 19th January 1928, an objection under O, 21, R. 90 was filed by the judgment-debtor that the decree-holder had dishonestly misled certain bidders by false representation, that fictitious bids were offered and that the property was sold for an inadequate consideration. The learned Munsif took down the evidence of the judgment-debtor on 25th January 1928 and dismissed his objection on the 26th. He did uot fix any date for its hearing and issued no notice to the decree-holder and obviously did not allow any opportunity to the judgment-debtor to produce any witnesses in corroboratian of his testimony. This in our opinion was a material irregularity in the exercise of jurisdiction which mignt have prejudiced the judgment-debtor. The judgment-debtor appealed to the District Judge who dismissed his appeal stating that it seemed that the judgment-debtor made no attempt to establish his suggestion and did not produce any evidence or ask for time to do so, but he conceded that the house seemed to have been sold for rather a low price. An objection is taken on behalf of the respondent that we have no power to interfere inasmuch as the revision has been filed from an order of the District Judge which does not fall under S. 115. As the whole record has been sent for we do not see any force in the technical objection that the revision is described as one from the appellate order. Nor do we think that the mere fact that the District Judge declined to interfere in the matter precludes us from curing the irregularity.

Section 115, Civil P. C. empowers this High Court to call for the record of any case which has been decided by any subordinate Court if no appeal lies thereto. This obviously includes a trial Court and the appeal referred to therein means an appeal tb the High Court. The present case therefore fulfils the conditions required by that section. If therefore a trial Court has acted with material irregularity in the exercise of its jurisdic-

tion or acted illegally the High Crurt has power to interfere in revision provided that no appeal lies to the High Court. The section does nct require that no appeal in the meantime should have been preferred to the Court of the District Judge, or that if preferred it is only the order of the District Judge which can be revised. We are satisfied that the objection of the judgment-debtor should be disposed of after giving him full opportunity to produce all his evidence. We accordingly allow this revision and setting aside the order of the Munsif dated 26th January 1928 send the case back to that Court through the District Judge for disposal according to law. Costs of this Court will abide the event.

P.N./R.K. *Revision allowed.*

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* A. I. R. 1929 Allahabad 794

BOYS AND PULLAN, JJ.

Shantanand Gir—Decree-holder—Appellant.

v.

Basudevanand Gir—Judgment-debtor—Respondent.

Execution First Appeal No. 156 of 1928, Decided on 25th June 1929, against decree of Sub-Judge, Allahabad, D/- 4th February 1928.

*** (a) Civil P. C., O. 45, R. 7 (1) (b)—Appeal by judgment-debtor to Privy Council—Decree-holder applying to attach deposit by judgment-debtor for costs of Privy Council—Idea of application being that decree-holder would attach and obtain deposited money and then be able to contend that judgment-debtor having no necessary deposit appeal should be dismissed—Such manoeuvre is grossly improper and offence to Court.**

Judgment-debtor appealed to the Privy Council and deposited a sum for the costs of the Privy Council and for printing charges. The decree-holder applied to attach the amount in execution of the decree which he had obtained from the High Court. The idea underlying the application was that the decree-holder would attach and obtain the amount deposited and would then claim to be in a position to contend that the judgment-debtor had not in deposit the money he was required to deposit and to ask that the appeal should be therefore dismissed.

Held : that the manoeuvre was grossly improper and an offence to the Court and the nature of the application was such as to make it desirable to consider whether the Court has inherent power in suitable case to make counsel pay the costs of litigation. [P 794 C 2]

(b) Civil P. C., O. 45, R. 7 (1) (b)—Attachment of deposit.

Where judgment-debtor appealed to the Privy Council and deposited necessary sum and decree-holder made an application to attach so much of the deposit as would eventually be found not to be required for the purpose for which it was entrusted to the Court but did not put any figures to suggest that there was any likelihood of there being any surplus, the application has absolutely no substance and even if the application contains such figures it would be wholly premature.

[P 795 C 1]

A. P. Pandey and *B. L. Dave*—for Appellant.

Janaki Prasad—for Respondent.

Judgment.—This appeal arises out of an application which in the form in which it was pressed in the lower Court reflects nothing but discredit on the persons who made it and the legal advisers through whom it was made. The application is of a nature that makes it desirable to consider whether the Courts have not inherent power in suitable cases to make counsel pay the costs of the litigation. One Mahant Shantanand Gir has got a decree against Mahant Basudevanand Gir. The latter has appealed to the Privy Council and has had to deposit in this Court a sum of Rs. 4,006-12-0 for the costs of the Privy Council and for printing charges. The decree-holder has now applied to attach this amount in execution of the decree which he has obtained from the High Court. It is manifest from the trend of the argument before the lower Court, as it appears from the judgment, that the idea underlying this application was that the decree-holder would attach and obtain the amount in question and would then claim to be in a position to contend that the judgment-debtor Basudevanand Gir had not in deposit the moneys he was required to deposit and to ask that the Privy Council appeal should be therefore dismissed. The Subordinate Judge has described this manoeuvre as "not charitable." We should unhesitatingly describe it as grossly improper and an offence to the Court. This manoeuvre of the decree-holder and his legal advisers in the Court below amounts to their saying to the Courts:

"You have told the judgment-debtor to pay into the Court certain money which the Court will hold on his behalf on trust for a certain purpose. I ask the Court forcibly to convert that money paid and held on that understanding, to a different purpose for my benefit

in breach of the faith put in the Court by the man who deposited the money."

In this Court the demand of the decree-holder has in the grounds of appeal been stated in all its nakedness. The first ground urges that the lower Court was wrong in not proceeding "against the said money." The second ground urges the said money is "not exempted from attachment" and that the

"judgment-debtor himself has a right to withdraw the unexpended money any time he likes for his own use and give up the appeal."

The third ground urges that "there is no equity in favour of the judgment-debtor" because he has throughout resisted the decree-holder. "No equity" in favour of a man who has deposited money in trust that the trustee (the Court) should not commit a breach of trust! Because the man who deposited the money in trust can withdraw it and abandon his appeal, therefore the decree-holder can ask the Court to commit a breach of trust by handing over the money to the decree-holder and thus for the benefit of the decree-holder force the judgment-debtor to abandon his appeal.

When counsel who signed these grounds came to state his case to this Court, he had no doubt realized the impropriety of them and very properly made no endeavour to support them, but reduced his request to a claim to attach so much of the money as might eventually be found not to be required for the purposes for which it had been entrusted to the Court. This is something quite different from the actual application made to the lower Court and quite different from the appeal to this Court. Further, in this form the application has no shadow of substance. Counsel does not put to us any figures to suggest that there is any likelihood of there being any surplus and the application, even if it had been made in this form, would have been wholly premature. We would dismiss the appeal. As to the question of costs, let Mr. A. P. Pande be informed that he should be prepared on a date to be fixed by the Hon'ble the Chief Justice to argue the general question whether this Court has power to order a legal practitioner, in appropriate circumstances, to pay personally the costs of an application or suit, and secondly, if the High Court has such power, whether it should be exercised in the present case. Let a similar notice be issued immediately to the legal practitioner who filed the application in execution, which was under appeal to this Court. After hearing the questions involved in the above notices, a final order will be passed.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 795

IQBAL AHMAD, J.

Moti Lal Agarhari—Judgment-debtor—Appellant.

v.

Champa Lal—Decree-holder—Respondent.

Execution Second Appeal No. 1290 of 1928, Decided on 4th July 1929, against decree of 2nd Addl. Subordinate Judge, Jaunpur, D/- 29th May 1928

(a) Limitation Act, Art. 182 (7), Expln. 1—Application for execution against some judgment-debtors keeps decree alive against all—Joint liability is not affected though decree differentiates between the judgment-debtors as regards mode of execution.

The mere fact that a decree differentiates between the judgment-debtors as regards the mode of execution does not affect the fact that all of them are jointly liable for the decretal amount and application for execution against some of many judgment-debtors against whom a joint decree has been passed keeps the decree alive against all. [P 796 C 2]

(b) Limitation Act, Art. 182 (6)—Major judgment-debtor described as minor is party to execution proceedings—Issue of notice to him gives fresh starting point.

The mere fact that a judgment-debtor who has attained majority is described as minor in execution proceedings does not lead to the conclusion that the judgment-debtor was not a party to execution proceedings. A notice of application can be said to have been issued to him and the decree-holder is entitled to compute the period of limitation from the date of the issue of the notice. [P 797 C 1]

Mushtaq Ahmad—for Appellant.

D. P. Malaviya—for Respondent.

Judgment.—This is a judgment-debtor's execution second appeal and arises under the following circumstances:

On 7th December 1920, the decree-holder respondent obtained a simple money decree against three brothers named Hira Lal, Panna Lal and Moti Lal. Panna Lal and Moti Lal were minors on the date of that decree. The decree provided that the person of Panna Lal and Moti Lal and their shares in the ancestral house will be exempt from the operation of the decree. The decree-holder filed an appeal against that decree

and, on 7th July 1921, the appellate Court modified the decree of the trial Court to this extent that it passed a decree against all the three brothers with the proviso, that so far as Panna Lal and Moti Lal were concerned, the decree money will be recoverable only from the family property in their hands.

The first application for execution was filed on 1st February 1924. All the three brothers were arrayed as judgment-debtors in that application. Moti Lal by that time had attained majority, but he was arrayed as minor in the said application. Notice of the said application was issued to the judgment-debtors on 15th February 1924. That application was dismissed for default.

The decree-holder then filed a second application for execution on 7th February 1927. It would be noticed that this application was within three years from the date of the issue of the notice of the first application and, beyond three years from the date of the filing of that application.

Moti Lal, judgment-debtor-appellant, objected to the execution of the decree on the ground that the application for execution was time barred. This contention of Moti Lal has been overruled by both the Courts below and, he has come to this Court in second appeal.

The lower appellate Court has held that the decree sought to be executed was a joint decree, and that though Moti Lal was not properly made a party to the first application for execution, yet that application was a good application against the other judgment-debtors and, as such, in view of the provisions of Expln. 1 to Cl. 7, Art 182, Sch. 1, Lim. Act, the first application for execution gave a fresh start to the period of limitation as against all the judgment-debtors. It further held that the issue of the notice dated 15th February 1924 also entitled the decree-holder to compute the period of limitation from that date: vide Cl. 6, Art. 182.

The learned counsel for the appellant has taken exception to these conclusions of the lower appellate Court. He argues that, inasmuch as the decree sought to be executed provided that the decretal amount, so far as Panna Lal and Moti Lal were concerned, could be recovered only from the family property in their hands, and whereas in the case of Hira Lal the decree was uncontrolled by any such condition, it follows that that decree was not a joint decree against all the three brothers. He further argues that, in order to invite the application of the explanation to Cl. 7, Art. 182, it is necessary that the decree should be executed only against one out of many co-judgment-debtors, and as in the present case the first application for execution was against all the three judgment-debtors the decree-holder is not entitled to the benefit of that explanation. I am unable to agree with these contentions.

The mere fact that the decree as against Panna Lal and Moti Lal could be executed only against the family property in their hands, does not affect the fact that all the three brothers were jointly liable for the decretal amount. The decree was a joint decree against all the three and, all of them were equally liable to satisfy that decree, with this reservation that the persons of Panna Lal and Moti Lal were exempt, and they could not be arrested in execution of that decree. In other words, though the decree differentiated between the three brothers as regards the mode of execution, it did nothing of the sort so far as their joint liability for the decretal amount was concerned.

The argument that, as the first application for execution was an application against all the three judgment-debtors, apply Expln. 1 to Cl. 7, Art. 182 does not appeal to me. If the argument of the learned counsel for the appellant that Moti Lal was not properly made a party to the first execution application is correct, then it necessarily follows that the application for execution was valid only so far as the remaining two brothers were concerned. In other words that application was a good application as against two out of three co-judgment-debtors. That being so, Expln. 1, Art. 182 applies to the case, and the Courts below were right in so holding.

But as already stated the present application for execution is beyond three years from the date of the first application, and unless the decree-holder is entitled to the benefit of Cl 6, Art. 182, the present application is time-barred. The question, whether or not Cl. 6 applies to the facts of the present case, is not free from difficulty. But after giving my best consideration, I have come to the conclusion that the decree-holder is entitled to

the benefit of the provisions of that clause.

It is true that notwithstanding the fact that Moti Lal, on the date of the first application for execution, had attained majority, he was described as a minor in the said application. But the mere fact, that a judgment-debtor, who had attained majority, was described as a minor in the execution application, does not, in my opinion, lead to the conclusion that that judgment-debtor was not a party to the execution proceedings.

There is a distinction between cases in which a minor is impleaded as a major and cases in which a person, who has attained majority, is impleaded as a minor. In the former case the minor cannot be said to have been validly impleaded, for the simple reason, that there is a statutory prohibition to sue on behalf of or against a minor without a next friend or guardian for the suit of such minor. But in the latter case if the person, who has attained majority and is by accidental mistake impleaded as a minor, has notice of the proceedings against him, it cannot be said that he was not a party to, and will not be bound by the result of, those proceedings. Whether he is or is not a minor must be a fact within his knowledge and, therefore, on receipt of notice of proceedings against him, it is perfectly within his power to go to Court and defend himself and protect his rights. In the present case Moti Lal whether a minor or a major, was made a party and notice of the application was issued to him. That being so, the decree-holder is entitled to compute the period of limitation from the date of the issue of the notice. In other words it cannot be disputed that a notice against Moti Lal to show cause why the decree should not be executed against him was issued by the Court on 15th February 1924, and now the decree-holder applies to execute the decree against him. That being so, the two conditions requisite for the application of Cl. 6, Art. 182, Lim. Act, are satisfied in the present case, and as such, the second application for execution is within time.

In my judgment the decree of the Courts below are perfectly correct and I dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 797

SULAIMAN AND PULLAN, JJ.

Mohammad Ibrahim Quareshi and *others*—Plaintiffs—Appellants.

v.

Syed Abdul Hamid—Defendant—Respondent.

Second Appeal No. 806 of 1926, Decided on 26th June 1929, against decree of Addl. Dist. Judge, Agra, D/- 4th February 1926.

Contract Act S 23—No cause of action arises against person for merely financing appellants in appeal when costs could not be recovered from appellants—Damages.

Even if a person is known to have financed an appellant, it will not give a cause of action to the respondents to recover damages from the financer personally because they have been unable to recover their costs from the appellant. [P 797 C 2]

N. P. Asthana—for Appellants.

Mahmudullah—for Respondent.

Judgment.—This second appeal arises from a suit brought under the following circumstances: The mutwallis of a certain religious trust brought a suit against certain persons which was dismissed by the District Judge of Agra. An appeal was filed in the High Court and this appeal also was dismissed. The respondent obtained a decree for costs against one Farman who became an insolvent and they were unable to realise their decree. They have now filed this suit against a certain Abdul Hamid for damages, saying that they have been put to unnecessary expense owing to the action of this person in instigating the filing of the appeal in the High Court. The lower appellate Court has recorded a finding which in our opinion decides this case. He holds that "one cannot say upon the evidence that Abdul Hamid had the appeal No. 203 of 1917 filed on behalf of Faiyaz Husain or Muhammad Ali or both without their authority."

The appeal purports to have been filed by all three plaintiff-appellants and even if this Abdul Hamid financed them that will not give a cause of action to the respondents to recover damages from him personally, because they have been unable to recover their costs from the appellants. It is not necessary to go at length into the question as to whether the English Law of Maintenance applies or does not apply in India. In our opinion this is a simple case in which we must hold that no damages accrued and no damages can be claimed. There is also a question of limitation which in our

opinion was decided correctly by the Court of first instance against the plaintiffs.

Cross-objections have been filed on the question of costs, but we are satisfied that the Judge exercised his discretion reasonably and we are not prepared to interfere. We therefore dismiss both the appeal and cross-objections with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 798

DALAL, J.

Amir Ullah and *another*—Defendants—Applicants.

v

Mt. Taqdirunnissa Bibi and *others*—Plaintiffs—Opposite Parties.

Civil Revn. No. 121 of 1929, Decided on 4th July 1929, against order of Sub-Judge, Allahabad, D/- 17th January 1929.

Jurisdiction—Civil and revenue Courts—Liability of land to be assessed separately or jointly; so also questions regarding validity of engagement with Government and assessment and distribution of revenue do not come within jurisdiction of civil Court—U. P. Land Revenue Act S. 233.

A prayer that a certain portion of land is not liable to pay land revenue separately but is liable to pay revenue jointly with another land conflicts with the prohibition contained in S. 233 (c), Land Revenue Act, against the civil Court discussing the liability of any land to be assessed with a payment of revenue.

So also a prayer which attacks the validity of an engagement with Government by a holder to pay revenue and also brings into question the amount of revenue assessed and distributed between two parcels of land comes under S. 233 (e) and redress cannot be obtained from a civil Court which has no jurisdiction to touch these matters. [P 798 C 2]

Ambika Prasad—for Applicants.

Mushtaq Ahmad—for Opposite Parties.

Judgment. — The lower appellate Court had no jurisdiction to touch this matter. Formerly there was a khata-khewat No. 4 belonging to Muhammad Ali and Mt. Sajidunnissa. The plaintiffs are the successors-in-interest of Muhammad Ali and the defendants of Sajidunnissa, They owned 83 bighas and odd in equal shares and paid revenue in equal shares. On 10th April 1911 Muhammad Ali executed two deeds of gift granting 4 bighas 19 biswas to his wife free of revenue and the rest of his property to his daughters making them liable to pay the entire half revenue. In 1320 fasli Government revenue officials distributed the revenue. 4 bighas 19 biswas was separated as khata No. 5 and assessed to revenue disregarding the direction of Muhammad Ali in his gift to his wife that the property shall be hold by her free of revenue. The rest of the property was kept in khata No. 4 and the revenue was distributed half and half, half payable by Muhammad Ali's daughters and half by the defendants, the sons of Mt. Sajidunnissa. It may be imagined that the burden of Muhammad Ali's share increased because instead of half of a certain revenue his successors-in-interest had to pay a certain portion for khata No. 5 and half of the balance. The plaintiffs were certainly aggrieved, but their grievance could not be remedied by the civil Court. The present suit was brought for a declaration that khata No. 5 was part of khata No. 4 and that the defendants were liable to pay half the revenue of the total of the two khatas.

This practically means that while Government made Mt. Agani, widow of Muhammad Ali, liable to pay the revenue of khata No. 5 the plaintiffs desired that the defendants should also be made liable to pay half portion of that revenue. Such a prayer violates several of the provisions of S. 233, Land Revenue Act, against the jurisdiction of the civil Court. First of all the civil Court is desired to hold that 4 bighas 9 biswas is not liable to pay revenue separately but is liable to pay revenue jointly with khata No. 5. This prayer conflicts with the prohibition contained in S. 233 (c), Land Revenue Act, against the civil Court discussing the liability of any land to be assessed with a payment of revenue. The next prayer is that the defendants should also pay part of the revenue of khata No. 5 by combining the revenue of khatas Nos. 4 and 5. This attacks the validity of an engagement with Government by the holder of khata No 5 to pay revenue and also brings into question the amount of revenue assessed and distributed between khatas Nos. 4 and 5. The plaintiffs cannot obtain redress from the civil Court. I set aside the decree of the lower appellate Court dated 17th January 1929 and restore the order of the trial Court dated 26th May 1928. The defendants shall receive costs throughout.

R.M./R.K. *Decree set aside.*

A. I. R. 1929 Allahabad 799 (1)

MUKERJI AND NIAMATULLAH, JJ.

Ramdas Rai—Defendant—Applicant.

v.

Ram Sarup and *others*—Plaintiff and Defendants—Opposite Parties.

Civil Revn. No. 212 of 1928, Decided on 3rd July 1929, against order of Sub-Judge, Azamgarh, D/- 19th April 1928.

Civil P. C., Sch, 2, R. 21 (1)—Application was made to file award—Court after hearing objections and concluding that award was lawfully made passed order that "plaintiff's suit is decreed. The decree is to be prepared according to award as prayed."—Order is really a combined order and Court should not make such order.

There was an arbitration and an application was made by the opposite parties to the Court for the filing of the award. The Court after hearing the objections and having come to the conclusion that the award had been lawfully arrived at, made an order in the following terms: "plaintiff's suit is decreed with costs. The decree is to be prapared according to the award as prayed."

Held: that the order which the Court ought to have made was one directing the award to be filed and that a separate order should have been made saying that a decree should follow in accordance with the award. [P 799 C 1, 2]

N. P. Asthana and *Baijnath Sahai*—for Applicant.

Shiva Prasad Sinha—for Opposite Parties.

Judgment.—This is an application in revision against an order of the learned Subordinate Judge of Azamgarh dated 19th April 1928, dismissing the defendant-appellant's appeal on the ground that the appeal was incompetent. It appears that there was an arbitration and an application was made by the opposite parties to the Munsif of Azamgarh for the filing of the award. The learned Munsif heard the objections of the persons who have been arrayed as defendants in the case and having come to the conclusion that the award had been lawfully arrived at, made an order in the following terms:

"Plaintiff's suit is decreed with costs. The decree is to be prepared according to the award as prayed."

It is clear that the order which the learned Munsif ought to have made was one directing the award to be filed. A separate order should have been made saying that a decree should follow in accordance with the award. His order was really a combined order.

Section 104, Civil P. C., allows an appeal against an order directing an award to be filed. Such an appeal was filed by the defendant-applicant. In the heading no doubt the applicant said, besides saying that he was appealing against the order, that he was appealing also against the decree. But if he was appealing also against the decree, he ought to have paid the ad valorem court-fee, which he did not. The grounds of appeal indicate that the appeal was made against the order directing the award to be filed. As a matter of fact there can be nothing against the decree if it was going to be in terms of the award. The learned Subordinate Judge, as already stated, was of opinion that the appeal was incompetent. His ground was that no appeal was againt the decree. We hold that it was not. We set aside the order of the learned Subordinate Judge and direct him to re-admit the appeal and to proceed to dispose of it according to law. The costs in the Subordinate Judge's Court so far and in this Court will abide the result.

P.N./R.K. *Order set aside.*

A. I. R. 1929 Allahabad 799 (2)

MUKERJI, J.

(*Babu*) *Ram Dubey* and *another*—Plaintiffs—Appellants.

v.

Har Narain Dubey and *others*—Defendants—Respondents.

Second Appeal No. 938 of 1926, Decided on 2nd July 1929, against decree of Dist., Judge, Gazipur, D/- 19th February 1926.

Adverse Possession—Person mortgaging certain plot and then selling same—Vendee bringing redemption suit and obtaining possession not only over the plot but also over another plot—Latter plot in possession of mortgagee under colour of mortgage—Vendee continuing in possession of both plots—By the redemption decree proprietary rights in 2nd plot went back to proprietors, vendor and possession of vendee is adverse to him.

A person mortgaged a plot of land No. 99 in 1862 and sold the same land in 1867. The vendee brought a suit for redemption and by a compromise succeeded in the suit and got posseesion not only over plot 99 but over another plot 100/1. The latter plot belonged to the mortgagor and was taken by the mortgagees under colour of mortgage. The vendee was in

possession over both the plots since 1867. The descendants of the vendor obtained an order directing the removal of the vendees' name from the record so far as the plot 100/1 was concerned. The vendee brought a suit against this order for declaration that he was owner of plot 100/1.

Held: that when the redemption suit was decreed the proprietary rights in plot 100/1 went back to the proprietors, the descendants of the vendor and the possession of the vendees was not as mortgagee buf it was adverse to descendants of vendor and the vendee was entitled to declaration that he was in possession of plot 100/1 as proprietor. [P 800 C 2]

R. K. Malaviya and *Debi Prasad Malaviya*—for Appellants.

A. P. Pandey—for Respondents.

Judgment.—This appeal must succeed. The facts briefly are these. One Jagannath Dube mortgaged a certain piece of land which is now represented by plot 99, in 1862. He sold the land to the predecessor-in-title of the present plaintiffs, the appellants before me, in 1867. The purchasers instituted a suit for redemption and, by a compromise, succeeded in the suit. They got possession not only over plot 99 but over an additional piece of land, which is now recorded as plot 100/1. This was in 1887. It has been found on an issue being remanded that the plot 100/1 did belong to Jagan Dube. Evidently the mortgagees had taken possession of that plot under the colour of their mortgage. When the redemption took place, the mortgagees handed over, as they were bound to do, not only plot 99 but also plot 100/1. Since 1887, it has been found, the plaintiffs have been in possession not only over plot 99 but also over plot 100/1. The respondents who now represent the estate of Jagannath Dube, succeeded in obtaining an order, in the revenue Court, directing the removal of the plaintiffs' name from the record, so far as the plot 100/1 was concerned. On this, the plaintiffs brought the suit out of which this appeal has arisen for a declaration that they are the owners of plot 100/1. In the alternative, they have sued for possession.

As already stated, it has been found that the plaintiffs are in possession of plot 100/1. The learned District Judge on appeal, has held that the possession of the plaintiffs is that of a mortgagee. The plaintiffs complain of this finding and I think rightly. When the redemption suit was decreed it is immaterial whether by compromise or on contest the mortgagees' title came to an end and the property went back, as it should on redemption, to the original proprietor. The proprietary rights of plot 99 were in the plaintiffs but the proprietary right in plot 100/1 was in Jagan Dube's descendants. Qua plot 100/1, the possession of the plaintiffs, they having no interest, became adverse to Jagan Dube's descendants. There was no trust in favour of Jagan Dube's descendants. I fail to see how it can be said that the plaintiffs are in possession as mortgagees. If the plaintiffs are mortgagees, the question would arise what is the amount of the mortgage money? Evidently, there was no mortgage and therefore there is no mortgage money to be paid. In the result, I allow the appeal, modify the decree of the Court below and give the plaintiffs a declaration that they are in possession of plot 100/1, and as proprietors. The plaintiffs will have their costs throughout.

P.N./R.K. *Decree modified.*

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* A. I. R. 1929 Allahabad 800

BENNET AND IQBAL AHMAD, JJ.

Mangat Lal—Appellant.

v.

Ghasi Khan and *others*—Respondents.

Second Appeal No. 1482 of 1926, Decided on 23rd July 1929, against decree of Dist. Judge, Meerut, D/- 14th July 1926.

*** Transfer of Property Act, S. 41—Auction sale is transfer by law and not by any person conveying property — Auction purchaser therefore does not come under S. 41.**

According to definition of transfer in S. 5, T. P. Act, there must be some person who conveys in a transfer. In the case of auction there is no person who conveys. An auction sale is in fact a transfer by law and not at all transfer by any person conveying property. S. 41 relates to a transfer by the ostensible owner. Therefore the case of an auction purchaser cannot come under S. 41. [P 801 C 1]

N. C. Vaish—for Appellant.

M. A. Aziz—for Respondent.

Judgment.—This is an appeal by defendant 1 Mangat against a decree of the lower appellate Court in favour of the plaintiffs and defendants 7 and 8, for recovery of joint possession of two third share in kat khewat No. 13, mouza Basaon with the remaining defendants. Several grounds of appeal were entered,

but the only grounds urged before us by the counsel for the appellant were grounds 2 and 3 in which he claimed that the appellant, an auction-purchaser, was entitled to the benefit of S. 41, T. P. Act. The lower appellate Court has considered this plea at considerable length and held that the appellant was not entitled to the benefit of that section, because he had not made sufficient enquiry. It appears to us that the appellant being an auction-purchaser, was not entitled to the benefit of S. 41, T. P. Act at all. That section begins :

"Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration."

The section, therefore, relates to a transfer by the ostensible owner. Transfer is defined in S. 5 as :

"an act by which the living person conveys property, in present or in future, to one or more other living persons etc.,"

that is to say, for a transfer there must be a person who conveys. In the case of an auction sale there is no person who conveys. It was argued by the learned counsel for the appellant that the judgment-debtor was the person who had conveyed. No doubt the judgment-debtor up to the period of the auction sale is the owner. But he does not do act which can be said to be an act conveying the property. On the contrary the transfer of his rights to the auction-purchaser is made without his free will or consent or active participation. It is in fact a transfer by and not at all a transfer by any person conveying the property. Accordingly we are of opinion that the appellant does not derive any benefit from S. 41, T. P. Act. That being the only point in appeal, we dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 801

MEARS, C. J. AND MUKERJI, J.

Empire Engineering Co., Branch of the British India Corporation Ltd., Cawnpore—Plaintiff—Appellant.

v.

Municipal Board, Bareilly—Defendant—Respondent.

Letters Patent Appeal No. 45 of 1928, Decided on 16th March 1929, from a judgment of Sulaiman, J., (dissenting with that of Ashworth, J.,) D/- 25th January 1928.

1929 A/101 & 102

(a) Contract Act, S. 118—Sale of goods—In case of breach of warranty buyer may accept or refuse goods — Only reasonable time to examine goods can be allowed to him —If goods are kept for longer period he loses his right to return or refuse to pay price.

In a contract with a warranty for sale of goods which at the time of contract was not ascertained, if the warranty is broken, the buyer may accept the goods or refuse to accept them when tendered. It is open to the buyer to keep the goods for a reasonably sufficient time in order to examine or try them in order to decide whether he would accept or refuse them. The user of the goods must be limited to the trial and must not go beyond that. If the goods are kept for a longer period than is necessary, the buyer loses his right to return it or to refuse to pay the price.

[P 802 C 2]

(b) Contract Act, S. 118—Sale of goods —To claim compensation for breach of warranty notice must be given within reasonable time after discovery of breach.

If there is breach of warranty the buyer can claim compensation, provided he gives notice of his intention to claim compensation within reasonable time after discovering the breach of warranty. [P 803 C 2]

(c) Contract Act, S. 118—Distinction between "condition" and "warranty" in English Law is avoided in India.

The Indian law has deliberately avoided the distinction between a "condition" and a "warranty" which is made in English law. The illustrations under S. 118 make the difference clear. The illustration (c) is an example of condition of contract yet the case is put under S. 118 as fully covered by it.

[P 802 C 2, P 803 C 1]

(d) Contract Act, S. 73—Breach of contract—Other party is entitled to interest on price as damages.

When a contract is broken by one party, the other party is entitled to interest on the price by way of damages. [P 803 C 2]

K. N. Katju—for Appellant.

P. L. Banerji and *B. Malik*—for Respondent.

Judgment.—This is the plaintiff's appeal. His suit was practically dismissed by the Court of first instance. On appeal by him and on a cross-objection put in by the defendant, the learned Judges composing the Bench hearing the appeal agreed in dismissing the cross-objection but differed as to the result of the appeal. The result was that both the appeal and the cross-objection failed. It is against the order of the Court dismissing the appeal that the present appeal has been failed.

A limited company, described as "plaintiff," brought the suit of which this appeal has arisen for recovery of Rs. 19,048-1-9, being the price of a motor lorry and a pumping apparatus supplied

by it to the defendant, the Municipal Board of Bareilly. The plaint was a simple one. It stated that the defendant, the Municipal Board of Bareilly, had purchased from the plaintiff the articles mentioned and agreed to pay the price in certain instalments detailed in the plaint. It further stated that delivery of the lorry, the pumping apparatus and other implements was made, all in good working order, on 3rd September 1921, but the defendant did not pay the balance of the price due to him. He accordingly claimed the balance of the price with interest at 12 per cent per annum.

The defence, so far as it is now material, was that the lorry supplied was not "in accordance with the contract" and was on test found to have several defects in it and did not prove to be serviceable, that the plaintiff had agreed to supply a new lorry and one which would not consume more than $1\frac{1}{4}$ gallons petrol in an hour, but the plaintiff supplied one which did not answer to the descriptions. The defendant also pleaded fraud on the part of the plaintiff but did not furnish any particulars beyond what has already been stated in this summary of his case. The defence ended by saying that the contract was null and void and the plaintiff had no right to maintain the suit. The defendant also contended that he was entitled to a refund of the sum of Rs. 5,000 which he had admittedly paid towards the price. The defendant, however, did not pay any court-fee and did not claim a refund. The liability of the defendant to pay interest was denied.

It will be noticed that on the pleadings as described above, the issues that arose in the case were the following :

1. Did the plaintiff agree to sell to the defendant a lorry of a particular description ? If so, what were the particulars of the lorry agreed to be sold ?
2. Did the lorry supplied answer to the description of the one agreed to be supplied ?
3. If the lorry supplied did not answer to the description agreed upon, can the defendant refuse to pay the price, having regard to the provisions of S. 118, Contract Act.
4. Is the defendant entitled to any and what compensation ? How is the question of compensation affected by the fact that no notice under S. 118, Contract Act, was given ?
5. Is the plaintiff entitled to any and what interest ?

(Their Lordships then discussed evidence that the lorry delivered in September 1921, was in all respects a machine in good order and condition, free from all defects, and in all respects answered to the contract, proceeded.)

Point No. 3.—Supposing that the lorry delivered to the defendant did not answer, in its entirety, to the article ordered, the defendant had every right to refuse to accept the article. He could use the article sufficiently long to find out whether it answered or not the description of what he wanted. S. 118, Contract Act, lays down the law on the point and the illustrations make the law absolutely clear. That section briefly lays down that when there has been a contract with a warranty for sale of goods which at the time of the contract was not ascertained, and the warranty is broken, the buyer may accept the goods or refuse to accept them, when tendered. It further lays down that it is open to the buyer to keep the goods for a reasonably sufficient time in order to examine or try them in order to decide whether he would refuse or accept them. The user of the goods, however, must be limited to the trial and must not go beyond that. Such being the law, when the lorry was placed in the hands of the defendant, it was the latter's duty to have it thoroughly examined, and if necessary, by an expert. After examination, the defendant could decide either to keep it or to return it. If, however, he kept it for a period longer than it was necessary to keep it for the purpose of ascertaining whether it answered or not to the contract, he lost his right to return it or to refuse to pay the price.

On behalf of the respondent, reliance was placed on English law and it was argued that there is a difference between a "condition" of a contract and a "warranty." It was urged that where the condition of a contract is broken, there can be no contract at all. It is, however, to be pointed out that our Indian law has deliberately, we must take it, avoided the distinction between a condition and a warranty. The illustrations given under S. 118, will make the matter clear. In illustration (c), *B* makes two pairs of shoes for *A* by *A's* order. *A* tries both, but uses one pair more than a mere trial requires. The shoes do not fit him. He cannot return the pair which he has used more than was necessary for the purpose of a trial. He must keep them and pay for them. The other pair

he can return. It was certainly a "condition" to the acceptance of the shoes by *A*, that the shoes should fit. It may very well be said that it was a condition of the contract that the shoes should fit the person ordering them. Yet the case is put under S. 118 as fully covered by it. We are governed by the Indian law and must decide the case in accordance with its principles.

Then it was urged that as the defendant ordered a new lorry and he got a second-hand one and there could be no contract, in law, if the parties were not agreed as to what was to be supplied. On the facts, we have found that such was not the case. The defendant never stipulated for a new lorry, nor did the plaintiff firm ever promise one.

Supposing, however, that the defendant expected a new lorry and was given a reconditioned one. Even then S. 118 would apply. He could only 'expect' what he had bargained for. There was the lorry before the defendant and he had every opportunity and right to have it thoroughly examined. Further, if there was a breach of the warranty, on the ground that the lorry was not a new one, the defendant could claim compensation, provided he gave notice of his intention to claim compensation within a reasonable time, after discovering the breach of the warranty. That was, under the law, the defendant's only right after he had accepted the goods after an exercise of his right of acceptance or refusal. The defendant now cannot refuse to pay for the goods which he has kept and used.

Point No. 4.—In dealing with point No. 3, we have already dealt with the question of compensation. The question of compensation was not definitely raised. The defendant said in para. 16 of the written statement that he was entitled to a refund of the part payment made by him. We have already said that the defendant did not claim the amount as a set off for his counter claim nor did he pay any court-fee on it.

On the merits, however, the defendant has no case. It was incumbent on him to give notice of his intention to claim compensation, as soon as he discovered (if ever) the fact that the warranty had been broken by delivery of an article that did not implement the contract. The defendant is not entitled to any compensation, nor to any refund of any part of the price paid by him.

Point No. 5.—The question of interest has not been discussed before us It arose, becaue there is the claim for interest and the defence was that no interest was payable. The contract has been broken and the plaintiff is entitled to interest by way of damages under S. 73, Contract Act. The rate of interest is reasonable, being 12 per cent per annum. We allow the plaintiff interest at the rate claimed, by way of damages.

The result is that the appeal succeeds, the decree of the Court below and of this Court are modified and the claim is decreed in full with costs throughout. Interest on the amount of the claim will be paid at six per cent per annum from the date of the institution of the suit till realization, and the costs will bear interest at the same rate from this date till realization.

R.M./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 803

BENNET AND IQBAL AHMAD, JJ.

Raghubir Chaube and *another*—Defendants—Appellants.

v.

Gauri Chaube and *others*—Plaintiffs—Respondents.

Second Appeal No. 913 of 1926, Decided on 28th June 1929, against decree of Dist. Judge, Ghazipur, D/- 17th February 1926.

Agra Tenancy Act, S. 15—Transfer of share in mahal—Vendor being exproprietary tenant of all cosharers and not vendee alone, holding cannot be relinquished in favour of vendee alone.

On a sale of a share in mahal the vendor becomes the exproprietary tenant of all the cosharers in *sir* plots and not merely the exproprietary tenant of the vendee in absence of contrary evidence from the wajib-ul-arz or any special custom or arrangement. Hence he cannot relinquish the exproprietary holding in favour of the vendee alone : 10 *A. L. J.* 95 ; 35 *All.* 27, *Ref.* [P 804 C 1, 2]

U. S. Bajpai, *Janki Prasad* and *Shah Zamir Alam*—for Appellants.

K. Verma—for Respondents.

Judgment.—This is an appeal by the defendants against a decree of the lower appellate Court in favour of the plaintiffs. The plaintiffs are cosharers in a mahal along with the defendants and the plaintiffs sued for possession of certain

specific plots and for damages for dispossession in regard to the year 1332 Fasli. The Court of first instance dismissed the suit for separate possesssion of the plaintiffs and damages and granted a decree merely for joint possession. The plaintiffs based their case on the following facts.

Newaz Chaube was a cosharer in this mahal and he mortgaged the zemindari to the plaintiffs. The plaintiffs brought a suit on this mortgage and got a foreclosure decree and purchased the share of Newaz Chaube. Newaz Chaube had certain *sir* lands in this mahal and he became the exproprietary tenant of the *sir* as the result of these proceedings. Newaz Chaube paid his rent to the plaintiffs alone since the year 1883. A dispute arose between the plaintiffs and the defendants in regard to this holding of Newaz Chaube and there were proceedings in Court under S. 145, Criminal P.C. and the criminal Court found on 21st October 1921 that the defendants were in possession and maintained their possession. In December 1925 Newaz Chaube died. On 18th January 1924 Newaz Chaube executed a document of relinquishment in favour of the plaintiffs. The plaintiffs, therefore, claim to be entitled to the plots which were the exproprietary holding of Newaz Chaube both on the ground that Newaz Chaube executed the relinquishment in favour of the plaintiffs and also that Newaz Chaube was specially their tenant and on his death the plaintiffs are entitled to possession of the lands. The defendants on the other hand maintain that the exproprietary tenancy of Newaz Chaube arose in favour of all the cosharers in the mahal and accordingly Newaz Chaube was not entitled to relinquish his exproprietary holding in favour of the plaintiffs alone; and on the death of Newaz Chaube the plaintiffs alone would not be entitled to possession of this exproprietary holding.

It has been laid down in *Muhammad Ibrahim* v. *Ram Krisha Rai* (1) and *Debi Prasad* v. *Bhagwan Din* (2) that on a sale of a share in a mahal the vendor becomes the exproprietary tenant of all the cosharers in *sir* plots and not merely the exproprietary tenant of the vendee. The latter ruling is a Full Bench ruling. The argument for the plaintiffs is that the present case is different from the case in the Full Bench ruling, because Newaz Chaube was for a great number of years treated as a sole tenant of the plaintiffs, and in fact plaintiffs alone had sued Newaz Chaube for enhancement of rent. No evidence, however, has been placed on the record in regard to the wajib-ul-arz, or any special custom in this village, under which a tenant may be the tenant of only one cosharer. Another fact on which the plaintiffs rely as differentiating this case from the cases and the rulings cited for the defendants, is that in the mahal in question there is no tenancy land but only *sir* land and certain uncultivated land and groves etc. The exproprietary tenancy of Newaz Chaube was the only cultivated land in this mahal which was not *sir*. It is contended, therefore, that in equity the plaintiffs had a right to treat this exproprietary tenancy as specially appertaining to the one quarter share in this mahal which the plaintiffs acquired. Reliance is placed on certain statements in the Full Bench ruling: *Debi Prasad* v. *Bhagwan Din* (2) at 439 (*of* 10 *A. L.J.*) One of the statements is

"In our opinion this view of the circumstances of this case is correct"

and the other statement is:

"It is to be noted that this is not a case where the vendor is really the sole owner of the proprietary title in the lands which he holds as *sir*."

In our view the meaning of the latter sentence is that the ruling would not apply to a sale by a vendor who owned the whole of a mahal. Reliance is also placed for the plaintiffs on a ruling in *Bhagwant* v. *Arjun* (3). This was a suit for profits in which it was held that the plaintiffs' claim that the defendants had collected more profits in their share was not well sustained, because the plaintiffs themselves should have got exproprietary rent assessed on certain plots of khudkasht of over twelve years' tenure which they allowed to remain in possession of their vendor without any assessment of rent. It is quite true that under S. 36, Act 3 of 1901, it was the duty of the plaintiffs as the persons obtaining mutation under S. 35 of that Act to apply to the Collector for assessment of exproprietary rent. It was not the duty of the other cosharers in the mahal to

(1) [1912] 10 A. L. J. 95=16 I. C. 487.
(2) [1912] 35 All. 27=16 I. C. 399=10 A.L.J. 437.
(3) [1916] 14 A. L. J. 209=32 I. C. 617.

take this action. That was a sufficient reason to hold that the plaintiffs had been negligent in not obtaining assessment of that exproprietary rent. We also note that at p. 211 of that ruling the following words occur :

"In our opinion it is clearly proved (if not admitted) that at the time of the sale to the plaintiffs an arrangement existed by which the different cosharers were entitled to possession of specific plots as representing their shares."

No such arrangement is admitted or proved in the present case, and as we have already mentioned the wajib-ul-arz has not been produced. We accordingly consider that the references to *Debi Prasad* v. *Bhagwan Din* (2) contained in *Bhagwant* v. *Arjun* (3) at p. 211 do not detract from the value of the Full Bench ruling as a guide in the present case.

We consider that the present case comes within the general rule that a vendor becomes the exproprietary tenant of all the cosharers in a mahal in the plots in which he owns *sir* for sale. If the contention of plaintiffs were allowed and it were held that the vendee became his special tenant with the power to relinquish in favour of the plaintiffs alone, the result would follow that on a sale of a share in a mahal it would be possible for the vendor to transfer the possession of *sir* plots to his vendee. That would defeat the provisions of the Tenancy Act S. 10 which lays down that it is not open to a vendor to transfer *sir*.

The plaintiffs claim that the result of dismissing his case for separate possession is to leave the other cosharers not only in possession of *sir* proportionate to their share but also in possession of this particular holding as khudkasht and to leave plaintiffs actually in possession of no plots in this mahal. It is a general rule that there is no wrong without a remedy. The plaintiffs, however, have adopted the wrong remedy. They have come to the civil Court with a suit for possession of these particular plots on the ground of this relinquishment. Another remedy is open to the plaintiffs. They may go to the revenue Court under Ss. 106 and 107, Land Revenue Act, and ask for partition of a share in this mahal and on obtaining partition they will receive a number of plots for separate possession which will be proportionate to their share. It was argued on behalf of the plaintiffs that they were doubtful as to whether they had such a right, for partition, because in the present mahal there is no revenue assessed and also because their share does not amount to 100 acres. But although they, may not be entitled to perfect partition they are entitled to imperfect partition, and as there is no land revenue payable on the mahal, imperfect partition in the present case is just as good from their point of view as perfect partition.

Accordingly we allow this appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs to the defendants in all Courts.

R.M./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 805

SULAIMAN AND NIAMATULLAH, JJ.

Gargi Din Misra—Defendant—Applicant.

v.

Debi Charan — Plaintiff — Opposite Party.

Civil Revn. No 134 of 1928, Decided on 13th June 1929, from an order of Dist. Judge, Cawnpore, D/- 22nd February 1928.

Civil P. C., S. 10—S. 10 is inapplicable unless both subject matter and reliefs are identical—Fact of one issue being in common would not necessitate stay of subsequent suit —"Matter in suit" means entire matter in controversy.

Unless the subject-matter in two suits is identical and the reliefs are also the same, S. 10 is inapplicable. The mere fact that one issue is common in two suits would not necessitate the stay of subsequent suit. The words "matter in suit" mean the entire matter in controversy and not one of the several issues in the case. S. 10 is limited in its scope; 11 *All.* 148; 24 *C. L. J.* 514 ; 4 *Pat. L. J.* 557 and *A. I. R.* 1925 *Mad.* 574, *Ref.* [P 806 C 1,2]

P. L. Banerji and *Shib Saran* — for Applicant.

N. P. Asthana—for Opposite Party.

Judgment.—This is an application in revision from an order of the District Judge, Cawnpore, remanding a revenue appeal.

The respondent, Debi Charan, first instituted a suit for arrears of rent based on a registered kabuliyat executed by the applicant. The suit was resisted on the ground that the kabuliyat was fictitious, that in respect of a sale-deed executed by the present applicant he still remained the proprietor of the land and that there

was no relation between the parties of a land holder and a tenant. The revenue Court ordered that the present applicant, who was a defendant to that suit should under S. 199, Tenancy Act, establish his title in a civil Court. Accordingly, he filed a suit for declaration, which was dismissed by the civil Court and an appeal from that decree is still pending in this High Court and is numbered as First Appeal No. 569 of 1926. In the meantime the revenue Court decreed the claim for arrears of rent on the basis of the judgment of the subordinate civil Court ex parte, but later on the ex parte proceedings were set aside and the suit restored, and is still pending. As limitation was expiring, the present respondent filed another suit for arrears of rent for subsequent years. The defendant inter alia took the plea that the second suit should be stayed, and also raised the question of proprietary title. The revenue Court decreed this claim, holding that the question of proprietary title had already been decided.

On appeal to the District Judge, he remanded this case with directions that the lower Court should proceed in accordance with S. 271, sub-Cl. 2, Agra Tenancy Act.

On behalf of the applicant it is contended that S. 10, Civil P. C., applied to this case and the lower Court was bound to stay the proceedings. We do not think that this contention can prevail. Under S. 12 of the old Act, which corresponds to the present S. 10, it was clearly held by this Court that, unless the subject-matter in the two suits is identical and the reliefs are also the same, that section would be inapplicable: *Bal Kishan* v. *Kishan Lal* (1). The words "for the same reliefs" have been omitted from the new section. and there are a few other slight alterations; but it is noteworthy that, while S. 11 provides that no Court shall try any suit or issue etc., S. 10 merely says that no Court shall proceed with the trial of any suit etc. It follows that the mere fact that one issue is common in the two suits would not necessitate the stay of the subsequent suit. Although the words 'matter in a suit' cannot be held necessarily to mean the subject-matter in dispute, it seems clear that they must mean the entire matter in controversy and not one of several issues in the case. Had the intention of the legislature been to widen the scope of S. 10 so as to make it co-extensive with S. 11 the language employed would have been identical.

That S. 10 is limited in its scope has been held by several High Courts although no case of this Court has been brought to our notice. We may in this connexion mention *Bepin Behari* v. *Jogendra Chandra* (2) *Kesho Prasad Singh* v. *Shiva Saran Lal* (3) and *Kuberan Nambudri* v. *Koman Nair* (4).

We, therefore, think that the learned Subordinate Judge was right in his conclusion that S. 10 did not apply to the present case. In these circumstances, he has rightly directed the trial Court to proceed in accordance with S. 271, sub-Cl. 2.

Although it is by no means obligatory on the subordinate Court to stay the suit it is entirely a matter of discretion whether or not to adjourn the hearing for a reasonable time and await the decision of the final Court of appeal in order to prevent the same evidence being recorded over again. The application dismissed with costs.

R.M./R.K. *Application dismissed.*

(1) [1889] 11 All. 148=(1889) A. W. N. 42.

(2) [1916] 24 C. L. J. 514=37 I. C. 641.

(3) [1919] 4 Pat. L. J. 557=51 I. C. 36=(1919) P. H. C. C. 284.

(4) A. I. R. 1925 Mad. 574.

A. I. R. 1929 Allahabad 806

MEARS, C. J. AND BENNET, J.

Govind Ram and *others*—Plaintiffs—Appellants.

v.

Gokul and *others*—Defendants—Respondents.

Letters Patent Appeal No. 18 of 1928, Decided on 14th June 1929, from judgment of Ashworth, J., D/- 17th November 1927.

Civil P. C., O. 1, R. 8—No representative suit can be brought without permission of Court—Courts cannot go into merits of case unless permission is obtained.

Order 1, R. 8, contains a clear provision that no representative action can be brought without the permission of the Court having been given. The Court cannot go into the merits of a case once it is satisfied that it is a representative action and the imperative provisions of O. 1, R. 8 have not been complied with. [P 807 C 1]

R. C. Ghatak—for Appellants.

Shambhu Nath Seth—for Respondents.

Judgment.—This appeal raises an interesting point. Govind, Dallu and

Kallu, all by caste Kalwars, were aggrieved by certain Hindus and Muhammadans, refusing to allow them to draw water from five wells and thereupon Govind, Dallu and Kallu purporting to act on behalf of all the members of their brotherhood filed a plaint what was, as we shall show most clearly, intended to be a representative and not a personal suit against some 18 defendants. The plaintiffs omitted to obtain the permission which is required by O. 1, R. 8. That fact did not appear to be noticed by the defendants. It was undoubtedly a matter of discussion before the Munsif, who, however, in our opinion, did not approach the matter properly when he had found that the plaintiffs were themselves alleging that the suit was one under O. 1, R. 8. It was his duty to study the provisions of O. 1, R. 8, and he would then have seen that before he was entitled to hear the suit at all permission had to be granted by a competent Court declaring that the plaintiffs were entitled to present a representative suit.

Order 1, R. 8 has two intentions. The first is to see that the suit which is proposed to be lodged is prima facie a proper suit brought by people who can clearly claim to be representing the community. The second intention is that the plaintiffs shall furnish funds which will permit of a sufficient advertisement of the suit, so that the whole of the members of the community may be fully apprised of the suit. The Munsif quite improperly permitted himself to take up this case and to record evidence. It was, in our opinion, his plain duty to require the plaintiffs to obtain permission as a condition precedent to his entering on the case and then his duty of notification would follow. In the same way the lower appellate Court entertained and heard the appeal and so did the single Judge of this Court. We are of opinion that none of the Courts should have gone into the merits of the case once it was satisfied that this was a representative action, and the imperative provisions of O. 1, R. 8, had not been complied with. Argument has been addressed to us in which it was endeavoured to show that this was a dual species of action by the plaintiffs, namely an action in which they personally were suing as individuals and that they also were suing on behalf of others, the members of the community in a representative an action. The short answer to this is what the plaintiffs themselves say. In para. 7 they say:

"On account of the nature of the suit other persons and the members of the plaintiffs' brotherhood could not join in the suit. Therefore the plaintiffs file this suit on their own behalf and on behalf of the members of the brotherhood under O. 1, R. 8, for the benefit of all the members."

The phrase "on their own behalf and on behalf of the brotherhood" is a recognized phrase used in a matter of this kind, in the same way as in the representative suit by a shareholder against a company the phrase is "on behalf of himself and all others, the members of the company." It has been said that although there was a failure to obtain permission, nevertheless the learned Munsif should have amended the plaint and cut out all the portion that related to a representative action and have allowed the plaintiffs to continue a personal action. But all sorts of difficulties would at once have arisen. The defendants were brought on the record not because all of them had personally obstructed each and every one of the plaintiffs but because they were representatives of the two opposing communities. In our opinion, no amendment could possibly have turned this point into an effective one. Again the other answer is that nobody asked for any amendment. We have been referred to two cases, one of them is: *Baiju Lal* v. *Bulak Lal* (1) and the other in *Shiamlal* v. *Mt. Lalli* (2). These decisions are, in our opinion, exactly right in every way on the points which the learned Judges were called on to decide, and we approve the passage in Walsh, J's., judgment where he pointedly refers to the peremptory nature of O. 1, R. 8. This case is an illustration of a very simple truth which is that rules must be obeyed. O. 1, R. 8 contains a clear provision that no representative action can be brought without the permission of the Court having been given and the learned Munsif should have been aware of this fact. We, therefore, dismiss this appeal on the ground that there was no suit which came up in legal form before the Munsif. Some apprehension of res judicata has been suggested. There can be no question of res judicata because there never was before the Court a pro-

(1) [1897] 24 Cal. 385.
(2) A. I. R. 1922 All. 16=44 All. 231 (F.B.).

per res upon which any judgment could be pronounced. The only order the Munsif should have made would have been to have rejected the plaint on the ground of the failure to obtain permission. We therefore set aside the decree of the learned single Judge of this Court. and repeating that this was a suit which should never have been entertained by the Munsif, we dismiss the suit ordering the plaintiffs to pay the costs throughout in all Courts.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 808

MEARS, C. J. AND SEN, J.

Mt. Ajaib—Defendant—Appellant.

v.

Noor Khan and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 109 of 1926, Decided on 28th June 1929, against judgment of Ashworth, J., D/- 6th May 1926.

(a) Agra Tenancy Act (2 of 1901), Ss. 17 and 22—Occupancy holding—Division between joint tenants by common consent does not create separate holdings—Joint tenancy continues subject to devolution of inheritance under S. 22.

When the joint tenants of an occupancy holding by their common consent divide their holding, this has not the legal effect of creating separate holdings so as to affect the integrity of the original holding and notwithstanding the division the joint tenancy continues with the incidents of survivorship subject only to such devolution of inheritance as is possessed by S. 22. [P 809 C 1]

(b) Agra Tenancy Act (2 of 1901), S. 17—Occupancy holding—Tenants cannot carve out fresh occupancy tenure without consent of zamindar—Permissive possession is in nature of license.

Occupancy tenants cannot without the consent of the zamindar carve out a fresh occupancy tenure as regards a portion of original holding under a compromise which gives permissive possession of property. The position of person under possession is no more than that of licensee and the license can be revoked. [P 809 C 1]

Akhtar Husain Khan—for Appellant.

S. D. Sinha—for Respondents.

Judgment.—This is an appeal by the defendant in a suit for recovery of possession of four plots of land and Rs. 156 as mesne profits.

Nur Khan, Ismail Khan and Mustaqim the three plaintiffs and one Wazira were the joint occupancy tenants of a certain holding which included the four plots in dispute. By a mutual partition, the four plots were allotted by the plaintiffs to Wazira, and Wazira was in cultivatory possession of the same. Wazira died six years before suit leaving a grandson Sikandar. Sikandar died a month after Wazira. Mt. Ajaib, the defendant, is now in possession of this property. She applied to the revenue Court for the entry of her name in the rent roll and her name was recorded with the consent of the plaintiffs. The plaintiffs are no longer desirous that the name of Mt. Ajaib should continue to remain recorded in the jamabandi and applied for the removal of her name from the revenue record. The application was rejected by the revenue Court and the plaintiffs were referred to a civil suit. The suit was resisted upon the ground that the 4 plots in dispute constituted the occupancy holding of Wazira and that upon the death of Wazira and his grandson Sikandar, no title accrued to the plaintiffs under the law of possession under S. 22, Agra Tenancy Act (Act 2 of 1901). The defendant also contended that under a compromise entered into between the parties the defendant was put into possession of property and the plaintiffs were not competent to go behind the compromise. The Court of first instance overruled the pleas taken in defence and decreed the plaintiffs' suit. The lower appellate Court reversed the decision and dismissed the plaintiffs' suit on the grounds that the plots in question had been allotted on partition by the plaintiffs to Wazira, that under S. 22, Agra Tenancy Act, the plaintiffs were no heirs either to Wazira or to his grandson Sikandar, that the plaintiffs had allowed the defendant to remain in possession of this property under a compromise and that the compromise did not operate as an estoppel but it would be inequitable to allow the plaintiffs to go behind the compromise. On second appeal a learned Judge of this Court has reversed the decision of the lower appellate Court and restored that of the trial Court. We are satisfied that the judgment under appeal is a correct judgment and ought not to be interfered with.

The partition effected between the plaintiffs and Wazira was merely for facility or convenience in the matter of cultivation. The occupancy tenants by mutual agreement could not create a division or partition of an occupancy

holding without the consent of the zamindar. Notwithstanding the partition, the liability of the plaintiffs for the rent of the entire holding including the rent of the 4 plots in dispute continued. Upon the death of Wazira or Sikandar, the plaintiffs became the sole tenants of this property by rule of survivorship.

There could be no severance of the holding without the consent of the landholder. It would not be said that as an effect of the partition the 4 plots in dispute became a separate holding in the hand of Wazira with a separate engagement for payment of rent to the landlord. When the joint tenants of an occupancy holding by their common consent divide their holding, this has not the legal effect of creating separate holdings so as to affect the integrity of the original holding and notwithstanding the division, the joint tenancy continues with the incidents of survivorship subject only to such devolution by inheritance as is possessed by S. 22, Tenancy Act.

The defendant Mt. Ajaib was not an heir to Sikandar under S. 22, Agra Tenancy Act.

The compromise relied upon by the defendant did not confer any title upon her as an occupancy tenant under the law. The plaintiffs were not competent without the consent of the zamindar to carve out a fresh occupancy tenure as regards a portion of the original holding in favour of Mt. Ajaib. Under the compromise the defendant obtained only a permissible possession of the property. The position of the defendant was no more than that of a licensee and the plaintiffs were competent to revoke the license. In view of these facts, we are of opinion that the judgment appealed against is correct and ought to be affirmed. We dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 809

BOYS, J.

Mt. Karimunnissa Bibi—Plaintiff—Appellant.

v.

Mira Baksh and *others*—Defendants—Respondents.

Second Appeal No. 576 of 1929, Decided on 31st May 1929, against decree of Addl. Sub-Judge, Allahabad, D/- 31st May 1929.

Easement Act, S. 18—Plaintiff suing defendant for infringement of her right of privacy by certain construction—Her house already overlooked from another house and she not showing reason why she did not object to being so overlooked—She also enduring without protest invasion of privacy by defendant for two years—She is not entitled to right of privacy.

Where a custom of privacy existed in the locality in which the plaintiff lived and she sued the defendant that her right of privacy was infringed by certain construction made by defendant and where her house was already overlooked from another house and she did not show any reason why she did not object to being overlooked from that particular house and where she endured without protest the invasion of her privacy by the defendant for two years, she is not a person who is entitled to right of privacy although her suit is brought within limitation : 10 *All.* 358 and *A. I. R.* 1929 *All.* 676, *Ref.*

[P 810 C 1]

Mushtaq Ahamad—for Appellant.

Judgment.—The plaintiff sued on an allegation that her right of privacy had been infringed by certain constructions which the defendant had made. The trial Court gave a decree. The lower appellate Court had dismissed the plaintiff's suit. It was admitted (I take this fact from the judgment) that there is " a custom of privacy " in the locality in dispute. How this admission came to be made or what was supposed to be admitted, I do not know. It is manifest that in a particular locality some of the inhabitants may be in the habit of keeping parda. It is equally manifest that the fact that some persons in a locality keep parda cannot possibly be meant that all the persons within those local limits and at all places are entitled not to have their privacy infringed. A great deal of loose talk has followed from an abuse of certain statements made in the 40 years old decision in *Gokul Prasad* v. *Radho* (1). But for the purposes of the present case, I am prepared to take it, that the admission of the existence of a local custom means that there are some persons or classes of persons in the city of Allahabad, who are recognized as keeping parda. I use the expression " parda " in a broad sense, meaning that they do not commonly or at all appear before the public. Similarly, I do not imagine that a right of privacy, such as we are now considering, would ever be set up by or would ever be allowed to a man in regard to himself.

(1) [1888] 10 All. 358=(1888) A. W. N. 135.

Taking it, therefore, to be admitted by the defendant that there is a custom of privacy effective in certain cases in the city of Allahabad, the next question for decision would be whether the particular plaintiff in question was one of those entitled by the custom to privacy. It is not merely a question of whether the plaintiff is a man, or a woman, a Mahomedan or a Hindu, or a Christian, but a question whether the particular plaintiff is entitled to take advantage of the custom. The trial Court has held that the plaintiff is such a person and that her right of privacy has been infringed The lower appellate Court has held that she is not such a person and that she has no right of privacy. This finding is based, as practically all such findings must be, on the broad facts of the case. He has held that the plaintiff's house in question was already overlooked from another house to the west and that the plaintiff has not shown any reason why she does not object to being overlooked from that particular house. She has not led apparently any evidence to show that that particular house was inhabited by her own relatives or any other similar reason.

Next, it has been found by the lower appellate Court that the house is overlooked from the north roof of a mosque, possibly is visible from the interior of the mosque but certainly from the roof of the mosque to which apparently the whole of such part of the public, as is entitled to enter the mosque at all, would have access. Thirdly, the lower appellate Court has been influenced by the fact that the plaintiff has endured without protest for two years the so called invasion of her privacy. No explanation is forthcoming of this. It is of course, urged to me that the suit is brought within limitation and there will be every day some fresh invasion of privacy, but that does not touch the inference that can reasonably be drawn from the plaintiff's inaction for two years that there has in fact been no real or substantial invasion of her privacy. Even in the case to which I have referred *Gokul Prasad* v. *Radho* (1) it was considered necessary that there should be a finding that there was a substantial invasion of privacy. That case was decided before the Easements Act was applied to these Provinces. The phrase was undoubtedly taken, as I have pointed out before, from S. 18, Ill. B, Easements Act. The lower Court has found, for what appear to me to be these three good reasons, that there has been in fact no substantial invasion of any privacy. I have, sitting with Young, J., in *Bhagwan Das* v. *Zamisrao Husain* (2), and not yet reported, agreed with the remarks of Mukerji, J., who referred that case to us that :

"the custom of privacy which undoubtedly exists should not be carried to an oppressive length."

For these reasons I would dismiss this appeal. I am asked to give leave to appeal. The view of the lower appellate Court and my own view appear to be findings of fact that there is in this case no substantial invasion of privacy. If the plaintiff can get over this difficulty, I am prepared not to refuse leave to appeal, but only in view of the general importance of the case.

P.N./R.K. *Appeal dismissed.*

(2) A. I. R. 1929 All. 676.

A. I. R. 1929 Allahabad 810

SEN, J.

Bashir Husain—Plaintiff—Appellant.

v.

Mohammad Ali and *others*—Defendants—Respondents.

Second Appeal No. 509 of 1928, Decided on 9th July 1929, from a decree of Addl. Sub-Judge, Moradabad, D/- 23rd December 1927.

Cosharers—One cosharer in undivided mahal in possession of property by collecting rent for coparcenary body — Other cosharer cannot sue for joint possession and mesne profits in civil Court, but must go in revenue Court—Agra Tenancy Act (1926), S. 236.

Where a person is a cosharer in an undivided mahal and actually in possession of the property in the sense that he was making collection of rent for the coparcenary body, it is not open to one of the cosharers to institute a suit in the civil Court for joint possession of property or for the mesne profits and his remedy is by a suit in the revenue Court : (1894) *A. W. N.* 127, *Rel. on.* [P 811 C 1, 2]

Mushtaq Ahmad—for Appellant.

M. Waliullah—for Respondents.

Judgment.—The facts of the case clearly show that the suit, as framed by the plaintiff, was misconceived and that the civil Court was not competent to

grant the reliefs claimed by the plaintiff in the suit. The plaintiff came to the Court on the allegation that in mauza Inampur, mahal Safed, the plaintiff was the owner and sharer of 1 bigha, 5 biswas and 8 biswansis in khewat No. 9 of 3 bighas and 14 biswas, and defendants 1 to 3 were the cosharers in 10 biswas 9 biswansis and 12 kachwansis, and in khewat No. 25 of 2 bighas and 1 biswa of the same village the plaintiff was a cosharer in 7 biswas and 12 biswansis and defendants 1 to 3 were the cosharers in 10 biswas 1 biswansi and 7 kachwansis. The plaintiff alleged that the cosharers were in possession of separate plots, that certain plots specified in the plaint were in the possession of the plaintiff and that the defendant had no right to realize the rent of the plaintiff's share, as each cosharer realized rent from the tenants to the extent of his share. The principal relief claimed in the plaint was that, on establishment of the plaintiff's right, the plaintiff may be put in proprietary possession of 8 biswas pukhta land jointly with the defendants, and for a certain sum of money as mesne profits for the years 1332 to 1334 Fasli.

The suit was resisted inter alia on the grounds that it was not cognizable by the civil Court, that defendants 1 to 3 were actually making collections of the rent on behalf of the cosharers, that at the date of the suit defendant 1 was the person who was collecting rent and that the remedy of the plaintiff was a suit for settlement of account and profits in the Court of revenue. The Court of first instance gave the plaintiff a decree. The lower appellate Court has reversed this decision and has directed that the plaint be returned to the plaintiff for presentation to the proper Court. The finding of the lower appellate Court is that the plots detailed in the plaint were the joint property of the parties and that the allegation in the plaint that the plots were privately divided was not proved at all. The position, therefore, is that the parties are cosharers and that the defendants or one of them is a cosharer in an undivided mahal and is actually in possession of the property in the sense that he is making collections for the coparcenary body. In such a case, it is not open to the plaintiff as being one of the cosharers to institute a suit in the civil Court for joint possession of property held in coparcenary or for mesne profits. The remedy of the plaintiff is by a proper action before a proper forum, that forum being the revenue Court. The remedy lay by a suit for profits or for settlement of account in the revenue Court and not by a suit in the civil Court for the reliefs as have been claimed by the plaintiff. The above view is supported by a Division Bench ruling of this Court in *Bhola Nath* v. *M. Buskin* (1). The result is that this appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(1) [1894] A. W. N. 127.

A. I. R. 1929 Allahabad 811

SULAIMAN AND NIAMATULLAH, JJ.

Bhagwan Prasad— Defendant—Applicant.

v.

Madan Murari Lal and *others*—Plaintiffs—Opposite Parties.

Civil Revn. No. 68 of 1928, Decided on 14th June 1929, against order of Sub-Judge, Ghazipur, D/- 4th February 1928.

Civil P. C., S. 151—Court wrongly dismissing suit under O. 9, R. 8 even when pleader for party is present can rectify its error and restore suit under S. 151.

Where the Court wrongly dismisses a suit under O. 9, R. 8, there is being no default in appearance, according to O. 17, R. 2 (as amended by Allahabad High Court), the party being represented by a junior pleader, the Court has jurisdiction under S. 151 to restore the case if it thinks that such restoration is necessary for ends of justice. [P 812 C 1]

U. S. Bajpai and *K. Varma*—for Applicant.

N. P. Asthana—for Opposite Parties.

Judgment.—This is a defendant's application in revision from an order restoring a case. It is not necessary to consider the preliminary objection raised on behalf of the respondents as we are satisfied that on the merits this revision must fail. On the adjourned date of hearing, the senior vakil engaged did not turn up in time, and the junior vakil for the plaintiffs stated that his client had gone to fetch the senior vakil and he himself could not produce the evidence. The learned Subordinate Judge thought that this was a case of non-appearance on the part of the plaintiffs, and dismissed the suit under O. 9, R. 8. That this was an error is now conceded by the advocate for the applicant. Under O. 17, R. 2, as am-

ended by this High Court no party is to be deemed to have failed to appear, if he is either present or is represented in Court by any pleader, though engaged only for the purpose of making applications. As the junior vakil was present in Court, there was no default in appearance, and the learned Judge should not have dismissed the suit for default of appearance.

When an application for restoration was made, the learned Judge rectified his mistake and restored the case. It is rightly contended before us that the Court below should not have proceeded under O. 9, as the provisions in that order were not applicable; but it cannot be doubted that the Court had jurisdiction to rectify its own mistake. Even under O. 47, the Court could have set aside its own order because there was a mistake and error apparent on the face of the record. The Court, however, has not proceeded under O. 47 but under S. 151, Civil P. C. If O 47 did not apply, then the Court would certainly have inherent jurisdiction to restore the case if it thought that such restoration was necessary for the ends of justice.

The Court below was satisfied that it was necessary for the ends of justice that it should intervene. We, therefore, should not interfere in this case. The application is accordingly dismissed. We direct that the parties should bear their own costs.

R.M./R.K. *Application dismissed.*

A. I. R. 1929 Allahabad 812

DALAL, J.

Mt. Kaunsilla and *another*—Applicants.

v.

Dip Singh and *another*—Opposite Parties.

Civil Revn. No. 152 of 1929, Decided on 19th July 1929, from an order of the Small Cause Court Judge, Tilhar, D/- 12th December 1928.

Limitation Act, Art. 75—Where benefit of provision as to recovery of the whole amount is waived, cause of action accrues on each default.

Where the plaintiffs waive the benefit of the provision as to recovery of the whole amount, they will not be able to sue in future for the whole amount at once but they are entitled to sue for instalments as they fall due under Art. 75, the cause of action accruing on each default. The general Art. 80 does not apply in such a case : 35 *All.* 455, *Dist.* [P 812 C 2]

S. B. Johari—for Applicants.

B. Malik—for Opposite Parties.

Judgment.—There was an instalment bond executed by the defendant for payment of the money borrowed by instalments with the option of recovering the whole amount and in case of default of payment of any instalment, interest was recoverable if the option was exercised. The trial Court dismissed the suit on the ground that it was instituted more than three years after the first default. Four payments were alleged by the plaintiffs' creditor, but not believed by the Court on a denial by the defendant. In my opinion the trial Court has not paid proper attention to the form of the suit which is entirely for the recovery of certain instalments after waiving of the right which accrued to the plaintiffs to sue for the whole amount. The ruling in the case of *Amolak Chand* v. *Baijnath* (1) will therefore not apply, because the suit here is not for the whole amount in exercise of the option. Under Art. 75, Sch. 1, Lim. Act, where the benefit of the provision as to the recovery of the whole amount is waived, the cause of action accrues on each default and a suit for a separate instalment may be brought within three years of that particular default. The plaintiffs having waived the benefit of the provision will not be able to sue in future for the whole amount at once, but they are entitled to sue for the instalments as they fall due. The trial Court further believed that Art. 80 applied. In my opinion the bond is of the nature to which Art. 75 will apply and not the general Art. 80. In my opinion the plaintiffs have not lost their right to sue the defendants for the instalments as they fall due.

The argument as to interest not being chargeable is correct. Interest is chargeable only in case option is exercised.

In the result, I set aside the decree of the trial Court, and decree the suit for Rs. 40 with proportionate costs in both Courts.

R.M./R.K. *Decree set aside.*

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(1) [1913] 35 All. 455=20 I. C. 933=11 A. L. J. 664.

A. I. R. 1929 Allahabad 813

YOUNG, J.

Ram Rup Bhar—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 264 of 1929, Decided on 5th June 1929 from order of Sess. Judge, Ghazipur.

(a) Criminal P. C., S. 110—When charge in the notice under S. 110 amounts to definite and specific offence, preventive sections could not be used.

Originally four men were charged under S. 110 before a Magistrate. Notice under S. 110 charged the four accused that they formed one gang and have been habitually committing theft and burglaries since 1927.' The Magistrate acquitted one of the four and the Sessions Judge acquitted two more and confirmed the sentence as regards the applicant.

Held: that the ground in the notice was bad in law, the particular charge alluded to therein being a definite and specific offence under S. 401, Penal Code, the preventive sections of the Criminal Procedure Code, could not be used: *A. I. R.* 1925 *All.* 250, *Foll*; *A. I. R.* 1925 *All.* 694, *Ref.* [P 813 C 1, 2]

(b) Criminal P. C., S. 110—Scope.

That "you possess a bad reputation in the vicinity of your village" is not a proper notice under S. 110 and cannot be said to be the basis of an order under this preventive section. [P 813 C 2]

(c) Criminal P. C., S. 110—Notice.

That you "have only a nominal means of livelihood except the proceeds of theft and burglary" is not a proper notice under S. 110. [P 813 C 2]

(d) Criminal P. C., S. 110—Scope.

That you "have been strongly suspected to have committed the following burglaries" cannot be the ground of proceedings under S. 110: *A. I. R.* 1928 *All.* 357, *Foll.* [P 813 C 2]

L. M. Roy—for Applicant.

M. Waliullah—for the Crown.

Judgment.—This an application in revision from the judgment of the learned Sessions Judge of Ghazipur, in which he confirmed the order against one Ram Rup Bhar under S. 110, Criminal P. C. Originally four men were charged under S. 110 before the Magistrate. The Magistrate acquitted one of the four. The learned Sessions Judge acquitted two more, and confirmed the sentence only as regards Ram Rup Bhar. There are many difficult points in this case, but I think that the application must be allowed on a preliminary point. The notice under S. 110 charges the four accused with:

"that they formed one gang and have been habitually committing theft and burglaries since 1927."

This ground is clearly bad. In a decision of this High Court reported in *Ram Prasad* v. *Emperor* (1), Mukerji, J., laid it down that where:

"a man may be by habit a robber and so long as he is not charged with a definite act of robbery, he may be bound over under S. 110, Criminal P. C. But when it is said that he, along with several others, habitually commits robbery, the man becomes at once a member of the gang of dacoits and, therefore, commits a definite and specific offence punishable under S. 400, I. P. C. and cannot be bound over under the preventive sections."

The learned Assistant Government Advocate has drawn my attention to the case of *Budhan* v. *Emperor* (2), which is a Bench case. But in my opinion, the decision in this case in no way overrules Mukerji's decision in the earlier case on the particular point on which I am deciding this application. In this case the particular charge that I have alluded to is a definite and specific offence punishable under S. 401, I. P. C. and, therefore, it seems to me to be clear that the preventive sections of the Code cannot be used in this particular case. The second ground in the notice is that:

"you (the four men) possess a bad reputation in the vicinity of your village."

That is not a proper notice under S. 110 and cannot be said to be the basis of an order under this preventive section. Ground 3 says:

"Have only nominal means of livelihood except the proceeds of theft and burglary."

This again is not a proper notice under S. 110. Ground 4 is: "Have been strongly suspected to have committed the following burglaries." This too cannot be the ground of proceedings under S. 110. In the case of *Emperor* v. *Kurva* (3) it has been held by a Bench of this Court that:

"in a case under S. 112, Criminal P. C., evidence cannot be led under S. 110 that an accused person has been suspected of committing such and such offences."

There is nothing, therefore, in the notice which can possibly, in my opinion, be the basis of proceedings under S. 110.

Several other points have been taken before me, but, taking the view which I do of the notice, it is unnecessary to discuss them. The application must be granted and the order passed set aside.

K.N./R.K. *Application granted.*

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(1) A. I. R. 1925 All. 250.
(2) A. I. R. 1925 All. 694=47 All. 733.
(3) A. I. R. 1928 All. 357.

A. I. R. 1929 Allahabad 814

MUKERJI AND NIAMATULLAH, JJ.

Ghura Koer—Appellant.

v.

Bishun Ram and *others*—Respondents.

First Appeal No. 450 of 1926, Decided on 29th April 1929, against decree of Addl. Sub-Judge, Ballia, D/- 3rd September 1926.

(a) Civil P. C., O. 34, R. 1—Scope.

A co-mortgagor who is not suing for redemption is a necessary party in a redemption suit: *A. I. R.* 1926 *All.* 46, *Foll.* [P 814 C 2]

(b) Civil P. C., S. 11—Nine out of 15 properties mortgaged, purchased by mortgagee, 4 by *A* and 2 still in mortgagor's possession —*A* suing for redemption making mortgagor and mortgagee defendants—Court taking account of liability for redemption and deciding that certain sum was payable by properties in mortgagor's possession—Decision is binding on mortgagor in his subsequent redemption suit.

Out of the 15 properties mortgaged, 9 were purchased by the mortgagee himself, 4 were purchased by *A* and 2 remained still in the possession of the mortgagor. *A* sued for redemption arraying both the mortgagee and the mortgagor as defendants. In that suit account was taken of what was the liability for redemption of the several propreties, owned by the several parties, and a certain sum was found payable by the two properties still in the possession of the mortgagor.

Held: that the decision in this former suit would be binding on the mortgagor in his subsequent suit for redemption against the mortgagee with respect to the two properties in his possession. [P 815 C 1]

U. S. Bajpai and *Haribans Sahai*—for Appellant.

K. Verma and *A. P. Pandey*—for Respondents.

Judgment.—This appeal is by one who was defendant 2 in the suit. It arises out of a claim for recovery of mortgage money by sale of two out of 15 properties originally mortgaged. The mortgage was a simple one and was executed on 6th January 1911 for a sum of Rs. 6,999-15-0. The appellant now represents the original mortgagor. In the course of time, subsequently to the execution of the mortgage-deed, out of the 15 properties mortgaged, which will be found detailed at p. 3 of our paper book, properties 1 to 9 were purchased by the mortgagees themselves. The properties 12 to 15 were purchased by one Zuber, from whom they were wrested, after a pre-emption suit, by one Khairunnissa. Mt. Khairunnissa brought a suit for redemption being suit No. 198 of 1918 in respect of the four villages purchased by her. To this suit, the present appellant was a party. In Khairunnissa's suit, an account was taken of what was the liability on a particular date fixed by the Judge for redemption of the several properties owned by the several parties. The learned Judge found that on 25th April 1918, the date fixed for payment of the mortgage money by Mt. Khairunnissa, a sum slightly over Rs. 1,800 was payable by the properties Nos. 10 and 11 which were still in the possession of the representatives of the original mortgagor. The plaintiffs claim recovery of a certain amount by sale of the two properties, namely Nos. 10 and 11 which are called Alwalpur and Shahpore.

The main question that had to be determined by the Court below was, what was the amount for which these two villages were liable. The learned Subordinate Judge held that the judgment in the earlier suit of 1918 operated as res judicata between the present plaintiff and the appellant, although they were arrayed on the same side, as defendants, in that suit of 1918. Taking Rs. 1,800 as the basis of the liability of the two villages, still owned by the appellant, the learned Judge decreed the claim. In this Court, two points have been urged. The first is that the judgment of the earlier suit did not operate as res judicata, and the second is that even in the view taken by the Court below, the amount decreed is too much.

On the first point, we cannot agree with the argument of the learned counsel for the appellant. It was urged that in the earlier suit, the appellant was not a necessary party. That is not our view of O. 34, R. 1, Civil P. C. The suit was a redemption suit and, therefore, in the suit relating to a mortgage, the co-mortgagor of Khairunnissa, namely, the present appellant was a necessary party. The learned counsel for the appellant has very fairly drawn our attention to the case of *Ahmad Husain* v. *Muhammad Qasim Khan* (1), to which one of us was party. In that case it was held that in a suit for redemption, a co-mortgagor who was not suing for redemption was a necessary party. We hold that in the earlier suit, Mt. Ghura Kuer, the appellant, was a necessary party.

(1) A. I. R. 1926 All. 46=48 All. 171.

Coming to the question of res judicata we think that the decision of the Court below was right. It was necessary, in order to give relief to Khairunnissa, to decide what was the liability of the present appellant's property as also what was the liability of the properties purchased by the present respondents. The question could be settled only in the presence of these parties. The interests of both the parties were conflicting, inasmuch as, if a heavier burden was put on one party, the benefit of that would be reaped by the other party. The two sets of defendants were therefore interested in seeing that a proper amount was found payable by Khairunnissa. We hold that the judgment of 1918 operated as res judicata.

Coming to the second point, the contention of the learned counsel for the appellant seems to be right. The actual amount payable by the two villages Alwalpur and Shahpore was found to have been Rs. 1,869, as on 25th April 1918. According to the terms of the mortgage, interest due up to the due date, was to be added to the original amount lent and thereafter, interest was to be paid on the total amount at 15 per cent per annum. The amount found as due on 25th April 1918 consisted of a principal amount and an amount of accumulated interest. The principal amount was Rs. 917 and the accumulated interest was Rs. 952. Further interest, according to the terms of the mortgage-deed could run only on the sum of Rs. 917 and not on the amount of interest that had accumulated so far. In this respect the decree of the Court below will have to be modified. The learned Judge has allowed interest at the uniform rate of 15 per cent on the total amount of Rs. 1,800. We have already pointed out that the correct amount is not Rs. 1,800, but Rs. 1,869.

In the result, we modify the decree of the Court below to this extent that the plaintiff-respondents' claim stands decreed for recovery of Rs. 917 with interest thereon at 15 per cent per annum from 25th April 1918 to six months from this date which we fix for payment. To this entire sum will be added the sum of Rs. 952, the interest which accrued on the principal amount from the due date, which is 24th May 1911 to 25th April 1918. In case of default in payment of this total amount and proportionate costs, which we allow to the plaintiffs in both the Courts, the properties, namely Alwalpur and Shahpore, will be sold. The properties will be sold subject to the encumbrances described in the judgment of the Court below. After the date fixed for payment by this judgment, interest will run on the total amount of the total mortgage money and the costs at 6 per cent per annum till realization. The appellants will pay their costs in this Court and the Court below. In calculating the costs in the Court below, the amount of fees payable for the counsel of the plaintiffs will be calculated on the amount decreed, and if sum total of the fee paid when the suit was heard ex parte, and the fee paid later on, should exceed this amount the amount of fee will be limited to the sum already indicated.

S.N./R.K. *Decree modified.*

A. I. R. 1929 Allahabad 815

MEARS, C. J. AND SEN, J.

Sukhdarshan Prakash—Applicant.

v.

Ram Das—Opposite Party.

First Appeal No. 70 of 1928, Decided on 10th July 1929, from an order of Dist. Judge, Meerut, D/- 14th April 1928.

Contempt—Selling of property in defiance of injunction is contempt of Court and amenable to punishment.

Where a person sells immovable property in spite of an injunction served on him, the case is one of contempt and the excuse that he was hard pressed is no excuse at all in law for open defiance of a definite order of a Court in a matter so solemn as that of injunction. Such a person being guilty of contempt of Court is rightly amenable to punishment.

[P 815 C 1]

Panna Lal. B. L. Dave and *Kirpa Narain*—for Applicant.

G. Agarwala—for Opposite Party.

Judgment.—On 24th April 1921, a suit was instituted by Ram Das against Sukhdarshan Prakash, for recovery of certain sums of money. On 1st September, Ram Das obtained a temporary injunction restraining the defendant from transferring his immovable property pending the decision of the suit. That interim injunction was served on the defendant on 3rd September 1926. He promptly disregarded it, treated it with contempt and on 8th October 1926, in plain definance of the order of the Court,

executed a mortgage of part of his immovable property. A month later the temporary injunction was made absolute and a decree was obtained by Ram Das on 6th September 1927. On 20th December 1927, an application was made by the decree-holder bringing these circumstances to the notice of Mr. Bhagwan Das, who was then Assistant Sessions Judge at Meerut. The case was perfectly clear. It was one of contempt and the respondent had no possible excuse except that he was hard pressed which is no excuse in law at all for open defiance of a definite order of a Court, in a matter so solemn as that of injunction. Mr. Bhagwan Das made a very unusual order, which we shall quote in full :

"Read the reply of Sukhdarshan Prakash. He says that he was hard pressed for money and had no alternative but to transfer the property. It appears that Sukhdarshan Prakash has been adjudicated an insolvent. I think it is no use taking action against him now under O. 39, R. 2, Civil P. C. The application be filed."

Mr. Bhagwan Das entirely overlooked the fact that this man had been guilty of contempt of Court and therefore rightly amenable to punishment. The effect of Mr. Bhagwan Das's order would be most deterimental to the administration of justice, if followed by other Judges. Courts are bound to see that their orders are obeyed and litigants must respect such orders and realize that imprisonment is the normal usual punishment for a plain premeditated breach of an injunction. The order of Mr. Bhagwan Das was fortunately set right on 14th April 1928, on which date Mr. Smith, the District Judge had no difficulty in coming to the conclusion that Sukhdarshan Prakash deliberately disobeyed the injunction, and having no doubt as to his duty, whilst taking a most lenient view of the matter, ordered him to be detained for one month in the civil prison. It appears that Sukhdarshan Prakash has served some part of his sentence. Our order is that this appeal of Sukhdarshan Prakash be rejected with costs and that he return to the civil prison there to remain till the expiration of his sentence. On Sukhdarshan Prakash's surrender the bail bond will be cancelled, as well as his personal undertaking.

R.M./R.K. *Order accordingly.*

A. I. R. 1929 Allahabad 816

DALAL, J.

Madan Kishor and *another*—Applicants.

v.

Mahabir Prasad and *others*—Opposite Parties.

Civil Revn. No. 144 of 1929, Decided on 12th July 1929, against order of Sub-Judge, Allahabad, D/- 29th January 1929.

(a) Provincial Small Cause Courts Act, Art. 32—Suit for share of price of branch cut from joint tree is not barred under Art. 35 (2), cutting not constituting mischief or theft.

Where a branch of a joint tree is alleged to have been cut and the plaintiffs sue for their share of the price, the case is not one of mischief or theft and therefore not barred from the jurisdiction of the Court of Small Causes under Art. 35 (2). [P 816 C 2]

(b) Provincial Small Cause Courts Act, S. 23—Court of Small Causes is to decide whether question of title is involved.

It is for the Court of Small Causes to decide whether a question of title is involved in a case. If the Small Cause Court so desires it may return the plaint. [P 816 C 2]

S. D. Sinha—for Applicants.

Ram Nama Prasad — for Opposite Parties.

Judgment.—The regular Court had no jurisdiction. The suit for a small amount of money was certainly triable by a Court of Small Causes. The lower appellate Court was of opinion that the case was one of mischief, if not of theft. and, therefore, barred from the jurisdiction of the Court of Small Causes under Art. 35 (ii), Sch. 2 of the Act, No criminal Court would countenance such a charge. A branch of a joint tree is alleged to have been cut and the plaintiffs have sued for their share of the price. The second reason given by the lower appellate Court is that a question of title is involved. That matter, however, is for the Court of Small Causes to decide under S. 23 of the Act. If the Court of Small Causes so desires he may return the plaint.

I set aside the decrees of the two subordinate Courts and direct the trial Court to return the plaint to the plaintiffs for presentation to the proper Court. The defendants raised the plea of jurisdiction in the lower appellate Court and in this Court, so they will receive their costs of these two Courts. In the trial Court costs will follow the event.

R.M./R.K. *Decree set aside.*

A. I. R. 1929 Allahabad 817

KING AND IQBAL AHMAD, JJ.

(*Saiyad*) *Abdullah*—Plaintiff—Appellant.

v.

Ahmad and *others*—Defendants—Respondents.

Second Appeal No. 811 of 1926, Decided on 10th June 1922, from a decree of Dist. Judge, Azamgarh, D/- 28th January 1926.

(a) Transfer of Property Act, S. 45—In absence of specification shares are presumed to be equal.

In absence of specification of the shares purchased by two persons in the sale deed it must be held that both purchased equal shares. [P 818 C 2]

(b) Transfer ot Property Act, S. 54—Prior agreement has priority in law over later agreement if there is knowledge of it.

Where an agreement is entered into with the knowledge of a prior agreement the agreement prior in date has priority in law over the later one. The mere fact that lesser share than stipulated in the prior agreement was purchased and for different consideration does not matter. Even the terms as regards consideration may be varied. The decisive factor is the priority in date of the agreement and not the terms of the agreements. [P 818 C 2, P 819 C 1]

(c) Specific Relief Act. S. 23 (b)—Contract for sale can be assigned and representative-in-interest can enforce it.

In a contract for sale learning, skill, etc. of a party thereto is not a material ingredient. Such a contract can therefore be assigned and it can be enforced by the representative-in-interest of a party in absence of any agreement to the contrary : *A. I. R.* 1926 *Mad.* 699, *Rel. on.* [P 819 C 1]

P. L. Banerji and *Mushtaq Ahmad*—for Appellant.

Narain Prasad Asthana—for Respondents.

Judgment. — This is a plaintiff's appeal and arises out of a suit for specific performance of a contract of sale, and for a declaration that the sale-deed dated 12th January 1925 executed by defendant 1 in favour of defendants 2 and 3 is null and void as against the plaintff.

The plaintiff's case was that defendant 1 contracted to sell his 1 anna 7 ganda and odd share in mauza Dharamsipur to the plaintiff for a sum of Rs. 1,925, and, on receipt of Rs. 99 by way of earnest money, on 26th December 1924, executed an agreement embodying the terms of the contract and promised to execute the sale-deed on 5th January 1925, but notwithstanding the said contract defendant 1 sold 17½ gandas share to defendants 2 and 3 for a sum of Rs. 2,700 on 12th January 1925.

The suit was contested by all the defendants. The case put forward by the defendants was that, prior to the agreement alleged by the plaintiff, defendant 1 had on 17th November 1924 agreed to sell his 1 anna 7 ganda and odd share to defendants 2 and 3, and that the plaintiff had knowledge of the said agreement. The defendants alleged that the sale of 12th January 1925 was in pursuance of the agreement dated 17th November 1924, that was prior in date to the agreement alleged by the plaintiff, and, as such, the plaintiff was not competent to assail the validity of the sale-deed in favour of defendants 2 and 3. Defendant 1 also pleaded that the plaintiff had induced defendant 1 to enter into the contract of sale by the exercise of fraud and and as such the plaintiff is not entitled to a decree even with respect to the 10 gandas share that remained with defendant 1 and was not included in the sale-deed executed by him in favour of defendants 2 and 3

The claim with respect to 10 ganda share has been decreed by the Courts below, and there is no controversy about the same in the present appeal

Both the Courts below have agreed in dismissing the plaintiff's suit with respect to 17½ gandas share that was sold to defendants 2 and 3 by means of the sale-deed dated 12th January 1925. By this appeal the plaintiff assails the validity of the decrees of the Courts below with respect to the said share.

In order to appreciate the question of law that has been raised before us it is necessary to state certain facts.

On 1st December 1925, defendant 1 sent a notice to the plaintiff informing him that he had entered into a contract with Mukh Ram Singh defendant 3 to sell his 1 anna 7½ ganda share to him for a sum of Rs. 3,500 and asked him to reply if he was willing to purchase the said share. The plaintiff sent a reply to this notice to defendrnt 1 on 5th December 1925. We are not concerned with the contents of the letter sent by the plaintiff to defendant 1.

In view of this correspondence that passed between plaintiff and defendant 1 and other evidence in the case, the Courts below have come to the conclusion that

defendant 1 entered into a contract with defendant 3 to sell his 1 anna 7½ ganda share in November 1924 and that the plaintiff was fully aware of that agreement when he entered into the contract of sale on 26th December 1924.

It was maintained by the defendants that by the contract of November 1924 defendant 1 had agreeed to sell his share to both Mahabir and Mukh Ram Singh defendants 2 and 3, and as the contract with those defendants was prior in date to the contract of sale entered into between the plaintiff and defendant 1, the sale-deed dated 12th January 1925 could not be assailed by the plaintiff.

The Courts below have not accepted the contention of the defendants that by the contract of November 1924 defendant 1 agreed to sell his share both to Mukh Ram Singh and Mahabir, and the judgments of those Courts proceed on the assumption that that contract was between the ptaintiff and Mukh Ram Singh and that Mahabir was no party to the said contract. But the Courts below have held that the mere fact that the sale was settled primarily with Mukh Ram Singh alone and that he joined with him another purchaser and purchased a lesser share than the share agreed to be sold to him does not entitle the plaintiff to assail the validity of the sale-deed and to claim enforcement of the agreement, dated 26th December 1924 as against defendants 2 and 3.

In appeal before us it is argued by the learned advocate for the plaintiff-appellant that the sale-deed dated 12th January 1925 must be deemed to have been executed in accordance with a newly substituted agreement different from the agreement of 17th November 1924, and that the defendants must be deemed to have abandoned that agreement and it is no longer open to them to put forward that agreement as having priority over the agreement, dated 26th December 1924. It is pointed out that the sale-deed dated 12th January 1925 differs in material particulars from the agreement dated 17th November 1924 set up by the defendants and it is argued that there is no escape from the conclusion that the sale in favour of defendants 2 and 3 was not carried out in pursuance of and in conformity with the agreement of November 1924. It is urged that the defendants having given a go by to the agreement of November 1924, the plaintiff is entitled to a decree for specific performance of the agreement, dated 26th December 1924.

The learned advocate for the defendant-respondents supports the decree of the Courts below on the ground that a contract of sale may be assigned and the assignee can enforce specific performance of it, and that it must be deemed that when Mukh Ram Singh joined Mahabir with him as a purchaser, he did no more than assign his rights under the agreement of November 1924 to Mahabir to the extent of the share sold to him. He maintains that the mere fact that the sale to defendants 2 and 3 was of a lesser share than the share originally agreed to be sold, and that the consideration was not the consideration originally agreed upon does not disentitle the defendants to plead the agreement of November 1924 in bar of the plaintiff's claim.

As has already been stated the sale-deed dated 12th January 1925 is with respect to 17½ gandas share. There is no specification of the shares purchased by Mukh Ram and Mahabir in the sale-deed, and in the absence of such specification, in view of S. 45, T. P. Act, it must be held that both Mukh Ram and Mahabir purchased 17½ gandas in equal shares, in other words the share purchased by each was 8¾ gandas.

With respect to 8¾ ganda share purchased by Mukh Ram Singh we are in agreement with the Courts below that the plaintiff is not entitled to succeed. Before entering into a contract with the plaintiff defendant 1 had agreed to sell his entire share to Mukh Ram Singh, and the plaintiff had knowledge of that agreement and, as such the agreement with Mukh Ram Singh had priority in law over the agreement with the plaintiff. The mere fact that eventually Mukh Ram Singh purchased a lesser share than the share originally agreed to be sold to him and for consideration different from the consideration originally agreed, does not disentitle him to take advantage of the agreement of November 1924. It cannot be denied that Mukh Ram Singh, on the facts found, would have been entitled to claim specific performance of the contract of November 1924. In other words he could insist on the sale of the entire 1 anna 7½ gandas share to him. That being so,

he was fully competent to waive his right with respect to a portion of that share and by mutual agreement with defendant 1 to agree to purchase the lesser share. Equally so it was open to defendant 1 and to Mukh Ram Singh to vary the terms of the agreement of November 1924 as regards consideration. The decisive factor in such cases must be the priority in date of the agreement and not the terms of that agreement. In our judgment the purchase of $8\frac{3}{4}$ gandas by Mukh Ram Singh must be deemed to be in pursuance of the agreement of November 1924 and the plaintiff's suit with respect to that share must fail.

Now we pass to a consideration of the question whether or not the plaintiff is entitled to relief with respect to the share purchased by Mahabir. It is provided by S. 23 (b), Specific Relief Act, that a contract, in which the learning, skill, solvency or any personal quality of a party thereto is not a material ingredient, and which does not provide that the interest of a party under the same shall not be assigned, can be enforced by the representative-in-interest of any party to the contract. It is clear that in a contract of sale the learning, skill etc., of a party thereto is not a material ingredient. The material ingredients in such a contract are the property to be sold and the consideration therefor. It, therefore, follows that a contract for sale can be enforced by the representative-in-interest of a party to that contract. In other words the benefit of a contract of sale can be assigned. The general rule is that the benefit of contract may be assigned in equity and the assign is entitled to enforce specific performance of it. No doubt there are statutory exceptions to this rule, but a contract of sale is within the rule and not within the exceptions. It is no doubt open to the parties to a contract of sale to agree that the interest of either party thereto shall not be transferable, and if there is such an agreement between the parties, it will not be open to either party to that contract to assign his interest under the same but in the absence of any such agreement the benefit of such a contract can be assigned : vide Fry on Specific Performance, Edn. 6, para. 222 and *C. Muniswami Nayudu* v. *Sagalaguna Nayudu* (1).

(1) A. I. R. 1923 Mad. 699=49 Mad. 387.

But we are unable to agree with the learned advocate for the respondents that Mukh Ram Singh must be deemed to have assigned the benefit of the contract of November 1924 in favour of Mahabir to the extent of the share purchased by him. The case of assignment was not put forward in the written statement. In both the Courts below it was maintained by the defendants that Mahabir was a party to the contract of November 1924. This contention of the defendants has failed. In our judgment it is not open to the defendants to put forward a case of assignment for the first time in second appeal. It must, therefore, be held that it is not open to Mahabir to claim the benefit of the contract of November 1924 and as such the plaintiff is entitled to enforce the agreement dated 26th December 1924 against Mahabir provided Mahabir had notice of that agreement. Neither of the Courts below have tried the question whether or not Mahabir was aware of the agreement with the plaintiff and indeed no issue on the point was framed by the trial Court.

In order to decide this appeal we must have a finding from the lower appellate Court on the following point ;

Is Mahabir a transferee for value in good faith without notice of the contract, dated 26th December 1924.

Parties will be allowed to adduce evidence on the point. On receipt of the finding the usual ten days will be allowed for objections.

R.M./R.K. *Case remanded*

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* A. I. R. 1929 Allahabad 819

MUKERJI AND NIAMATULLAH, JJ.

Shiva Prasad Gupta—Assessee.

v.

Commissioner of Income-Tax, U P.—Referring Officer.

Misc. Case No. 1001 of 1923, Decided on 20th February 1929, order on reference submitted by the Commissioner of Income Tax, U. P.

*** (a) Income-tax Act. S. 66—S. 66 requires High Court to decide questions of law that arise in the case i. e., High Court is entitled to "resettle issues" as it were and to decide those issues.**

High Court has to accept the facts as found by the Commissioner of Income-tax and if necessary may call for further facts by asking him to make a fresh statement of them under

S. 66 (4). But though ordinarily the Income-tax Commissioner would be the officer who would frame the points of law that arise in the case stated by him and though he would be expected to give his own opinion on those points of law, for the benefit of the High Court S. 66 requires the High Court to decide the questions of law that arise in the case, i. e., the High Court is entitled to "resettle the issues" as it were and to decide those issues.

[P 821 C 2 P 822 C 1]

* (b) **Income-tax Act, S. 13— Assessee is entitled to deduct from his estimated income actual losses suffered in particular year and amount of irrecoverable debts that should have been discovered in particular year.**

It is unjust that in treating the book income as the actual income, the losses, which would have been deducted if the book income had been treated as the actual income in a particular year by the assessee, should not be deducted. That being so the assessee fs entitled to deduct from his estimated income the actual losses that may have been suffered in a particular year and the amount of irrecoverable debts that should have been discovered and could have been discovered in a particular year.

[P 823 C 2]

Uma Shankar Bajpai—for the Crown.

Tej Bahadur Sapru and *Rama Kant Malaviya*—for Objectors.

Mukerji, J.—This is a reference by the Commissioner of Income-tax, United Provinces under S. 66, Income-tax Act of 1922.

The facts as they appear from the statement of the case made by the learned Commissioner and from the several appendices attached to the statement appear to be as follows: There was a joint family business owned by several members of the family, the head office of which was in Calcutta. The income-tax for the entire business was paid at Calcutta by the head office firm carrying on business under the name and style of Sital Prasad Kharag Prasad. The members of the family decided to separate, as and from the date 9th October 1921. The date of separation having been fixed by mutual agreement, the actual partition of the effects of the family was made over to two gentlemen, Pandit Madan Mohan Malaviya and Babu Baldeo Ram Dave. These gentleman made an award on 30th November 1925. The said award made a rule of the Court on 26th February 1926. It was therefore on 26th February 1926, that the assessee, B. Shiva Prasad Gupta, at whose instance this reference has been made, became the owner of the lot given him as the result of the partition. 26th February 1926 was almost at the close of the Samvat year 1982. The Samvat year 1983 began on 15th March 1926. For the Samvat 1983 B. Shiva Prasad Gupta had a statement of his financial position drawn up in the shape of a profit and loss account. I have already mentioned that the family became separate with effect from 9th October 1921 which would correspond to sometime about Katik 1978 Samvat. In preparing the profit and loss account on the credit or income side was shown the interest which accrued to B. Shiva Prasad during the years 1978 to 1983 Samvat, each year being shown separately. On the debit or loss side was shown for different years, such amounts as represented either a loss in business or unrealizable debts.

B. Shiva Prasad Gupta was to be assessed for his income of the years 1927-1928. The amount of his probable income for the purpose of assessment was to be taken to have been the same as was his actual income in the "previous year," namely 1926-1927 which would approximately correspond to the Samvat year 1983. Having the profit and loss account prepared as aforesaid before him, the income-tax officer took all the accumulated interest of the several years as B. Shiva Prasad's income from the year 1926-1927. B. Shiva Prasad's contention was that, if on the income side the interest that accumulated from time to time was to be shown as the income of the particular year 1926-1927 (Samvat 1983), he was entitled to set off, as against that income the losses suffered by him in business (the main business being a printing press) and on account of irrecoverable debts.

Apparently, the income-tax officer refused to deduct, out of the so-called income of B. Shiva Prasad Gupta for the year 1926-1927, his losses during the years the interest earned for which have been taken as his income. There was an appeal to the Assistant Commissioner. It was unsuccessful except in so far as the assessable income was slightly reduced by him. The assessee petitioned the Income-tax Commissioner to refer his case to the High Court but he did not formulate the questions of law that really arose for decision. The learned Commissioner of income-tax has formulated three questions for being answered by the High Court. These are as follows:

(1) In computing the income, profits and gains of the previous year, for the

purpose of assessing them to income-tax, can business losses incurred in year anterior to the previous year be set off against the income of the previous year?

(2) Similarly, in computing the income of the previous year can bad debts or irrecoverable loans that became bad or irrecoverable respectively in years anterior to the previous year be deducted from the income of the previous year?

(3) If the answer to these two questions be in the negative, can interest that accrued in years anterior to the previous year, but for which the assessee in accordance with the system of accountancy regularly employed by him: see S. 13, Income-tax Act, has taken credit for the first time in the previous year, be included in computing the income of the previous year for the purpose of assessing it to income-tax?

It will be noticed that the first two questions do not really arise in the case. The third question again does not state the actual question that is in controversy. It entirely ignores the contention of Mr. Gupta that he is entitled to deduction out of what has been taken to be his income. The learned Government Advocate has contended that the High Court has no power to find out for itself what are the substantial questions of law that have arisen between the parties and that it is bound either to answer such questions as have been put to it by the Commissioner of Income-tax or send back the case to him to make a fresh "statement" in the case.

In view of this contention, I have considered S. 66, Income-tax Act, carefully. I am unable to find any warrant in it for the extreme contention of the learned Government Advocate. It appears to me that the section is not happily worded and the pronoun " it " has been used sometimes for a "question of law" and sometimes for the " case. " The meaning and object, however, of the entire S. 66 seems to me to be free from obscurity. My impression is that the High Court has to accept the facts as found by the Commissioner of Income-tax and if necessary may call for more facts by asking him to make a fresh statement of them under sub-S. 4, S. 66. But it is for the High Court to find out from the contention of the assessee on the one hand and the contention of the Income-tax authorities on the other, what is the real point of law that arises between the parties and what it has to decide. This reading of S. 66 seems to be clear to me from among other matters the fact that the High Court is nowhere called upon to decide such questions as may be framed by the Commissioner of Income-tax.

Let us now read S. 66 clause by clause. Sub-S. 1 says:

" Where in the case of any assessment a question of law arises, the Commissioner may draw up a statement of the case and refer "it" with his own opinion to the High Court.

The pronoun "it" may refer either to the case which word appears close by, or it may refer to the "question" of law which word "question" appears four lines earlier.

Subsection 2 mentions the case where reference is to be made at the instance of the assessee, sub-S. 1 having already provided that a reference could be made by the Income-tax Commissioner either of his own motion or on reference from any income-tax authority subordinate to him. Here again, the pronoun "it" that appears after the word "refer" may stand for the "case" or the "question" of law. The proviso to sub-S. (2) makes it clear that the object of the reference is the decision by the High Court of the question of law that arises in the case and the main object of sending up the "case" is the decision of the question of law. The proviso says that if the Commissioner, in the exercise of his power of revision, decides the "question," which can mean only the question of law that arises, the assessee may withdraw his application for a reference to the High Court. If the assessee is satisfied with the Commissioner's decision on the point of law he may choose that he no longer would have a decision by the High Court.

Sub-rule 3 relates to the position that might arise if the Commissioner happens to be of opinion that there is no question of law to be decided and the High Court is of opinion that there is a question of law to be decided and all that the High Court wants is a statement of the case by the Commissioner. Obviously, in these circumstances, it will be for the High Court to find out what is the point of law that arises and requires decision. In this subsection what is to be referred to the High Court is the

statement of the case or the case itself and not a point or points of law.

Sub-rule 4 relates to the affair when statement of the case made by the Commissioner is unsatisfactory. It says that where a statement in a case referred under this section (S. 66) is insufficient to enable the High Court to determine the question raised "thereby," namely by the case, the Court may refer back the case to the Commissioner for additions and alterations. This proviso supports the view that it would be for the High Court to find out what is the real point of law that is in issue between the assessee on the one hand and the income-tax authorities on the other and whether for the purposes of determination of the point of law, sufficient facts have been supplied. It must be remembered that the questions of law that would ordinarily arise would arise in connexion with particular facts and must be answered with reference to those facts. Otherwise, there would be no necessity of a statement of a case or any addition or alteration in that statement. It would be sufficient merely to put an abstract question of law to the High Court for an answer.

Sub-rule 5 says that the High Court, on hearing any such "case" shall decide the "question of law raised thereby," The word "thereby" must stand for "the case." This sub-rule nowhere suggests that the duties of the High Court are confined to answering the question of law put to it by the Commissioner whether or not such question is a substantial question that is to be decided between the parties (the assessee and the income-tax authority.)

The result of my reading of S. 66, therefore, is that although ordinarily the income-tax Commissioner would be the officer who would frame the points of law that arise in the case stated by him and although he would be expected to give his own opinion on those points of law, for the benefit of the High Court, S. 66 requires the High Court to decide the questions of law that arise in the case, i. e., the High Court is entitled to "re-settle the issues" as it were, and decide those issues. Of course, the issues would all be on the question of law.

This being my reading of the provisions of S. 66, Income-tax Act, I find that the only controversy that does arise between the income-tax authority on the one hand and the assessee on the other, is:

"Is the assessee is entitled to deduct from his "income," which is in the shape of interest which has accrued due not only in the year 1926-27, but in five previous years (going up to Samvat 1978: see p. 7 Appendix A), the losses and irrecoverable debts that happened and should have been discovered, respectively in those years?"

The answer to such a question can be only in the affirmative.

It will be re-called among the members of the joint Hindu family, the date of separation was fixed as 9th October 1921, corresponding to 1978 Samvat. For full four years, the partition proceedings dragged on and it was not till the close of Samvat 1982 that the assessee came to know what he had got as his share in the joint family property. It has been found that no income-tax was paid on the interest that accrued in the years 1978 to 1982, according to the account books. It is clear that income-tax ought to be paid for those years, but no income-tax can be assessed for the years 1978 to 1982 unless the accumulated interest be taken as a part of the income of the year 1983 (1926 to 1927). Prior to the year 1927-28, the assessee could only have been the joint family. The family did not treat the accrued interest as a part of their profits and did not pay any income-tax on the same. In the profit and loss account, the assessee, Mr. Shiva Prasad Gupta, treated the accumulated interest as his income for the year 1983. This treatment by Mr. Gupta was only for the purpose of ascertainment of his own financial position. It would be an untrue statement of fact if we said that the accumulated interest of 5 years was Mr. Shiva Prasad's income in one particular year, namely 1983. But he is prepared to allow the income-tax authorities to treat the entire accumulated interest as his income for the "previous year," provided he is allowed to set off against the interest, that accrued in a particular year, the loss that was incurred in the business (press) or due to a particular debt becoming irrecoverable in that particular year. This is a perfectly fair and equitable position and is not in any way discountenanced by S. 13, Income-tax Act. S. 13, Income-tax Act is a very fair section if properly

understood. It says that when an assessee keeps his accounts in a particular way in order to ascertain his own profit and loss, take his case of profit and loss in his particular way, provided it gives an accurate idea of his income in a particular period. But for this purpose, the method of keeping the account should be one which the assessee habitually and regularly adopts. This can only mean that the practice has gone on for sometime. In this particular case before me, there can be no question of any particular method of keeping account which may have been "regularly employed," to quote the exact language of S. 13. Mr. Gupta came by his separate property in the very year under consideration, viz., 1926-1927. He could not possibly have developed for himself any method of accounting as to which the description "regularly employed" may be applied.

The income-tax officer, in the circumstances, is thrown upon "such basis" and "such manner" as the income-tax officer may determine; see S. 13. This does not mean that the income-tax officer has a purely arbitrary power to assess the income. If he adopts one particular method he is to pursue it to its logical conclusion. In this case, the income-tax officer adopts the assessee's "chitta" or profit and loss account for the purposes of S. 13, Income-tax Act, but he accepts only the figures on the one side and ignores the figures on the other. In other words he proceeds on what has been described in the course of the argument and in the statement of the case as "mercantile accountancy system." That system is this. In any particular year, the amounts that have become recoverable are shown as the income actually received and the liabilities incurred are shown as amounts actually disbursed. Under this system, the merchant, in order to ascertain his income, which is really a "book income," deducts from the profit earned according to his books, the losses that he has suffered, also according to his books. The balance is a net "book income." Under S. 13, Income-tax Act, this net "book income" may be accepted by the income-tax officer as a fair estimate of the merchant's income. The reason will be two-fold. The merchant himself uses this method of ascertaining his own income aud secondly the method is not an unfair one. In this particular case before me, the income-tax officer accepts the "book income" of any particular year, say for example, the year 1979 as the assessee's income, because the assessee, in his "profit and loss account" has taken the book income of 1979 Samvat as his income. But when the assessee ascertained also his losses for the year 1979 in order to ascertain his actual book income for 1979 samvat, the income-tax officer says: "you ought to have done that in the year 1979 and you cannot do it now." The simple and honest answer to that would be :

"In the year 1979, the accrued interest was never treated as a part of the income and, therefore, the accrued losses were never deducted out of the income."

To my mind, it is mainfestly unjust that in treating the book income as the actual income, the losses, which would have been deducted if the book income had been treated as the actual income in a particular year, by the assessee, should not be deducted.

My answer to the question formulated above, at p. 7, therefore, is that the assessee is entitled to have deducted from his estimated income the actual losses that may have been suffered in a particular year and the amount of irrecoverable debts that should have been discovered and could have been discovered in a particular year.

As regards the questions put by the learned Commissioner of Income-tax, my simple answer is that those questions do not at all arise, for there is no difference of opinion between him and the assessee on those points. The learned counsel for the assessee, Sir Tej Bahadur Sapru agreed before us, without any difficulty, that the answer to the questions 1 and 2 should be in the negative and the Income-tax Commissioner has himself given his answers to those questions in the negative. As regards the third question, as I have already stated, it does not cover the point in controversy which is, whether or not the assessee is entitled to have deducted from his estimated income certain particular amounts. I need not repeat, therefore, that none of the three questions framed by the learned Commissioner arise in the case. There is no occasion for calling for a fresh statement of the

case under sub-S. 4, S. 66; for all the facts necessary for the determination of the real controversy, on the questions of law, do appear from the statement of the case furnished to us by the learned Commissioner.

Niamatullah, J.—I concur.

P.N./R.K. *Reference answered.*

A. I. R. 1929 Allahabad 824

SULAIMAN AND PULLAN, JJ.

Beni Din and *others*—Appellants.

v.

Ram Naresh and *another*—Respondents.

First Appeal No. 427 of 1926, Decided on 10th July 1929, from a decree of Sub-Judge, Banda, D/- 25th May 1926.

Pardanashin lady—Agreement for reference and its legal consequences not fully explained — Award though registered is not binding on her.

Where there is no satisfactory evidence to show that the agreement of referenee to arbitration was fully explained to pardanashin ladies and they appreciated the legal consequences of the reference, the arbitration award though a registered document does not bind them and they can accelerate their estate with the consent of the next heir.

[P 826 C 1, 2]

P. L. Banerji, *Ramnama Prasad* and *Majid Ali*—for Appellants.

K. N. Katju and *Damodar Das*—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit for recovery of possession brought by the daughter's sons of Brij Behari claiming possession of Brij Behari's estate on the ground that his widow Mt. Sukhdei had accelerated the succession with the consent of the daughter Mt. Ram Kedari in favour of the present plaintiffs by means of a gift dated 13th June 1923 which related to the entire estate. The main defence to the suit was two-fold. In the first place it was pleaded that Brij Behari was joint with the other defendants Beni Din Ram Autar and others and in the second place that the effect of an arbitration award of 7th June 1918 and the proceedings following thereupon was to prevent the plaintiffs from obtaining possession of the property during the lifetime of Mt. Sukhdei. The learned Subordinate Judge has decided both these points against the defendants.

The question of separation was a pure question of fact and the learned Subordinate Judge has written an excellent judgment dealing with the entire evidence in a clear manner. As we are agreeing with his view it is not disputed that Brij Behari's father Ishwar Din in his lifetime got portions of properties entered in the names of his four sons and his wife and on the death of one of the sons got his share divided among his surviving sons. It is immaterial to consider whether the division among the sons was absolutely equal or unequal. Indeed there is no clear proof of any inequality in the shares which were given to the sons, nor is it quite clear whether the entire property in the hands of Iswar Din ancestral. The fact is admitted that for about 40 years the names of these sons have stood recorded separately and that of Mt. Mathuri, widow of Iswar Din stood recorded separately against other properties.

The learned Subordinate Judge, has believed the evidence of the two witnesses Jagannath and Mahadeo Singh produced by the plaintiffs particularly that of Jagannath which was to the effect that the brothers separated from each other in the lifetime of Iswar Din under the said arrangement and got properties separately and lived and messed separately and carried on cultivation separately. There are a number of documents executed by the sons transferring properties standing in their names respectively which go to show that there were separate dealings. Out of those one document, viz.: a mortgage bond dated 12th February 1896 is particularly important inasmuch as it shows that two brothers borrowed money from another Brij Behari and mortgaged their own share in the property to him. This transaction shows dealings inter se which are not ordinarily expected in a joint family. It is further clear and indeed Beni Din defendant admits that the brothers have had separate houses and separate *sir* cultivation and separate cattle sheds. The explanations given by the defendants of these separate transactions were not convincing and have been rejected by the Court below. Thus the separation of the property from the lifetime of the father, separation in the cultivation separate residence, mess and dealings

as well as transactions inter se are all clearly established by the evidence.

The arbitration award on which the defendants rely itself goes to show that on the death of Brij Behari, Beni Din and others acquiesced in the widows of Brij Behari taking over possession of the property standing in his name. Furthermore they allowed the widows to take a share in the inheritance left even by Mt. Mathuri which was said by them to have devolved on their husband. Having regard to all this evidence there can be no doubt that the presumption of jointness was completely rebutted and separation was complete.

The finding of the Court below must therefore be accepted.

The next question is whether the arbitration award of 7th June 1918 under which the two widows were allowed to remain in possession during their lifetime after the death of Brij Behari with the proviso that on the death of either of them three-fourths of the property would go to the brothers of Brij Behari and one-fourth to the daughter has the effect of preventing the plaintiffs from recovering possession of of the property.

The learned advocate for the appellants argues that the two widows could under a compromise with the brothers of their deceased husband validly enter into an agreement by which each could prevent the other of the right of succession to the estate left by the co-widow and that such agreement would be binding on her during her own lifetime: vide *Muhammad Hashmat Ali* v. *Kaniz Fatima* (1). He then argues that the surviving widow could not go behind her own agreement and on the analogy of the doctrine that a donor cannot derogate from his own property, he contends that Mt. Sukhdei was incompetent to surrender the estate in her own lifetime in favour of her daughter's sons by accelerating the succession. He relies on the case of *Lachhmi Chand* v. *Lachho* (2) and contends that the acceleration of the estate must be subject to the compromise previously arrived at by the widows. There might be some force in this contention, but it is unnecessary to decide this point because in this particular case it is not fully established that a valid and binding agreement for reference to arbitration was entered into by the widows.

The learned Subordinate Judge has recorded very clear findings and given cogent reasons for disbelieving the evidence that the two widows understood the transaction and realized their full legal effect. On the death of Brij Behari it is said that an agreement for reference to arbitration was prepared which bore the thumb-marks of the widows under which the matter in dispute between them and his brothers was referred to arbitration. This is not forthcoming and it is alleged that this has been burnt and destroyed. Although Lalji Sahan the scribe admits that he keeps copies of all documents which he scribes, no attempt was made to summon the copy from him. We therefore do not know the contents of this alleged agreement. It is not clear from the documentary evidence that it really bore the thumb-marks of the two widows, that is to say, that the two widows were parties to the agreement of reference. When we turn to the award we do not find any clear recital to the effect that the two widows had referred the matter in dispute to the arbitrators. The names of the brothers of their husband are mentioned but not their names. The learned advocate for the appellants suggests that their names are included in the general expression "and others." But this cannot be necessarily presumed.

It is not also quite clear whether the arbitrators had authority to decide the line of future succession. But assuming that the matter was referred to them it was a matter which was not in dispute directly between the widows on the one hand and their brothers-in-law on the other. According to the award the dispute was as to who shall be entitled to get the property left in the aforesaid villages after the death of the two Mussammats (p. 58), that is to say, the right to succeed to the Musammats after their death. An attempt was made to suggest that the daughter Mt. Ram Kedari was a party to these proceedings, but there being no satisfactory evidence to establish it the learned Subordinate Judge has rightly rejected that theory. Thus the arbitrators proceeded to determine the right of the daughter to succeed behind her

(1) [1915] 13 A. L. J. 110=27 I. C. 701.
(2) A. I. R. 1927 All. 258=49 All. 334.

back. There is no satisfactory evidence to show that the agreement of reference to arbitration was fully explained to the two ladies and they appreciated the legal consequences of the reference to arbitration. When the right of the widows to get their names entered and to enter into possession in their own lifetime was not in dispute, it is very doubtful whether there could have been any bona fide dispute which required a settlement the dispute relating merely to future succession. It is well settled that the arbitrators cannot by their award lay down a new rule of succession so as to alter the personal law. There may be circumstances under which a personal estoppel may arise but those circumstances are missing from this case where the widows were illiterate pardanashin ladies who apparently had no male or near relations to advise them. We are therefore not satisfied that the ladies understood the terms of referenoe to arbitration and understood the contents of the deed of agreement. The finding of the Court below on this point must also therefore be accepted.

It is worthy of note that so far as the body of the award is concerned there was no express recital that the widows would have no power of alienation. This restriction on their power only appears in the remark column of the list of properties attached to the plaint.

We are also satisfied that there is nothing in the subsequent proceedings which took place which would estop Mt. Sukhdei. A compromise was filed in the revenue Court the day after the award was delivered which bore two marks said to have been made by the two ladies. By this they were supposed to have accepted the award. The revenue Court ordered mutation of names in their favour. The order did not incorporate the provision of the award which was to regulate the line of succession after the death of either of them.

In 1921 one of the widows Mt. Sheorani died. Applications were filed on behalf of Mt. Sukhdei and also Mt. Ram Kedari purporting to bear their thumb-impressions. In these applications they prayed that the mutation of names should be effected in accordance with the panchnama. They were both written by petition-writers and were alleged to have been thumb-marked by the ladies. The revenue Court ordered that the entry of the names should take place in accordance with the panchnama and this order was verified by the two ladies who were identified by two witnesses as being Mt. Sukhdei and Mt. Ram Kedari. These applications, however, merely referred to the mutation of names for the purpose of entries in the revenue papers and cannot be taken to dispose of the title to the property. These compromises were applications to the revenue Court and were not registered documents. We do not see how they can stand absolutely in the way of the present plaintiffs who are the daughter's sons. We must accordingly hold that the arbitration award of 1918 though a registered document did not prevent Mt. Sukhdei from accelerating the estate with the consent of her next heir Mt. Ram Kedari in favour of her daughter's sons. The surrender is of the entire estate left by her deceased husband and it has not been suggested before us that the acceleration is in any way defective.

We accordingly uphold the decree of the Court below and dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 826

MEARS, C. J. AND SEN, J.

L. Hudson—Applicant.

v.

Official Liquidator of Dehra Dun Mossoorie Electric Tramway Co.,—Opposite Party.

Letters Patent Appeal No. 101 of 1929, Decided on 17th May 1929, against judgment of Mukerji, J., D/- 26th February 1929.

(a) Companies Act (7 of 1913), S. 2 (ii)—Articles of Association not mentioning auditor as officer though appointed at general meeting—Article dealing with conduct of business granting indemnity to officers except as regards their wilful acts and defaults—Company suffering loss through neglect of auditors—Auditors held not officers and not entitled to come within purview of the Article.

Article 118 of the Company's Articles of Association which dealt with the conduct of Company's business provided that officers of the Company would be entitled to an indemnity out of the funds of the company except in regard to their own wilful acts or defaults. Owing to the overdrawings and irregularities of the Managing Agent and

the determined policy of auditors to get through their work easily and deliberate abstention on their part to examine documents the company had to wind up compulsorily. The Official Liquidators sued the auditors to make good the loss. It was contended that the auditors were officers of the company and were entitled to indemnity under Art. 118. The auditors were in fact appointed at the general meeting of the shareholders of the company but were not mentioned in the articles as officers.

Held: that the auditors could not claim to be officers of the company within the purview of Art. 118 of the Articles of Association: *Re. London and General Bank*, (1895) 2 *Ch.* 166; *Western Counties Steam Bakeries and Milling Co.*, (1897) 1 *Ch.* 617, *Dist.*: 18 *All.* 12; *In Re. City Equitable Fire Insurance Co., Ltd.* (1925) 1 *Ch.* 407, *Expl.* [P 830 C 1]

(b) Deed — Construction — "Wilful" in "wilful acts and defaults" is used not as a definition but as description.

The adjective "wilful" in "wilful acts or defaults" has evidently been used as a description and not as a definition. The idea intended to be conveyed is that the default is occasioned by the exercise of volition or as result of the non-exercise of will due to supine indifference, although the defaulter knew or was in a position to know that loss or harm was likely to result. The word does not necessarily suggest the idea of moral turpitude. The element of accident or inadvertence or honest error or judgment should also be eliminated. The default must be the result of deliberation or intent or be the consequence of a reckless omission. Wilful default therefore is indicative of some misconduct in the transaction of business or in the discharge of duty of omitting to do something either deliberately or by reckless disregard of the fact whether the act or omission was or was not a breach of duty: *Forder* v. *G. W. Ry. Co.* (1905) 2 *K. B.* 562; *In Re. City Equitable, Fire Insurance Co.*, (1925) 1. *Ch.* 407, *Ref.* [P 830 C 1, 2]

(c) Company's Act (7 of 1913), S. 2 (ii)— Auditor deliberately passing over manifest illegal payments is guilty of misfeasance.

Under the Act where auditors pass over illegal payments without demanding explanation and the facts disclose that there was deliberate abstention from performing plain and manifest acts and there was absolute duty cast upon them to enquire into the illegal payments and think over the real meaning of dubious transactions they are guilty of misfeasance unless there is anything to the contrary in the Articles of Association. [P 831 C 1]

M. L. Agarwala and *Hazari Lal Kapoor*—for Applicant.

K. N. Katju and *K. Verma* — for Opposite Party.

Judgment.—This an appeal from the decision of Mukerji, J. who, on 26th February 1929, ordered Mr. Hudson and Mr. Dignasse, member of the late firm of Mrs. Neison Dignasse & Co., to pay the sum of Rs. £9,812-8-0 to the Official Liquidators of the Dehra Dun Electric Tramway Co. in liquidation.

The proceedings were under S. 235, Companies Act, 1913.

Before proceeding to consider the five charges which were discussed before us we must give a brief outline of the disastrous history of this Company. It was registered on 23rd August 1921, and obtained permission to commence business on 21st October 1921. It was formed to acquire a concession from Mr. Beltie Shah to construct an electric tramway. It was proposed to issue 22 lacs of preference and 28 lacs of ordinary shares. Mr. Beltie Shah became the Managing Agent invested with such wide powers as the drawing of cheques on the Company's behalf. By 26th March 1926, the undertaking was in an insolvent condition and a compulsory winding up order was passed. Official Liquidators were appointed on 8th April 1926, and they commenced to look into the affairs of the Company. They came to the conclusion that Beltie Shah had pursued a systematic course of bleeding the Company whenever opportunity offered, and that he did this by making various fraudulent agreements with other persons whereby they were supposed to be legally entitled to receive sums of money by way of commission or brokerage, and that certain advances, purporting to be made by him to third persons, were in fact not so made and the money was intercepted by him. Beyond all doubt he habitually put himself in funds by drawing cheques upon the Company's account, and the irregularities committed by Mr. Beltie Shah with the Dehra Dun branch of the Allahabad Bank were the subject of an action by the Official Liquidators against the Bank, which action we have been informed by counsel has been settled by payment by the Bank to the Official Liquidators of a very considerable sum of money. Mr. Beltie Shah was by an order of Mukerji, J. of 2nd April 1929, ordered under S. 235, to refund to the Company sums of money amounting to more than three lacs of rupees.

The audits for which Mr. Hudson is responsible are:

1. The audit for the statutory report of 18th April 1922.

2. The audit of the Company from its inception to 31st March 1923, and

3. The audit of the Company from the 1st April 1923, to 31st March 1924.

The learned Judge speaks of the second and third audits as the first and second regular audits respectively, and when referring to the audit for the statutory period, he refers to it by that name. We propose so follow the same plan.

The first regular audit is dated 16th August 1923. It was made by Mr. Dignasse, and the second regular audit made by Mr. Hudson is dated 10th December 1924. In each case, a clerk or clerks of the Auditors went to Dehra Dun and examined the books of the Company, and having spent what time was considered necessary, brought back such materials and notes to their principals as appeared to be of importance. The audit was then taken up by either Mr. Dignasse or Mr. Hudson.

The first point that was urged before us was that by virtue of Art. 118, Articles of Association, the auditors were entitled to the indemnity therein contained, by virtue of their being officers of the Company. If they were in law officers of the Company, they would be entitled to an indemnity out of the funds of the Company except in regard to their own "wilful acts or defaults." The Official Liquidators contend first, that the Auditors are not officers within the meaning of that article, and even if they were efficers, the facts disclose that the loss to the Company has been occasioned by their wilful act or default. The article has been set out at length in Mukerji, J's., judgment and need not be repeated here.

The three classes of persons entitled to indemnity are "Directors, Officers or Servants." The auditor as such is not specifically included, and reliance has been placed by the liquidators upon the definition in S. 2 (ii) of the Act which they urge was intended as regards India to lay down definitely that an auditor should not be regarded as an officer of any Indian Company except in the three instances, Ss. 235, 236 and 237 in which he is intentionally included. The actual text of S. 2 (ii) is: "Officer" includes "Any Director, Manager or Secretary" but save in Ss. 235, 236 and 237 does not include "an Auditor." Some criticizm has been directed to that part of Mukerji, J's. judgment in which he discusses Art. 118. He says the whole article deals with the "conduct of the Company's business" and his view is that such a phrase is inapplicable to the case of an Auditor. It is, however, to be noticed that there is an alternative; "Or in the discharge of his duties." If "Auditor" had been included with "Director, Officer or Servant," he could, certainly have claimed an indemnity subject to the exception of "wilful acts or defaults" in respect of the discharge of his duties. We, however, agree with the learned Judge that there is not in Art. 118. nor in any of the Arts. 127 to 134, any phrase which can be construed as showing that the auditors were to be regarded as officers. Art. 128, whilst permitting the auditors to be members of the Company, prescribed that:

> "No Director or other Officer of the Company shall be eligible during the period of his continuance in office."

It is true that the word "Office" is used in relation to the appointment of an auditor, but we regard that word as being used in the sense of the word "Official" meaning service, function, duty, business, appointment.

The question has arisen in various cases. The principal ones to which we were referred were:

In *In re, London and Central Bank* (1) the auditors were appointed by a banking company in pursuance of S. 7, Companies' Act, 1879. They were spoken of as officers of the company in the Articles of Association. The question which arose in the case was whether an auditor of the Bank could be properly regarded as an officer within the meaning of S. 10, Companies' Act of 1890. Lindlay, L. J. observed that in order to decide that question one must consider what an auditor is, how he is appointed, by whom he is paid and what his duties are. He found that he was appointed by the company, that he was paid by the company and his position was described in the Articles as that of an officer of the company although he was not servant of the directors, but, on the contrary, was appointed by the company to check the directors. He concluded

(1) [1895] 2 Ch. 166 = 2 Manson 282=42 W. K. 481=72 L. T. 611.

that an auditor of a banking company was an officer within the meaning of the section. Lopes, L. J. also took the same view but he rested his decision inter alia upon the fact that an auditor was made liable for misfeasance in S. 10. If an auditor might in collusion with the directors prepare a false account which would involve misapplication of the assets, this would amount to a breach of duty and it will be permissible to conclude from this that an auditor would be an officer within the meaning of S. 10.

The present case differs from the ruling referred to above, inasmuch as the auditor has not been mentioned in the Articles of Association as an officer.

The last mentioned case has been followed in *Kingston Cotton Mill Co.* (2) at pp. 284 and 288 ; *In re, Kingston Cotton Mill Co.* (3), by the Court of appeal and *In re, Western Counties Steam Bakeries and Milling Co* (4) In *In re, Kingston Cotton Mill Co.* (2). Lindley, L. J. observed :

"The duty of an auditor generally was very carefully considered by this Court *in Re. London and General Bank* and I cannot usefully add anything to what will be found there. It was there pointed out that an auditor's duty is to examine the books, ascertain that they are right, and to prepare a balance sheet showing the true financial position of the company at the time to which the balance sheet refers."

It is therefore not necessary that an auditor should be associated in the internal administration of management of the company. In *In re, Western Counties Steam Bakeries and Milling Co.* (4), the question arose whether the auditors could properly be made respondents to a misfeasance summons Sterling, J., answered the question in the affirmative. The matter was dealt with by the Court of Appeal. Lindley, L. J. observed as follows :

"An auditor may or may not be an officer of the company. So may anybody else—e.g., a banker or solicitor, prima facie such persons are not officers" . . . . . But to be an officer there must be an office, and an office imports a recognized position with the rights and duties annexed to it and it would be an abuse of words to call a person an officer who fills no such position either de jure or defacto but who happens to do some of the work which he would have to do if he were an officer in the proper sense of the word."

It follows that an auditor who is casually called in to do the work of auditing is not an officer ; but the same cannot be said with reference to persons who have been appointed auditors in a general meeting of the shareholders.

In *In re, Kingston Cotton Mill Co.* (3), Vaughan Williams, J., is reported to have observed :

"I want to say generally of auditors that I have no doubt myself but that auditors who have to perform that duty are not only in this case but in all cases, officers of the company."

It appears to us that the proposition has been expressed a little too widely and is not supported either by appeal to facts or by authority. This view does not appear to have been adopted by the Court of Appeal, which was composed of a very strong Bench consisting of Lord Hershchell, A. L. Smith, L. J., and Righby, L. J. While affirming the conclusion of the trial Court, the Court of Appeal appears to have rested its decision mainly upon the decision, in *In re, London and General Bank* (1). This matter had come up before this Court in *Connel* v. *Himalaya Bank* (5). It was contended in this case that no one could be an officer of the company within the meaning of that section unless he had control of the business of the company and of the monetary dealings of the company. There was no statutory definition of an officer in Act 6 of 1882. It was held by Edge, C. J. and Banerji, J., that where a person had not been casually called in on an occasion arising for the services of an auditor, but he was the auditor appointed at the general meeting of the company in accordance with the provisions of Act 6 of 1882 he was an officer of the company within the meaning of S. 214, Act 6 of 1882.

In *In re, City Equitable Fire Insurance Co. Ltd.* (6), the question arose whether an auditor could be held liable for misfeasance. The question whether an auditor was an officer of the company was not decided.

The general result of the decisions is that where an auditor has been appointed by a limited liability company at a general meeting of the shareholders, he must be taken to be an officer of the company. It is not absolutely necessary that

(2) [1896] 2 Ch. 279=65 L. J. Ch. 673=74 L. T. 568.
(3) [1896] 1 Ch. 6=2 Manson 626=44 W. R. 210=73 L T. 482.
(4) [1897] 1 Ch. 617=66 L. J. Ch. 354=45 W. R. 418=76 L. T. 323.
(5) [1895] 18 All. 12=(1895) A. W. N. 136.
(6) [1925] 1 Ch. 407.

he should be mentioned as an officer in the Articles of Association. If things stood here, we might have felt considerable difficulty in holding the contrary. But we are confronted with the following facts : The term "officer" had not been defined in Act 6 of 1882, but in *Connell's* case (5), it had been held that an auditor was an officer of the company. There was a long train of reported English decisions in support of the same view. We find, however, that the legislature has introduced a statutory definition of the term "officer" in S. 2, Cl. 2, Act 7 of 1913, which says that "officer" includes any director, manager or secretary but, save in Ss. 235, 236 and 237, does not include an auditor. We are bound by this statutory definition. In enacting Act 7 of 1913 the legislature seems to have consciously departed from the view which had been taken in decided cases in the past so far as this country was concerned.

We hold therefore that an auditor cannot claim to be an officer within the purview of Art. 118 of the Articles of Association.

We are therefore of opinion that the auditors cannot avail themselves of the protection given by Art. 118, but inasmuch as this opinion may be wrong, we propose to say, with respect to any charges that may be proved, whether Mr. Hudson would be entitled to an indemnity on the assumption of an auditor being an officer.

It will therefore be convenient at this stage to consider the second point of law raised viz., what is the meaning to be attached to "wilful acts or defaults" on the assumption that the auditors were officers ?

The adjective "wilful" in "wilful acts or defaults" has evidently been used as a description and not as a definition. The idea intended to be conveyed is that the default is occasioned by the exercise of volition or as the result of the non-exercise of will due to supine indifference, although the defaulter knew or was in a position to know that loss or harm was likely to result. The word does not necessarily suggest the idea of moral turpitude. We have also to eliminate the elements of accident or inadvertence or honest error of judgment. The default must be the result of deliberation or intent or be the consequence of a reckless omission. "Wilful default" therefore is indicative of some misconduct in the transaction of business or in the discharge of duty by omitting to do something either deliberately or by a reckless disregard of the fact whether the act or omission was or was not a breach of duty.

The above view is amply supported by authority. *Forder* v. *G. W. Ry. Co.* (7), was an action for damages against a railway company for the arrival of a parcel in a damaged condition, which parcel had been consigned by the plaintiff on the terms of a consignment note for goods to be carried at owner's risk. The question which arose in the case was whether there had been "wilful misconduct" on the part of the servants of the defendant's company. Lord Alverstone, C. J., observes as follows at p. 535:

"I am quite prepared to adopt with one slight addition the definition of "wilful misconduct" given by Johnson, J., in *Graham* v. *Belfast and Northern Countries Ry. Co.* (8), where he says "wilful misconduct" in such a special condition means misconduct to which the will is a party as contradistinguished from accidents and is far beyond any negligence even gross or culpable negligence and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do or to fail or omit to do (as the case may be) a particular thing and yet intentionally does or fails or omits to do or persists in the act, failure or omission regardless of consequences. The addition which I would suggest is 'or acts with reckless carelessness, not caring what the result of his carelessness may be.'"

Pollock, M. R. agrees with the definition quoted by Lord Alverstone and with the addition he proposes to make and is of opinion that this definition is in close accord with the previous decisions on the subject, *Re. City Equitable Fire Insurance Co* (6). *Queen* v. *Senior* (9), was a case against a father for manslaughter of his child by wilful negligence under S. 1, Prevention of Cruelty to Children Act, 1874. Lord Russell, C. J. held (p. 290) that:

"wilfully means that the act is done deliberately and intentionally, not by accident or inadvertence but so that the mind of that person who does the act goes with it."

In a similar case *Queen* v. *Downes* (10), Lord Coleridge, C. J., is reported to have observed as follows :

"By wilful neglecting I understand an intentional and deliberate abstaining from

(7) [1905] 2 K. B. 562.
(8) [1901] 2 I. R. 13.
(9) [1899] 1 Q. B. 283.
(10) [1875] 1 Q. B. D. 25.

providing the medical aid knowing it to be obtainable."

In *In re, City Equitable Fire Insurance Co.* (6), which has already been referred to Romer, J., observes at p. 434 that :

"an act or omission to do an act is wilful where the person of whom you are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of duty and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing and intends to commit a breach of his duty or is recklessly careless in the sense whether his act or omission is or is not a breach of duty."

Warrington, L. J., quotes with approval a passage from the judgment of Bramwell, L. J., in *Lewis* v. *G. W. Ry. Co.* (11), which runs thus :

"Wilful misconduct means misconduct to which the will is a party, something opposed to accident or negligence ; the misconduct, not the conduct, must be wilful."

Sargant, L. J., was of the same opinion p. 529, and held that:

"the word "wilful" connoted that the person 'was consciously acting or failing to act in a reprehensible manner. If an officer failed to give a consideration to the question of his duties, acted recklessly and without caring whether he was fulfilling them or not,"

such an "officer could not be protected." But he adds :

"In my judgment these were words which would excuse an officer if through mere inadvertence or error of judgment and while endeavouring honestly to carry out his duty he does or omits to do something which apart from these words might have rendered him liable."

We adopt the rule laid down above as specially applicable to this case. (Their Lordships then discussed evidence as to specific charges and allowed the appeal in part and ordered as follows.) We order Mr. Hudson to pay to the liquidators costs proportionate to their success in this appeal. We decline in the circumstances to award any costs to Mr. Hudson on the issue on which he has succeeded.

V.B /R.K. *Appeal partly allowed.*

(11) [1895] 3 Q. B. D. 206.

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* A. I. R. 1929 Allahabad 831

KING AND IQBAL AHMAD, JJ.

Baij Nath—Plaintiff—Appellant.

v.

Kundan Lal—Defendant — Respondent.

Second Appeal No. 832 of 1926, Decided on 7th June 1929.

(a) Registration Act, S. 17—Shop let out to *K* by *N*--No lease but document styled sarkhat executed by *K* providing *K* had taken shop for two years on rent and if *K* vacated shop before expiry of two years, *K* to pay rent for unexpired portion of term—Sarkhat not registered — Sarkhat is lease and being for more than one year and not registered it is inadmissible in evidence to prove claim for unexpired period but would be admissible to prove damages for use and occupation — Registration Act, S. 49 (c).

A shop had been let out to *K* by *N*. No lease was executed but a document styled a sarkhat was executed by *K*. It provided that *K* had taken the shop on rent for a period of two years and that if *K* vacated the shop before the expiry of two years, he would be liable to pay the rent, water rate and house tax in respect of the unexpired portion of the term for which the shop had been let. *K* vacated the shop before expiry of two years and *N* brought a suit claiming rent, water tax and house tax for the unexpired period. The sarkhat in question was not registered.

Held : that sarkhat was a lease as defined by Registration Act and it being not registered although the lease was for more than one year it was not admissible in evidence to prove *N's* claim which was based essentially on the terms of the contract embodied in the sarkhat and so *K* was at liberty to leave the shop at any time he liked and *N* could not make *K* liable as he could not prove the contract. [P 832 C 1]

Held further: that if *N's* claim had been for compensation for the use and occupation by *K* of *N's* shop the sarkhat would have been admissible in evidence for determining the amount for which the shop could be let. [P 832 C 1]

*** (b) Transfer of Property Act, S. 107—Equitable doctrine of part performance cannot override provisions of S. 107 or of Registration Act S. 17—Part Performance.**

The provisions of S. 107, T. P. Act, and S. 17, Regrn. Act, are imperative and cannot be overridden by the equitable doctrine of part performance as this doctrine can be of no avail when there has been a violation of a provision of law : *A. I. R.* 1928 *All.* 641, (*F. B.*), *Rel. on.* ; *A. I. R.* 1923 *Cal.* 63, *not Foll.* [P 832 C 2]

G. Agarwala—for Appellant.

S. K. Dar—for Respondent.

Judgment.—This is a plaintiff's appeal and arises out of a suit brought to recover Rs. 672 on account of rent of a shop which had been let to the defendant by the plaintiff on 1st May 1924. No lease was executed but on 7th May 1924, a document styled a sarkhat was executed by the defendant. It provided that the defendant had taken the shop on rent for a period of two years and that, if the defendant vacated the shop before the expiry of the two years, he would be liable to pay the rent, water rate and housetax in respect of the unexpired portion of the term for which the shop had been let.

The defendant vacated the shop on 7th July 1925, and the plaintiff's claim was for rent, water rate and house tax for the unexpired period, viz., period beginning from 7th July 1925 to 30th April 1926.

The defendant resisted the plaintiff's suit inter alia on the ground that the sarkhat in question is in fact a kabuliat and comes within the definition of "lease" given in the Registration Act and the kabuliat for a term exceeding one year was compulsorily registrable under S. 17, Regrn. Act, and, not being registered, was inadmissible in evidence and he was not liable to pay rent for the period during which he did not occupy the shop. The trial Court overruled the pleas urged in defence and decreed the plaintiff's suit. On appeal by the defendant the lower appellate Court reversed the decree of the trial Court and dismissed the plaintiff's suit. The lower appellate Court held that the document dated 7th May 1924, is a "lease" as defined by the Registration Act, and as the lease was for more than one year its registration was compulsory and, not being registered, could not be received in evidence of any transaction affecting the immovable property to which it related, in view of the provisions of S 49 (c), Regrn. Act. He accordingly came to the conclusion that the sarkhat was inadmissible in evidence, and apart from the sarkhat the plaintiff had no right to claim rent for the period during which the shop was not in the occupation of the defendant respondent.

In appeal before us it is argued on behalf of the plaintiff appellant that there is a difference between the nullity incurred so far as interest in immovable property is concerned, and the liability to pay damages, and that though the sarkhat is inadmissible in evidence to prove the transaction of lease, it could be admitted in evidence for the collateral purpose of proving the rate of rent agreed upon by the defendant, and for determining the amount of damages to which the plaintiff is entitled. We are unable to agree with this contention. If the plaintiff's claim had been for compensation for the use and occupation by the defendant of the plaintiff's shop the sarkhat would have been admissible in evidence for determining the amount at which the shop could be let. The reason would be that the defendant by remaining in possession was bound to pay rent for the period of occupation independently of the written agreement, and the unregistered agreement would be admissible to establish the rent agreed upon between the parties. But in the present case no question of the rate of rent agreed arises. The plaintiff's case is based essentially on the terms of the contract embodied in the sarkhat in question. Apart from that contract the plaintiff is not entitled to claim any amount from the defendant for the period during which the shop was not in occupation of the defendant. Our attention has been drawn by the learned advocate for plaintiff-appellant to the case of *Jogendra Kishna Roy* v. *Kurpal Harshi & Co* (1). At p. 350 (of 49 *Cal.*) the learned Judges are reported to have observed :

"It is now well established by a long series of decisions in this Court from the case of *Bibi Jawahir* v. *Chaterput* (2) to that of *Haripada* v. *Nirod* (3) that when in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents have not been executed and registered the position is the same as if the documents had been executed, provided that specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined. We must then take it that there was in law as in fact a tenancy for a term of three years. . . ."

With all respect we are unable to agree with the view taken in that case. The provisions of S. 107, T. P. Act, and of S. 17, Regrn. Act, are imperative. In accordance with these statutory provisions a lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent can only be effected by means of a registered instrument. The doctrine of part performance is an equitable doctrine, and it is well settled that equity cannot override the law. In other words, the doctrine of part performance can be of no avail when there has been a violation of a provision of law. This was the view taken by this Court in the Full Bench decision of *Ram Gopal* v. *Tulshi Raju* (4). It was held by the learned Judges in that case that the doctrine of part performance cannot override the positive rules of law embodied in the Transfer of Property Act. The learned Judge in that case pointed

(1) A.I.R. 1923 Cal. 63=49 Cal. 345.
(2) [1905] 2 C.L.J. 343.
(3) A.I.R. 1921 Cal. 383.
(4) A.I.R. 1928 All. 641 (F.B.).

out that on the whole the Madras and the Bombay High Courts are of opinion that the doctrine of part performance must yield to the provisions of the Transfer of Property Act :

"as regards sale, mortgage, exchange, gift and lease."

They further noticed the fact that there were a few cases decided by the Calcutta High Court in which countenance had been given to the doctrine of part performance, but they pointed out that on an examination of those cases it would be found :

"that in some of the cases at least the plaintiff could not succeed on the ground of personal estoppel, and the cases could have been decided without calling in aid the doctrine of part performance."

In the present case it is clear that the plaintiff has no cause of action at all except upon the contract which could only be effected by a registered instrument. The lease being for a period of more than one year and not being registered is void. Accordingly the defendant was at perfect liberty to leave the shop at any time he liked, and the plaintiff cannot make him liable except by referring to the contract which under the law cannot be proved. For the reasons given above we hold that the lower appellate Court was right in holding that the sarkhat in question, which is in reality the counterpart of a lease, was inadmissible in evidence and in dismissing the plaintiff's suit. The result is that we dismiss the appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 833

DALAL, J.

Dulichand—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 378 of 1929, Decided on 24th June 1929, against order of Addl. Sess. Judge, Meerut, D/- 10th May 1929.

Criminal P. C., S. 133 (2)—Jurisdiction of civil Court is barred only when the order is conditional but not when order is absolute.

The second paragraph of S. 133 prevents the civil Court from questioning the order duly made by a Magistrate under S. 133 which empowers the Magistrate to pass a conditional order. There is no such bar to the absolute order of a Magistrate being questioned in a civil Court.

The procedure adopted by Magistrate under S. 133 is more or less summary and his decision goes so far as to fix upon the party who must go to the civil Court to get a civil dispute decided. [P 833 C 2]

K. N. Katju and *Vishwa Mitra* — for Applicant.

P. L. Banerji and *G. Agarwala*—for the Crown.

Judgment.—Dr. Katju desired to induce the Court to interfere with a finding of fact of the Magistrate that a particular brick-kiln started by the applicant was a public nuisance in the place where it was started Reference was made to Bench ruling of this Court in the case of *Behari Lal* v. *James MacLean Dean* (1) to induce me to examine the evidence recorded by the Magistrate and pronounce independently whether the brick-kiln was a nuisance or not. The case cited was a case in second appeal where the provisions of law applicable are different from the provisions applicable to a revision under the Criminal Procedure Code. It was alleged that once the brick-kiln is stopped Duli Chand will have no remedy in the civil Court. If this were really the case I would have been prepared to inquire into the facts. Reference was made to para. 2, S. 133, Criminal P. C. That prevents the civil Court from questioning the order duly made by a Magistrate under S. 133 which empowers the Magistrate to pass a conditional order. There is no such bar to the absolute order of a Magistrate being questioned in a civil Court. A similar clause does not appear in S. 140 which deals with an absolute order. The view I take of proceedings under S. 133 is that the procedure adopted by a Magistrate is more or less summary and his decision goes so far as to fix upon the party who must go to the civil Court to get a civil dispute decided. In the grounds of revision it was alleged that the provisions of S. 139-A were ignored by the Magistrate. This plea has been fully answered by the Additional Sessions Judge. Another case (one of the Lahore High Court) *Gokal Chand* v. *Emperor* (2) quoted by the learned counsel proceeded on entirely different grounds and did not lay down that a Court of revision should revise the finding of Magistrates regarding a certain building being a public nuisance. In my

(1) A. I. R. 1924 All. 392=46 All. 297.
(2) [1920] 1 Lah. 163=56 I.C. 446.

opinion no point of law arises here, and this application is dismissed.

It is requested that compliance with the order absolute may be extended to two weeks from today's date. This prayer is granted.

R.M./R.K. *Application dismissed.*

A. I. R. 1929 Allahabad 834

SULAIMAN AND PULLAN, JJ.

Mehdi Ali Khan and *another*—Defendants—Appellants.

v.

Chunni Lal and *another*—Plaintiffs—Respondents.

First Appeal No. 182 of 1926, Decided on 15th April 1929, from decree of Sub-Judge, Muzaffarnagar, D/- 22nd December 1925.

(a) Transfer of Property Act, S. 58—Security bond not saying that it is mortgage or not mentioning the person to whom security is given cannot be treated as mortgage-deed.

A security bond for refund of sale proceeds in case of reversal of decision in appellate Court does not amount to a mortgage-deed when it does not expressly say that it is a hypothecation or mortgage and does not mention any person to whom the security is given. The liability is undertaken to the Court and the Court is not a juridical person and it can neither sue nor take the property nor assign it: *A. I. R.* 1919 *P. C.* 55 and 17 *All.* 94, *Rel. on.* [P 835 C 1, 2]

(b) Transfer of Property Act, S. 100—Charge — Beneficiary must be specifically named as person in whose favour charge exists.

A security bond which does not name the person to whom the money is to be paid does not create a charge. The beneficiary though not a necessary party to the transaction must be specifically named as being the person in whose favour the charge exists. [P 836 C 1]

(c) Contract Act, S. 70—Person discharging liability of others lawfully and not gratuitously is entitled to compensation.

Where liability of certain persons to restore sale proceeds of a decree subsequently set aside has been discharged by another person and the latter does the act lawfully and does not intend to do it gratuitously, he is entitled to compensation from the persons liable who appropriate money under the decree set aside. [P 836 C 2]

Iqbal Ahmad and *Gopi Nath Kunzru*—for Appellants.

S. K. Dar, *S. D. Sinha* and *S. B. L. Gaur*—for Respondents.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for sale on the basis of a security bond dated 11th July 1907, executed by the defendant-appellants. It appears that Mt. Faiz-un-nissa obtained a decree against Mt. Hanif-un-nissa from the High Court in appeal arising out of suit No. 37 of 1903. The decree was for about Rs. 63,000. Mt. Faiz-un-nissa sold her decree to Bansi Dhar, the father of the present plaintiffs for Rs 40,000 Prior to these proceedings Mehdi Ali Khan and Abdullah Khan the appellants held a decree in suit No. 20 of 1902 for over Rs. 11,500 against Mt. Faiz un-nissa. In execution of their decree they attached the decree held by Mt. Faiz un-nissa against Mt. Hanif-un-nissa. This sale took place after the attachment and therefore all claims under it were subject to that attachment.

The attaching creditors sought to execute the decree but the Court ordered that the decree should be executed by Bansi Dhar although when the sale proceeds are realised the decree of the attaching creditors should be discharged first. In execution of this decree some property was sold at auction on 26th October 1906 for Rs. 14,950 and bulk of it was purchased by strangers. One property, viz.: an Indigo Factory was purchased by Bansi Dhar himself. After this the judgment-debtor deposited nearly Rs. 6,000 in Court and later paid out of Court over Rs. 54,000. In this way the whole amount of the decree was paid off.

When Bansi Dhar wanted to take out the money from the Court he was ordered to furnish security before he took out the money (order dated 4th January 1907, p. 32). Similarly when Mehdi Ali Khan and Abdullah Khan applied to take out the money from the Court in discharge of their decree the Court ordered that without furnishing security they could not be allowed to do so (p. 35). After the passing of this order Mehdi Ali Khan and Abdullah Khan filed in Court a security bond dated 11th July 1907, which is printed at p. 41 and is the subject of controversy. On the filing of that security they were allowed to take out the whole of Rs. 14,950 realized by the sale of the property as well as a part of the amounts deposited subsequently.

All this time the appeal of Mt. Hanif-un-nissa was pending before their Lordships of the Privy Council. The appeal was remanded to this Court and this Court ultimately dismissed the suit and in this way reversed the decree.

Then followed protracted proceedings for restitution. Mt. Hanif-un-nissa applied for restitution of properties purchased by the strangers as well as by Bansi Dhar but her application as against the strangers was dismissed. We are informed that she recovered the Indigo Factory from Bansi Dhar. Later she applied for restitution of the amount against Bansi Dhar and to these proceedings she also impleaded Mehdi Ali Khan and Abdullah Khan. The learned Subordinate Judge dismissed her application (p. 79). On appeal the High Court remanded the case holding that Bansi Dhar was liable personally under S. 144, Civil P. C. to her for restitution. Piggott, J., further remarked :

"In the event of Bansi Dhar satisfying the claim of the appellants he will be entitled to enforce as against Mehdi Ali Khan and Abdullah Khan the liability undertaken by these gentlemen as sureties on his behalf."

This remark, however, was not directed to any point which was specifically in dispute at that time.

The result of all these proceedings has been that Bansi Dhar and now his sons have had to pay all the sums taken out of Court and in that way have made complete restitution to Mt. Hanif-un-nissa and her representatives.

The present plaintiffs, viz. : the sons of Bansi Dhar, did not apply to the Court before which the security was furnished for any remedy but instituted the present suit claiming to enforce the charge created by the security bond. The defence raised on behalf of the appellants was that no charge existed and that the bond could not be enforced by the plaintiffs as against them. There was a further plea of limitation.

The learned Subordinate Judge has held that the bond in question does not amount to a mortgage and cannot be enforced as such. But he has held that it created a charge on the property in favour of Bansi Dhar which would be enforced by the present plaintiffs. He has held that no part of the claim is barred by limitation and has accordingly decreed the whole claim.

We agree with the Court below that in view of the pronouncement of their Lordships of the Privy Council in the case of *Raj Raghubir Singh* v. *Jai Indra Bahadur Singh* (1) the security bond in question does not amount to a mortgage-deed. It is printed at p. 41 and under this document Mehdi Ali Khan and Abdullah Khan who described themselves as sureties agreed to be liable to the Court that if Mt. Hanif-un-nissa and others or their heirs be successful in the Privy Council and Mt. Faiz-un-nissa or her representatives have to refund the sale proceeds they shall refund Rs. 15,134-11-2 and shall comply with the order which might ultimately be binding upon them. They further agreed that they and their heirs shall pay the said sum amounting to the figure quoted above and as a security for the payment of the said amount they mortgaged by way of security the zamindari property detailed in the document. The object of furnishing this security was to enable them to take the money out of Court which was lying there and was in dispute. The document does not expressly say that it is a hypothecation or mortgage in favour of Mt. Hanif-un-nissa or her heirs. The executants did not undertake to pay to Mt. Hanif-un-nissa or her representatives the amount mentioned therein in case they succeeded. There was an undertaking to be liable to the Court for the refund or return of the amount which they were going to take out of Court. As observed by their Lordships in the case referred to above at p. 167 there is in this instrument no person mentioned to whom the security is given. They undertook liability to the Court, but the Court is not a juridical person and it can neither sue nor take property nor assign it. But on the clear language of the document there was an unquestioned liability on the part of Mehdi Ali Khan and Abdullah Khan to refund the amount and there was clearly both a personal liability to do so as well as that sought to be created by the security. Such unquestioned liability must undoubtedly be capable of being enforced.

In the document before their Lordships there had been no personal liability at all and no question of enforcing it under S. 145, Civil P. C., arose. The suit was purely one to enforce the charge said to have been created by the document. Their Lordships remarked that that was not the mode of enforcing the liability and the proper course was to apply to the Court for making an order in the suit upon an application to which the sure-

(1) A. I. R. 1919 P. C. 55=42 All. 153=45 I. A. 228 (P.C.).

ties are parties, that the property charged be sold unless before a day named the sureties find the money (p. 167). This was the practice of this High Court in similar cases as is evidenced by the ruling in *Janki Kumar* v. *Sarup Rani* (2). It follows therefore that the document cannot be treated as a mortgage deed within the meaning of S. 58, T. P. Act, because there is here no mortgagee to whom the property is transferred.

The learned Subordinate Judge has thought that if it is not a mortgage it must amount to a charge. It is impossible to accept this view. If the document is not a mortgage for want of any mention of a specific person in whose favour it is made it equally does not create a charge. Section 100 requires that where immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property. Here Mt. Hanif-un-nissa and her representatives are not named as being the persons to whom the money is to be paid. Thus the case does not fulfil the conditions required by S. 100. I am therefore of opinion that the learned Judge is in error in thinking that it creates a charge and can be enforced. No doubt it is not necessary that the beneficiary should be a party to the transaction under which the charge is created. But he must be specifically named as being the person in whose favour the charge exists. This is not the case here. It follows therefore that the plaintiffs' remedy to recover the money by enforcement of any supposed security either in the nature of a mortgage or of a charge must fall to the ground ; and they cannot take advantage of the 12 years period of limitation which is allowed for such remedies.

Bansi Dhar had to pay large sums of money by way of restitution in the year 1914. The payments ranged from 1st April 1914 to 30th April 1914 and amounted to over Rs. 71,000, Unfortunately the claim to recover any part of this amount is hopelessly beyond time because Art. 132, Lim. Act, does not apply.

There remains the sum of Rs. 15,950 which was paid by Bansi Dhar or his heirs between January 1923 and July 1923. The present suit is within three years of that payment. When the Court ordered that neither Bansi Dhar nor the attaching creditors could be allowed to take out the money without first furnishing security and they were allowed to take out portions of the amounts lying in Court on furnishing such security it is obvious that when the decree in execution of which the sums had been realised was reversed, they were in duty bound to refund the amount. There can be no doubt that there was the undoubted liability of Mehdi Ali Khan and Abdullah Khan to refund this amount which they had taken out. Similarly Bansi Dhar was bound to restore what he had taken out. This was the express personal undertaking by Mehdi Ali Khan and Abdullah Khan in their bond dated 11th July 1907.

But the attaching creditors were not considered as principal parties to the proceeding relating to restitution, and the High Court in its judgment dated 27th February 1919, held that Bansi Dhar was personally liable under S. 144 though he may have his own remedies against Mehdi Ali Khan and Abdullah Khan. But the fact remains that Bansi Dhar had to pay in Court what had been taken out by Mehdi Ali Khan and Abdullah Khan as well as what had been taken out by himself.

Section 70, Contract Act, lays down that when a person lawfully does anything for another person not intending to do so gratuitously and such other person enjoys benefit thereof the latter is bound to make compensation to the former in respect of the thing so done. Now there was a liability on Mehdi Ali Khan and Abdullan Khan to restore the amount which had been taken out by them and that liability was in the first instance discharged by Bansi Dhar. By making good that amount Bansi Dhar undoubtedly did a thing lawfully for Mehdi Ali Khan and Abdullah Khan and there is no doubt that he did not intend to do it gratuitously. Nor can there any doubt that Mehdi Ali Khan and Abdullah Khan to that extent have enjoyed the benefit thereof. They had attached a decree which was subsequently set aside and became a nullity, and

(2) [1895] 17 All. 99=(1895) A. W. N. 19.

yet under colour of it they realized an amount and have appropriated it. It therefore seems to me that the latter are bound to make compensation to the former in respect of the thing so done. It seems only just and fair that Bansi Dhar or his representatives should have the right to claim the amount which they have paid which in reality ought to have been paid by Mehdi Ali Khan and Abdullah Khan because they alone had taken out that sum.

The learned advocate for the respondents has strongly contended that the liability of Mehdi Ali Khan and Abdullah Khan could only arise after the amount had been refunded by the representatives of Mt. Hanif-un-nissa. This contention is correct in this sense that the present plaintiffs could not possibly have sued unless they had at first had to refund the amount. But there can also be no doubt that the liability of Mehdi Ali Khan and Abdullah Khan existed all along and they were bound to restore the amount. The cause of action for suing under S. 70 cannot be said to have arisen when the Privy Council decision was given, but only when the restoration was made by Bansi Dhar for it is on that account that he and his representatives can claim compensation. I am therefore of opinion that this appeal should be allowed in part and the decree of the Court below modified in this way that the plaintiffs should be given a decree only for Rs. 15,950 with interest at 6% per annum simple from 23rd July 1923, the last date on which Bansi Dhar made the payment till realization, and the rest of their claim should be dismissed.

Pullan, J.—I agree with the views expressed and the order proposed.

R.M./R.K. *Decree modified.*

A. I. R. 1929 Allahabad 837

NIAMATULLAH AND BENNET, JJ.

J. W. Thomas—Plaintiff—Appellant.

v.

Hanuman Prasad—Defendant—Respondent.

Second Appeal No. 524 of 1926, Decided on 7th June 1929, from a decree of Dist, Judge, Allahabad, D/- 16th December 1925.

(a) Contract Act, S. 18—Seller although only leaseholder professing to be owner of property—There is misrepresentation.

Where in a sale-deed a person purports to be the owner in possession and to convey the title of an owner while he is a mere leaseholder having no right even to transfer the rights of leaseholder without sanction of Cantonment authority, there is clearly misrepresentation [P 839 C 1]

(b) Transfer of Property Act, S. 55 2,—Seller professing to transfer interest not subsisting commits breach of implied contract.

Where a seller professing to be owner of a property transfers the same while he is really a lease holder with limited power of transfer there is a breach of implied contract. [P 839 C 2]

(c) Specific Relief Act, S. 35—Contract in writing being voidable or subsequently becoming unlawful can be rescinded.

Every sale-deed does constitute a contract. Where a contract is voidable or terminable by the plaintiff or where it becomes unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff it can be rescinded under S. 35. [P 839 C 1]

(d) Contract Act, S. 56—Contract to do act becoming impossible by reason of uncontrollable event becomes void.

Where the sale of the rights of the defendants is conditional on sanction of Cantonment authority and subsequent to the execution of the sale-deed the sanction is refused, it becomes impossible for the defendant to transfer his rights as a leaseholder and so the case comes under S. 56 and the contract becomes void. [P 839 C 2]

F. O. O'Neill—for Appellant.

K N. Katju—for Respondent.

Judgment.—This is a second appeal by the plaintiff, whose suit has failed in the two lower Courts. The matter was extremely simple, but around it there have grown a number of erroneous ideas both of law and fact. The plaintiff sued on the allegation that, on 28th March 1924, the defendant executed and got registered a sale-deed in favour of the plaintiff, conveying to the plaintiff plot 21 in the Cantonment of Allahabad in consideration of the payment of rupees 4,000 Para. 3 of the plaint runs as follows:

"After the receipt of the money and the execution of this document, the defendant did not deliver possession over it to the plaintiff nor could he do so, inasmuch as he defendant, had no right to transfer the said property. The plaintiff accordingly sued for the return of Rs. 4,000 consideration and also for interest."

The defence was that possession had been given to the plaintiff, and para. 15 of the written statement sets forth:

"This defendant purchased the said property in November 1914, under a registered

sale-deed from Mrs. Eates, the former owner and remained the owner in possession thereof up to 27th March 1924, the date of the execution of the sale-deed in question, without the interference of any one. Similarly Mrs. Eates had prior to the purchase by this defendant, been the owner in possession thereof."

The issues framed were:

"(1) Has the plaintiff got any cause of action and right of suit?

(2) Is he entitled to the refund of the sale price and damages? If so, how much?

(3) To what relief, if any, is the plaintiff entitled."

We consider that the two lower Courts have failed to apply their minds to the real question at issue, i. e., whether the defendant was the owner in possession of plot 21, as he claimed in para. 15 of the written statement, and whether the defendant had power to transfer his interest. We have summoned from the Cantonment authority the registers of the Cantonment, and they show clearly, beyond any doubt whatever, that plot 21 is owned by Government and that the defendant had merely the interests in that plot of a lessee from Government. These registers are maintained under statutory provisions, and are as follows:

"(1) Register of Government lands held by lessees outside bazaar, maintained under S. 271, Cantonment Code 1912, No. 21 is entered in this register as leasehold.

(2) Register of transfers of immovable properties, maintained under S. 274, Cantonment Code 1912. This shows the transfer of plot 21, which is entered in this register as a leasehold.

(3) Register of private lands situated in the Allahabad Cantonment. There are only two entries in this register of land owned by mahants, and there is no entry of plot 21 in this register."

The history of this plot is as follows:

It was leased first of all to an individual called Abhey Charan Bose, head clerk of the Cantonment Magistrate's office, and on 28th July 1902, this individual executed a deed of a dwelling house in No. 37 and of this No. 21 to Mrs. Eates, who happens to be the mother-in-law of the plaintiff, for rupees 3,500. The vendor purports to:

"sell, assign and transfer all those pieces or parcels of land numbered and known as sites Nos. 21 and 37 in the New Cantonment Allahabad in the United Provinces of Agra and Oudh together with the two dwelling houses kacha and pucca built."

The vendor, Abhey Charan Bose, did not explain in his sale-deed what his title consisted of He merely says:

"I the said vendor at the time of executing these presents have in myself good rightful power and absolute authority to grant and assure the aforesaid hereditaments and premises hereinbefore expressed to be granted or otherwise assigned according to the true intent and meaning of these presents."

The next transaction in regard to No. 21 is contained in a sale deed of 19th November 1914, registered on the same date, by which Mrs. Eates transferred her interest to Kallu Mal Gauri Dat, of whom Gauri Dat is the father of the present defendant, Hanuman Prasad. This document states:

"Whereas the said Hanuman Prasad being now the sole and absolute owner (by a registered sale-deed dated 28th July 1902) of all that piece or parcel of land numbered and known as site No. 21 New Cantonment Allahabad together with a dwelling house and an out-house."

In regard to this transaction we have had produced from the office of the Cantonment authority an application by the vendor showing that, on 20th October 1914 the Cantonment authority granted sanction for the transfer of the interests of the vendor. It was therefore after sanction had been obtained from the Cantonment authority that Mrs. Eates executed this sale-deed transferring her interests in No. 21. That application was later signed by the vendees, the signature being dated 18th February 1915. The terms of that application clearly admit that the property is held as the leasehold from the Cantonment authority.

In the present case, the vendor (the defendant) did not take the precaution to obtain sanction from the Cantonment authority before he executed the sale-deed in suit in favour of the plaintiff. What happened was that, after the execution of this sale-deed, an application was made to the Cantonment authority for sanction to transfer the interests of the vendor, and the order passed was:

"It is impossible to sanction this application for transfer, as land is the property of the Government. The original vendor had no title, and has sold what was not his property."

As we have shown above, a reference to the Cantonment registers establishes beyond all doubts that this attitude of the Cantonment authority is perfectly correct. The defendant had only the interests of a leaseholder, and he was, in no way whatever, entitled to transfer the rights of a proprietor in plot 21. A considerable amount of argument has been made for the respondent on the ground that the appellant was placed

by him in physical possession of plot 21 and the appellant collected some small sums from people to wnom the produce of the fruit trees was sold. There is apparently no bungalow on this number, although there are some out-houses.

The chief question which now arises on this appeal is to what remedy, if any, is the plaintiff-appellant entitled. It was argued by the learned counsel for the respondent that there was no finding of the lower appellate Court that there was fraud or misrepresentation. We consider, however that there clearly was misrepresentation, because in the sale-deed in suit the defendant-respondent purports to be the owner in possession and to convey the title of an owner. As we have already shown, the defendant is a mere leaseholder, and he has no right to transfer even the rights of a leaseholder without the sanction of the Cantonment authority.

The next point advanced by the learned counsel for the respondent was that no suit would lie for damages, unless the plaintiff proved that he had sustained actual loss. We consider, however, that the case comes primarily under S. 55 (2), T. P. Act, which states:

"The seller shall be deemed to contract with the buyer that the interests which the seller professes to transfer to the buyer subsist and that he has power to transfer the same."

We would also refer to S. 35, Specific Relief Act, which provides that a person interested in a contract in writing may sue to have it rescinded:

"(a) Where the contract is voidable or terminable by the plaintiff;

"(b) Where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff."

On this point the somewhat remarkable argument was addressed to us by the learned counsel for the respondent to the effect that an agreement to sell no doubt constituted a contract, but that when the parties carried out that agreement in a written sale-deed, that the written sale-deed did not constitute a contract at all and that therefore S. 35, Specific Relief Act, would not apply to that sale-deed We consider that there is nothing whatever in law to support such an argument and that every sale-deed does constitute a contract. We may also refer to illustration (a) to S 35, which states that a sale of a field will come under that section. We also consider that the legal rights of the plaintiff may be regarded from the different angle of vision, viz, that the sale of the rights of the defendant was conditional on the sanction of the Cantonment authority and that, subsequent to the execution of the sale-deed, the sanction of the Cantonment authority has been refused. It is therefore impossible for the defendant to transfer his rights as a leaseholder, because the Cantonment authority has refused to allow him to transfer those rights. Accordingly, the case comes under S. 56, Contract Act, which provides:

"A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

We would also refer to illustration (d) of this section, which states that a contract to take in cargo to a foreign port becomes void when war is declared. We consider that the sale-deed in suit is void; but if it be not void, it can be rescinded under S. 35, Specific Relief Act.

The case was also argued by the learned counsel for the appellant on the basis of a certain indemnity clause in the sale-deed in suit, under which he would also be entitled to interest in addition to the return of the principal; but we consider that, on the finding of the lower appellate Court that the plaintiff is in possession, that clause which relates to dispossession does not apply.

Under these circumstances, the sale-deed being void or rescinded, we award to the plaintiff Rs. 4,000, the full amount of consideration, subject to the plaintiff abandoning any possession he may have of plot 21 in favour of the defendant. In view of the fact that the plaintiff based his case solely on possession and our decree has been guided by other legal considerations, we consider that justice will be done in this case by awarding to the plaintiff-appellant half costs in all the three Courts.

R.M./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 840

MUKERJI AND NIAMATULLAH, JJ.

Jhabboo Misir—Applicant,

v.

Havaldar Tewari—Opposite Party.

Civil Revn. No. 150 of 1928, Decided on 4th July 1929.

Provincial Small Cause Courts Act, S. 17 (1), proviso—Applicant not depositing amount due but desirous to give security—Applicant must seek Court's direction at the time of application—Evidence as to security may be taken subsequently.

(*Per Niamatullah, J.*)—The meaning of the section is that the applicant has the option either to deposit the amount of the decree in cash or give security. But if he elects to adopt the latter course, the security must be to the satisfaction of the Court and subject to the Court's directions. It is necessary that an applicant who is not ready and willing todeposit the decretal amount and desires to give security instead should at the time of presenting the application obtain the directions of the Court as regards the security. The evidence as to the security being to the satisfaction of the Court may be taken on a subsequent date : 28 *All.* 470, *Ref.* [P 842 C 2 ; P 843 C 1]

(*Per Mukerji, J.*)—With the presentation of the application for setting aside ex parte decree must seek Court's direction asking for its specific order whether he should deposit cash or furnish security and in what manner. [P 841 C 1]

A. P. Pandey—for Applicant.

K. Verma—for Opposite Party.

Mukerji, J.—This is an application to revise the order of the Judge, Small Cause Court, Ballia, dated 3rd March 1928 by which that learned Judge refused an application on behalf of a defendant judgment-debtor to set aside the ex parte decree made against him on 1st November 1927.

The only point that requires decision in this Court is whether the learned Judge was right in dismissing the application on the ground (inter alia) that no direction of the Court was taken as to whether the judgment-debtor should deposit, along with his application, the decretal amount or should furnish security to the satisfaction of the Court.

We have to construe the proviso to sub-S. 1, S. 17, Provincial Small Cause Court Act. It reads as follows :

"Provided an applicant for an order to set aside a decree passed ex parte . . . . . shall, at the time of presenting an application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment or give security to the satisfaction of the Court for the performance of the decree or compliance with the judgment, as the Court may direct."

The plain construction of the above proviso would be that the applicant has to do one of two things and that he has to do such of the two things as may be dictated to him by the Court. The choice of the alternative lies, as to the performance on the part of the applicant with the Court and not with the applicant himself. The two things that the applicant is required to do are (1) deposit of the amount due from him under the decree or in pursuance of the judgment and (2) giving of security to the satisfaction of the Court for the performance of the decree or the compliance with the judgment. It has been urged that where the jugdment-debtor is prepared to deposit in Court the amount due from him under the decree or in pursuance of the judgment, it would be an unnecessary procedure on the part of the Court to solemnly signify that the security in cash may be deposited. Let us see if this is universally true.

A Court of Small Causes, as constituted under the Provincial Small Cause Courts Act, takes cognizance of all suits of a civil nature except those specifically exempted from its cognizance ; (S. 15 of the Act). Thus there may be cases in which the deposit of what has been called the decretal amount may not be enough to satisfy the need of the proviso to S. 17, Small Cause Courts Act. Take for example, this particular case. A father, by his will leaves his gun, as an heirloom, to the elder of his two sons. The younger son, being desirous of keeping the gun used by his father in his lifetime, takes possession of it. The elder brother sues for recovery of the gun. Ordinarily, he would be required to value the gun both for the purpose of jurisdiction of the Court and also for the purpose of enabling the Court to assess a money value for the gun in case the same was not forthcoming as required by R. 10, O. 20, Civil P. C. Suppose the Court directs the younger son to pay Rs. 250 as compensation if the gun is not forthcoming. The defendant may be perfectly willing to pay Rs. 250 to the elder brother and keep the gun. Under the provision of O. 21, R. 31 the decree for recovery of the gun would be executed by actual seizure of the gun and the delivery of it to the successful plaintiff. It is only in the case of all effort at getting hold of the gun failing that

the compensation will be awarded to the plaintiff. Suppose that a decree is passed, ex parte, in favour of the elder brother against the younger brother. Then the younger brother presents an application to the Court for setting aside the ex parte decree, the Court may very well say to the applicant :

"I won't accept the deposit of Rs. 250 as a condition precedent to setting aside of the ex parte decree. The decree may be executed today and the gun may be recovered this afternoon. You must produce two gentlemen of honour and means as security to see that nothing short of the gun itself is forthcoming after the retrial of the restored suit is over."

Such a case, to my mind, would be a case in which the Court may very well say that security to the satisfaction of the Court shall be given and the decretal amount shall not be deposited as a condition precedent to the entertainment of the application.

As I read the proviso to S. 17, I find no ambiguity whatsoever in it. The rule of law has to provide for all sorts of cases. In cases where the decree is of the simplest character, namely, where it directs payment of money by one party to another, the Court would surely prefer a deposit of the decretal amount to furnishing of any other kind of security. But where the Court, on the representation of the applicant agrees to accept security other than cash security, it shall see, when it gives the direction that security other than cash security may be furnished, that such security is to the satisfaction of the Court. The words "may direct" in my opinion have no reference to the nature of the security. The nature of the security is sufficiently defined by the words, "to the statisfaction of the Court."

In my opinion, the proper procedure when an application is made for the setting aside of an ex parte decree passed by a Small Cause Court or when an application for review of judgment of such Court is made is, to present a petition to the Court, asking for its specific order as to what the applicant should do, in the nature of furnishing security. The Court will then, on considering the entire circumstances of the case, decide whether a certain and what amount should be furnished as cash security or whether it should, in suitable cases, in spite of offer of cash security require any other kind of security or whether, in the case of the decree being for money only, the Court will allow the applicant to furnish any security other than cash security and, in that case, will tell the party, after hearing what sort of security he is prepared to furnish, whether the security proposed will satisfy it or not. I do not suggest that evidence as to the security being to the satisfaction of the Court may not be taken on a date subsequent to that on which the application itself is presented. It may be that the consideration of the question before the Court will require more time than the Court is able to give on the day the application is presented. All that is a subsidiary matter. The main thing is that, with the presentation of the application the applicant must invite the attention of the Court to his application and seek the Court's direction.

In my opinion the order appealed against is correct, so far as the interpretation of the proviso to S. 17 goes. On this ground alone, I will dismiss the application with costs.

Niamatullah, J.—This is an application for revision of an order passed by the Court of Small Causes at Ballia refusing to set aside an ex parte decree passed against the application on 1st November 1927. The application for order to set aside the ex parte decree was made on 15th December 1927. On the face of it, the application was made more than 30 days after the passing of the ex parte decree ; but the applicant sought exemption on certain grounds mentioned in his application, which, as I read the judgment of the lower Court have not been disposed of. It is, therefore, not necessary to refer to this aspect of the matter any further. The application for order to set aside the ex-parte dscree was not accompanied by a deposit in Court of the amount due under the decree ; but a security bond hypothecating immovable property, prima facie duly executed, was filed. It was disallowed by the Court below on the grounds (1) that :

"the direction of the Court at the time of the presenting of the application as to whether he should deposit in Court the amount due from him under the decree or give security to the satisfaction of the Court for the performance of the decree, as required by the proviso of S. 17, Cl. 1. Provincial Small Cause Courts Act,"

had not been obtained, and (2) that the security offered with the application was not such as satisfied the Court on the date on which the application was presented.

It is contended in revision that no direction of the Court was necessary as regards the deposit of the decretal amount in cash or the security to be furnished under S. 17, Provincial Small Cause Courts Act, nor was it necessary to adduce evidence of the sufficiency or otherwise of the security on the date on which the application was presented if subsequently the applicant could satisfy the Court that the security offered was adequate.

The proviso to S. 17, Provincial Small Cause Courts Act, is somewhat ambiguously worded. Omitting words with which we are not concerned, it runs thus :

"Provided that an applicant for an order to set aside a decree passed ex parte shall, at the time of presenting his application either deposit in the Court the amount due from him under the decree or give security to the satisfaction of the Court for the performance of the decree, as the Court may direct."

The last five words, "as the Court may direct" give rise to an ambiguity which makes certain provisions in the proviso a little obscure. If they are intended to refer to the two alternatives mentioned in it, namely, (1) either to deposit the decretal amount, or (2) give security to the satisfaction of the Court, the grammatical construction would lead to the result that the applicant must obtain the direction of the Court at the time of presenting his application as to whether he should adopt one or the other of the two alternatives. It is obvious that no Court will refuse to accept deposit in cash ; but the section. as it stands, makes the observance of the formality to obtain the Court's direction necessary. If, in the absence of the direction of the Court, sufficient security is given and the applicant cannot be deemed to have complied with the requirements of the proviso, it is equally arguable that a deposit without a specific direction does not comply with the requirements of it. It seems to me that the words in question have no grammatical relation to the two alternatives already mentioned. The applicant has been given the option either to deposit in cash, or to give security to the satisfaction of the Court ; and in the latter case, provided the security is to the satisfaction of the Court, no permission of the Court to furnish security is needed. The question then arises as to whether the direction contemplated relates to the security being to the satisfaction of the Court. I do not think this is the case .

To give security to the satisfaction of the Court, as the Court may direct"

would be a very clumsy language to use and I do not think the framers of the proviso intended that construction. If we were at liberty to insert the word "such" between "give" and "security" so as to make that particular part of the proviso to be :

"to give such security to the satisfaction of the Court, as the Court may direct,"

no ambiguity would be left, and the proviso would be capable of an obviously sensible interpretation, namely, that the direction of the Court is necessary as regards the kind of the security which, when furnished, should satisfy the Court as regards its sufficiency. I am inclined to think that, even without inserting the word "such," as suggested above the proviso in capable of that interpretation, in which case :

"to give security to the satisfaction of the Court, as the Court may direct,"

means that the nature and kind of the security must be according to the direction of the Court, which should also be satisfied as regards its sufficiency. In this view of the matter, which I accept, it is necessary for an applicant, who is not ready and willing to deposit the decretal amount with his application for an order to set aside the ex parte decree and desires to give security instead should "at the time of presenting his application" obtain the direction of the Court as regards the character of the security, i. e. whether it should be by hypothecating proprietary tenure, fixed rate tenancy house property, pledge of ornaments, or the like. Of course, in every case the Court should be satisfied as regards the sufficiency of the security to be furnished according to its directions. This is a separate requirement altogether. It is not, in my opinion, necessary that the Court should be placed in a position to express its satisfaction as regards the sufficiency of the security at the time of presenting the application. If the Court is not satis-

fied on that question on the evidence which the applicant can produce forthwith, it is open to the applicant to satisfy the Court on that point at a later but convenient stage, and if the Court is then able to record its satisfaction, I think the requirement of the section is made out.

The only case decided by this Court, to which reference has been made in course of arguments, is *Jagan Nath* v. *Chet Ram* (1) which is an authority for the proposition that an applicant for an order to set aside an ex parte decree passed by a Court of Small Causes must either deposit the decretal amount in cash or furnish security. It does not decide the second point which arises in the case before us. The learned Judges have expressed an opinion on the second point which supports the view which I have taken. They observe :

"We think that the meaning of the section is that the applicant has the option either to deposit the amount of the decree in cash or give security. But if he elects to adopt the latter course, the security must be to the satisfaction of the Court and subject to the Court's directions."

They were not called upon to say, and have not said, that the Court should express its satisfaction as to the sufficiency of the security at the time when the application is presented. Having taken the view that the applicant has the option either to deposit the amount in cash or to give security, direction of the Court could have only been meant to refer to the character of the security.

For the reasons already stated, while I do not agree with the Court below that any direction of the Court is necessary as to whether the applicant for an order to set aside the ex parte decree should furnish security instead of depositing the decretal amount in cash, or that the applicant must obtain a certificate, so to say, as regards the sufficiency of the security at the time of presenting his application, I maintain the order sought to be revised on the ground that the applicant should have obtained the direction of the Court as regards the character of the security which he proposed to offer, and that an omission to obtain such direction was fatal to the success of his application.

(1) [1906] 28 All. 470=3 A. L. J. 318=(1906) A. W. N. 93.

By the Court.—The application in revision is dismissed with costs.

R.M./R.K. *Application dismissed.*

A. I. R. 1929 Allahabad 843

MEARS, C. J. AND SEN, J.

Suraj Pal Singh—Creditor—Appellant.

v.

Shib Lal—Insolvent—Respondent.

First Appeal No. 50 of 1928, Decided on 10th July 1929, from order of Addl. Dist. Judge, Aligarh, D/- 17th December 1927.

Provincial Insolvency Act (1920), S. 42 (a)—S. 42 (a) does not stand in way of discharge unless fraudulent acts on part of insolvent or circumstances which he could have controlled are shown.

Where it is true that the assets of the insolvent are less than annas eight in the rupee on the amount of unsecured liabilities but it has not been shown that this state of things has been brought about by any fraudulent act on the part of insolvent or by circumstances which he could have controlled, S. 42 (a) does not stand in the way of the insolvent procuring the discharge. [P 844 C 1]

N. P. Asthana—for Appellant.

Panna Lal—for Respondent.

Judgment.—This is an appeal by Raj Suraj Pal Singh of Awagarh from an order directing the discharge of Shib Lal, an insolvent.

Shib Lal was adjudicated an insolvent in November 1925. The amount of the scheduled debts came to about Rs. 18,500, out of which the debts for which the insolvent was responsible to the Raja came to about Rs. 8,500. The assets of the insolvent which were available to the Official Receiver consisted of a building which was sold by the Receiver for Rs. 80. The finding of the Court below is that the insolvent is not possessed of any other property. It appears that the appellant obtained his decree against the respondent some time in November 1921. The insolvent transferred certain properties belonging to him by certain alienations between 1921 and December 1924. The present appellant instituted the suit for the setting aside of some of these alienations on the ground that they were without consideration, that they were fictitious and the so-called alienations

were merely cloaks intended to save the property from the clutches ef the creditors. The suit was dismissed by the trial Court and the decree was upheld in appeal. The application for discharge having been made by the insolvent, the said application was resisted by the present appellant on various grounds. It was alleged that the insolvent had suppressed his account books and was guilty of gross fraud and was carrying on business in the name of other persons. The learned District Judge finds that there is no proof of these assertions. It was alleged that the present application ought not to have been allowed, because it was in the teeth of S 42 (a), Provincial Insolvency Act (Act 5 of 1920). It is true that the assets of the insolvent are less than eight annas in the rupee on the amount of unsecured liabilities, but it has not been shown that this state of things has been brought about by any fraudulent act on the part of the insolvent or by circumstances which he could have controlled. Under the circumstances, S. 42, Cl. (a), does not stand in the way of the insolvent procuring his discharge. We think that the order of the Court below is right, and we dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 844

DALAL, J.

Mt. Wahidan—Defendant—Appellant.

v.

Mt. Aliman—Plaintiff—Respondent.

Second Appeal No. 602 of 1928, Decided on 18th July 1929, from a decree of Sub-Judge, Mainpuri, D/- 31st January 1928.

Civil P. C., S. 11—Suit dismissed for want of cause of action, is not a bar.

Where there is no cause of action, the Court has no jurisdiction to try a case and is not competent to decide other issues. Under S. 11 the bar arises only where the issue has been directly and substantially raised in a former suit. Where there is no cause of action, no matter in the plaint can be directly and substantially in issue. Therefore suit dismissed on the ground that there is no cause of action is not a bar under the principles of res judicata. [P 844 C 2]

N. P. Asthana—for Appellant.

M. A. Aziz—for Respondent.

Judgment.—The plaintiff's suit for possession was decreed by the lower appellate Court and the defendant has come here in second appeal on the ground that the suit was barred by the principles of res judicata. The plaintiff had brought an earlier suit for possession in 1926. In this suit various issues were framed and all of them were decided by the Munsif. The suit, however, was ultimately dismissed on the ground that there was no cause of action. It has been rightly pointed out by the lower appellate Court that the former suit ought not to have been dismissed but proceedings should have been taken by the Munsif under O. 7, R. 11, which lays down an imperative injunction that the plaint shall be rejected where it does not disclose a cause of action.

This is an important matter, because under R. 13, it is laid down that the rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. This imperative duty was not performed by the Court. The plaint is to be rejected before proceeding with the trial of the suit and it may therefore be said that when there was no cause of action, the Court had no jurisdiction to try the case and was not competent to decide the other issues Under S. 11, Civil P. C., the bar arises only where the issue has been directly and substantially raised in a former suit. When there was no cause of action no matter of the plaint can be said to be directly and substantially in issue in the former suit All that the plaintiff submitted to was that she had no cause of action for the suit and by submitting to that opinion she had no opportunity to appeal against the other findings of the trial Court in the previous suit. For these reasons, I agree with the opinion of the lower appellate Court and hold that the suit was not barred by the principles of res judicata. There is no other point in the grounds of appeal worthy of notice.

This appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 845 (1)

DALAL, J.

Mukhtar Ahmad—Defendant—Applicant.

v.

Lachman Prasad—Plaintiff—Opposite Party.

Civil Revn. No. 150 of 1929, Decided on 15th July 1929, from order of Sub-Judge, Muzaffarnagar, D/- 11th February 1929.

(a) Agra Tenancy Act (1926), S. 181—S. 181 merely provides for precedence of rent claim where distraint is genuine—No relief is afforded to third person against fraudulent distraint by zamindar.

The provisions of S. 181 afford no relief to a third person against a fraudulent distraint collusively brought about by a zamindar against his tenant. These provisions merely provide for the precedence of a rent claim where the distraint is genuine. [P 845 C 1]

(b) Jurisdiction—Civil Courts — Jurisdiction of civil Court arises where a person derives benefit by fraud or collusion.

Where fraud or collusion is alleged and one person has derived benefit and another has lost by such fraud or collusion, the jurisdiction of the civil Court certainly arises. [P 845 C 2]

Mukhtar Ahmad—for Applicant.

Shiva Prasad Sinha—for Opposite Party.

Judgment.—The Subordinate Courts certainly had jurisdiction in this matter. The plaintiff held a decree against one Jhandoo a tenant of the defendant Mukhtar Ahmad. What Jhandoo did was to get up a fictitious distraint by the zamindar and thereby fraudulently prevented the plaintiff from recovering the amount of his decree by selling Jhandoo's crops. Both the Subordinate Courts have found that really no rent was due from Jhandoo to Mukhtar Ahmad and that the distraint was collusive and fraudulent. It was argued that the jurisdiction lay entirely with the revenue Court under S. 181, Ten. Act. The provisions of that section, however, afford no relief to a third person aginst a fraudulent distraint collusively brought about by a zamindar against his tenant. Those provisions merely provide for the precedence of a rent claim where the distraint is genuine. The claim for rent is to prevail over a claim against a tenant for any other purpose. The Tenancy Act does not provide for a suit of the nature of the one filed by the plaintiff. Wherever fraud or collusion is alleged and one person has derivel benefit and another has lost by such fraud or collusion, the jurisdiction of the civil Court certainly arises.

This application is dismissed with costs.

R.M./K.K. *Application dismissed.*

A. I. R. 1929 Allahabad 845 (2)

DALAL, J.

Raghuraj Singh—Applicant.

v.

Hargobind—Opposite Party.

Civil Revn. No. 80 of 1929, Decided on 12th July 1929, from order of Dist. Judge, Agra, D/- 21st December 1928.

(a) Agra Tenancy Act (1926), S. 242 (1) (a)—Interpretation—"Subject matter."

The words "subject matter" in S. 242 (1) (a) refer to subject-matter of the suit and not to the subject matter of the appeal. [P 846 C 1]

(b) Interpretation of Statutes—Repealing Acts.

When a particular interpretation has been attached to certain words, the same interpretation should be attached to subsequent repealing Acts. [P 846 C 1]

Panna Lal—for Applicant.

Judgment.—With all respect, I do not agree with the opinion of the learned Judge Mr. Bennet, at present a Judge of this Court. The interpretation desired is of S. 242 (1) (a), Tenancy Act. It is as follows:

"An appeal shall lie to the District Judge from the decree of an Assistant Collector of the first class or a Collector in any of the suits included in group *A* of Sch. 4 in which (a) the amount or value of the subject-matter exceeds Rs. 200."

The learned Judge is of opinion that the subject-matter refers to the subject-matter of the appeal. Ever since 1887, when the Bengal, Agra and Assam Civil Courts Act (12 of 1887) was passed, jurisdiction of different Courts in appeal has been fixed in accordance with the subject-matter of the suit which has been made the criterion, and not the subject-matter of the appeal. The word "which" must refer to the nearer word "suits" and not to the further word "appeal." If the word "which" is made to refer to the appeal, Cl. (b) of the section will sound very strange. It is sufficient to put the two interpretations side by side to see which is the better and more natural interpretation:

"In which suit the rent annually payable by a tenant has been in issue in the Court of first instance, and is in issue in the appeal."

is good drafting, while if we read

"In which appeal the rent annually payable by a tenant has been in issue in the Court of first instance, and is in issue in the appeal."

much scope will be left for improvement in drafting. An appellate matter cannot be said to be in issue in the Court of first instance, while a suit matter can be in issue in the Court of first instance. Coming to the proviso, it is definitely stated there that when the amount or value of the subject-matter of the suit exceeds Rs. 5,000, the appeal shall lie to the High Court. The foundation of the jurisdiction of this Court is the subject-matter of the suit. A proviso refers back to make an exception in something that went before and not to make an exception in something totally different that may have preceded. There will also be a conflict of jurisdiction if the interpretation of the learned District Judge is accepted. According to the proviso, where the subject-matter of the suit exceeds Rs. 5,000 an appeal comes to this Court. Taking the instance of an appeal in such a suit of the value of Rs. 2,000, according to the proviso the appeal will lie here, while, according to the interpretation put by the learned Judge on the previous clause, the appeal will lie to the District Judge. When the jurisdiction is divided between the District Court and this Court the principle of division must be the same and not different. Finally, the words of Cl (a) are copied from Cl. (a), S. 177, Act 2 of 1901 which were formerly copied from S. 189, Act 12 of 1881. The words have ever since 1881 been interpreted as "subject-matter of the suit," and when a particular interpretation has been attached to certain words the same interpretation should be attached to subsequent repealing Acts.

The order of the learned Judge returning the petition of appeal is set aside, and he is directed to admit the appeal and decide it according to law.

The memorandum of appeal filed here shall be returned to Mr. Panna Lal.

I make no order as to costs here. Costs below shall follow the result.

R.M./R.K. *Order set aside.*

A. I. R. 1929 Allahabad 846

DALAL, J.

Saroop Singh—Defendant—Appellant.

v.

Narsingh and *others*—Plaintiffs—Respondents

Second Appeal No. 611 of 1928, Decided on 17th July 1929, from a decree of 2nd Sub-Judge, Saharanpur, D/- 11th January 1928.

(a) Transfer of Property Act, S. 52—S. 52 does not apply to execution proceedings of money decree.

In execution proceedings of a money decree, no right to immovable property is directly and specifically in question, and the provisions of S. 52, therefore, do not apply: 14 *C.W.N.* 677, *Ref.* [P 846 C 2]

(b) Civil P. C., O. 21, R. 54 (1)—Attachment operates as prohibition against alienation only from date on which proclamation is made and copy of order affxed.

An attachment operates as a valid prohibition against alienation of the attached property only from the date on which the necessary proclamation is made and copy of the order affixed as contemplated in O. 21, R. 54. Where no evidence of prohibitory order under O. 21, R. 54 (1) and its proclamation is given an alienation by the judgment-debtor cannot be impeached. 42 *Mad.* 844, *Foll.* [P 847 C 2]

Akhtar Hussain Khan—for Appellant.

Nehal Chand—for Respondents.

Judgment.—On 24th March 1927 during execution of a money decree obtained by the defendant an order was passed for the attachment of the property in suit. Two days after this order was passed the property was sold by a private sale by the judgment-debtor, the owner of the property, to the plaintiffs. The plaintiffs failed to have the attachment removed in the execution Court, so they instituted the present suit under O. 21, R. 63, Civil P. C., for a declaration that the property is not liable to be sold in execution of the defendant Sarup Singh's decree. The lower appellate Court decreed the suit on two grounds: (1) that the doctrine of lis pendens as enunciated in S 52, T. P. Act, did not apply and (2) that the order of attachment did not give the judgment-debtor the benefit of the provisions of S 64, Civil P. C.

In execution proceedings of a money decree, no right to immovable property is directly and specifically in question, and the provisions of S 52, T. P. Act, will, therefore, not apply. Counsel for the respondents referred the Court to a bench ruling of the Calcutta High Court

in *Mahadeo Saran* v. *Thahur Prasad Singh* (1). It was held there that where a property not mortgaged is attached in execution of a money decree the doctrine of lis pendens does not apply to the sale of the property.

The defendant did not produce in evidence that a prohibitory order under O. 21, R 54 (1) had been served on the judgment-debtor before the execution of the sale-deed in favour of the plaintiffs; nor has it been proved that the order was proclaimed at some place on or adjacent to the property attached as required by Cl. (2) of that rule. It was his duty to produce proof thereof, and in the absence of such proof it must be presumed that the prohibitory order was not served on the judgment-debtor nor proclaimed at the property before 26th March 1926. There is a Full Bench ruling of the Madras High Court on the subject, *Sinnapan* v. *Arunachalam* (2). It was held in that case that an attachment operates as a valid prohibition against alienation of the attached property only from the date on which the necessary proclamation is made and copy of the order affixed as contemplated in O. 21, R. 54.

This appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(1) [1910] 14 C. W. N. 677=5 I. C. 40=11 C. L. J. 523.

(2) [1919] 42 Mad 844=37 M. L. J. 375=10 M L W. 301=53 I.C. 207=(1919) M.W. N. 678 (F.B.).

A. I. R. 1929 Allahabad 847

SEN, J.

Janki Kuar and *others*—Plaintiffs—Appellants.

v.

Nanda and *another*—Defendants—Respondents.

Second Appeal No. 271 of 1928, Decided on 9th July 1929, from a decree of Dist. Judge, Agra, D/- 22nd November 1927.

Agra Tenancy Act (3 of 1926), S. 266—Some cosharers not impleaded—Suit though bad under S 266, should not be dismissed—Plaintiff should be allowed to bring the cosharers on record.

Though a suit is bad in law under S. 266, because certain cosharers have not been impleaded in the suit, the plaintiffs should not be penalised by the entire dismissal of the suit and an opportunity should be afforded to him to proceed with the suit after bringing the cosharers on record. [P 847 C 2]

G. Agarwala—for Appellants.

Indu Bhushan Banerjee and *S. N. Gupta*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for recovery of Rs 209-7-2, being the rent of certain cultivated land for 1333 and kharif 1334F. The suit was instituted by the appellant Mt. Janki Kuer, who is the wife of Sri Narain. The defendant against whom the claim was launched, was one Nanda, a resident of and cultivator of mauza Karsora. Another cosharer impleaded in the suit was Raja Dat Prasad Singh, rais of Mursan. The suit was resisted inter alia on the ground that, under the provisions of S 266 Act 3, of 1926, the suit was bad in law, because there were certain other cosharers who had been left out from the suit and without impleading whom the suit could not proceed. The trial Court gave effect to this contention, and further held that part of the rent had been paid by the tenant in good faith to Raja Dat Prasad aforesaid. The lower appellate Court has affirmed this decision.

The plaintiff, along with an appeal to this Court, has presented an application praying that the other cosharers, namely Sri Narain and Het Ram, be also added to the array of parties. Sri Narain is the husband of the plaintiff, and Het Ram is their son. I should have given effect to this contention and directed that the plaintiff should not be penalised by an entire dismissal of the suit by reason of the non-joinder of these two persons and that an opportunity should be afforded to the plaintiff to proceed with his suit after Sri Narain and Het Ram were brought on the record.

The trouble, however, is this. The defendant has filed an affidavit, which has not been traversed and which shows that during the pendency of the suit and after the dismissal of the suit by the trial Court, the Collector, proceeding under Cl 2, S. 45, Land Revenue Act (Act 3 of 1901), attached the mahal or part of the mahal and held it under his direct management, because a qualified nominee of the original lambardar was not appointed. The plaintiff was the lambardar of the mahal shortly before the institution of the suit. She however was removed from the lambardarship. No person was appointed as lambardar in her place. The cosharers had failed to

nominate any person as lambardar. Under the circumstances, the Collector proceeded under S. 45 (2), Land Revenue Act, and brought the property under his direct management. The property continues to be under the direct management of the collector, and during the continuance of this arrangement the tenant has paid the balance of the rent due to him to the revenue Court amin acting for the Collector. The result is that the entire rent for the period in suit has already been paid by the principal defendant. It will serve, therefore no useful purpose to direct that other persons should be included in the array of parties. The result is that I dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 848

MUKERJI AND NIAMATULLAH, JJ.

Secy of State—Applicant.

v.

B. Harbans Prasad Vaish—Opposite Party.

Civil Revn. No. 161 of 1928, Decided on 3rd July 1929, against order of Small Cause Court Judge, Banda, D/- 16th February 1928.

Railways Act, (9 of 1890), S. 54—Railway Company can re-classify and re-calculate rates when right is reserved in railway receipt.

Where the right of "remeasurement, reweighment, reclassification and recalculation of the rates" is reserved by the Railway Company in the railway receipt, the railway has the right to reclassify and recalculate rates and charge an additional sum of money: 29 *All.* 228 (*F. B.*), *Dist.* [P 849 C 1]

U. S. Bajpai—for Applicant.

Judgment.—In this revision the opposite party is unrepresented and the learned Government Advocate who appears for the petioner had to discharge the difficult duty of representing both sides of the case and in our opinion he has done that, as was expected of him, admirably. It appears that the opposite party had consigned to himself certain amount of jaggery from a railway station called Belharghat on the O. R. section of the E. I. Ry. to a station called Karvi situated on the G. I. P. Ry. The goods had to travel over the O. R. R. and E. I. sections of the E. I. Ry and the G. I. P, Ry. Over the G. I. P. Ry, and the E. I. section of the E. I. Ry. a certain rate known as 'first class rate' was charged. Over the O. R. section of the E. I. Ry. a certain rate known as (C/F) was charged. It appears that under the rules of the Railway, first class rates should have been chargsd over the O. R. section also. The (C/F) rate is reserved for Messrs. Carew and Co, apparently because they are a large customer of the railway with respect to jaggery. When the goods arrived at Karvi the station staff demanded, besides another item, Rs. 26-6-0 in excess of the freight declared in the railway receipt. The respondent paid this sum and then instituted the suit out of which this appeal has arisen for recovery of this sum of money namely Rs. 29-6-0 and also another sum of Rs. 4-5 (as to which there is no dispute) and interest. The suit was decreed by the learned Judge, Small Cause Court; hence this petition in revision. The petition came before a learned single Judge of this Court, but having regard to the importance of the decision to the Railway the matter was referred to a Bench of two Judges. The learned Government Advocate has drawn our attention to the Full Bench case of *Chuni Lal* v. *Nizam's Guaranteed State Ry. Ltd.* (1) and has sought to distinguish that case from the case before us.

In the case in *Chunni Lal* v. *Nizam's Guarantteed State Ry. Ltd.* (1) it appears, a certain consignment of chillies in two waggons was made. The officers of the railway, at the destination charged an excess freight on the basis of what had been described as 'maund rates." The railway officer at the place of consignment charged freight at what has been described as 'waggon rate. There was some difference between the two and the question was whether the officer, at the station of consignment, having decided to charge at the waggon rate the railway company could, subsequently, charge at the maund rate. The learned Judges held that the contract having been made in one way, could not be altered subsequently. They repudiated the argument that the officer at the station of consignment was not authorized to enter into the contract. Then the counsel of the railway argued that the right reserved by the Railway Company of "reweighment, re-classification and re-calculation of the rates" gave them a right

(1) [1907] 29 All. 228=4 A. L. J. 80=(1907) A. W. N. 21 (F. B.).

to change the waggon rate into maund rates. Their Lordships held that this reservation did not cover the case before them.

In this case, the learned Government Advocate has contended that the words quoted above (which will be found printed at the back of the railway receipt, para. 6) covered the present case. The learned Government Advocate has shown to us the E. I. Ry. pamphlet No. 1 containing general classification of goods and also the Goods Tariff part IA of the G. I. P. Ry. and has satisfied us that the C/F rate is reserved for a particular customer, viz., Carew and Co., while the ordinary customer has to pay the first class rate for jaggery when the goods are carried at owner's risk, as in this case. Chap. 3 of the E. I. Ry. pamphlet shows that there are ten classes of goods and for each class a separate rate is laid down. It follows that for every class of goods a specified rate is charged under the rules of the railway. The books already mentioned show that all kinds of goods which are subject of traffic have been classed under those ten heads and they are charged for accordingly. It must be perfectly clear, therefore, that the railway officer at the place of consignment should have charged over the R. section also, the 'first class rate' and not the C/F rate.

Now the question is whether the railway can make a fresh calculation on the basis of fresh classification. As we have said, para. 6 of the conditions provided at the back of the railway receipt, does give the railway a right to re-classify and re-calculate the rates. The re-classification will place the goods under class I and the re-calculation of rate (fixed for first class) will give the additional sum of Rs 29-6-0. The present case is, therefore, entirely different from the case before the Full Bench. We allow the petition in revision and reduce the decree granted to the respondent by the Court below, by the sum of Rs. 29-6-0 and proportionate interest and proportionate costs. The costs in this Court will be borne by the applicant himself as there is no contest and as the petitioner's own servant was responsible for the initial mistake.

R.M./R.K. *Revision allowed.*

1929 A/ 107 & 108

A. I. R. 1929 Allahabad 849

MUKERJI AND IQBAL AHMAD, JJ.

Askari Husain—Applicant.

v.

L. Chunni Lal and *others*—Opposite Parties.

Civil Revn. No. 186 of 1928, Decided on 4th July 1929, against the order of Dist. Judge, Bulandshahr, D/- 3rd March 1928.

Mahomedan Law—Wakf—Civil Court can entertain application for sanction to transfer wakf property— District Judge takes place of Qazi of day of old.

Under Mahomedan Law wakf property cannot be transferred without the sanction of the Qazi. In olden days the Qazi could sanction transfer of wakf property only while exercising civil powers. Naturally, therefore, in the present day, the mutwalli has to go to a civil Court to obtain the sanction and the District Judge has jurisdiction to entertain such application : *A. I. R.* 1924 *Cal.* 473, *Rel. on.* [P 850 C 1]

Haider Mehdi and *Zafar Mehdi*—for Applicant.

N. C. Vaish—for Opposite Parties.

Judgment.—This is an application to revise an order of the learned District Judge of Bulandshahr, dated 3rd March 1928 by which that Judge rejected an application made to him by the petitioner to obtain the Judge's sanction to certain proposed transfers of some property alleged to be wakf. The learned Judge refused the application on the ground that he had no jurisdiction to entertain it.

In the Court below the application was opposed by certain creditors of the estate. They are, in this Court represented by Dr. N. C. Vaish. His clients have filed an affidavit in this Court stating that they are no longer interested in the property and that certain moneys due to them have been realised by two auction sales. The learned counsel, however, urged that the decision of the Court below was right.

We have given the petition in this Court our best consideration and have come to the conclusion that the learned Judge had the jurisdiction to hear the application and should have heard it.

It is a piece of substantive Mahomedan Law that a mutwalli whether the wakf be a public or a private one cannot, practically speaking, transfer property without the sanction of the Qazi. The mutwalli's power of transfer is very much limited indeed. Cases may occur

in which a transfer of a portion of the wakf property, if timely made, would save the rest from destruction or loss. It is stated in the petition that the present case was like that. If the sanction of the Qazi has to be obtained, under the Mahomedan Law, and, if without a previous sanction being obtained, no purchaser may be forthcoming to purchase the property except at the risk of losing it eventually, it is necessary that the mutwalli should be in a position to obtain that sanction.

Then the question is, who is the officer to whom the mutwalli should go. So far as our information goes, in the olden days, the Qazi exercised both civil and criminal functions. In the present day, the civil and criminal functions are separately exercised in British India. The Qazi could sanction transfer of wakf property only while exercising his civil powers. Naturally therefore, in the present day, the mutwalli has to go to a civil Court to obtain the sanction. Now there are several grades of civil Courts namely the District Judge, the Subordinate Judge and the Munsif. The District Judge is theoretically at any rate, the principal Court of original civil jurisdiction. The application may therefore, be properly made to him by the mutwalli.

This is the conclusion at which we have arrived on a consideration of the principles involved in the case. As to authority, in numerous decided cases by the Calcutta High Court it has been held that in the mofussil, the District Judge, and in Calcutta proper, a Judge of the Original Side of the High Court are the officers who may be said to have taken the place of the Qazi of the days of old. The latest case on the point is *Habibar Rahiman* v. *Saidannessa Bibi* (1). Eminent text-book writers like Amir Ali and Tyabji express the same opinion.

We accordingly hold that the Court below has jurisdiction to entertain the application.

We allow the application, set aside the order of the Court below and remand the application of the petitioner to the Court below for disposal according to law. Having regard to the fact that the point is a new one, so far as this province is concerned, we direct that the parties shall pay their own costs in this Court. The costs so far incurred in the Court below will be at the discretion of that Court.

R.M./R.K. *Application remanded.*

(1) A. I. R. 1924 Cal. 473=51 Cal. 331.

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* A. I. R. 1929 Allahabad 850

BENNET AND IQBAL AHMAD, JJ.

B. Hirdey Narain, Mukhtar—Applicant.

v.

Emperor—Opposite Party.

Civil Revn. No. 236 of 1928, Decided on 12th July 1929, against order of Dist. Judge, Pilibhit, D/- 14th February 1928.

(a) Civil P. C., O. 16—Jurisdiction to impose fine vested by S. 32 can be exercised only in manner laid down by O. 16.

Section 32 vests the Court with jurisdiction to impose fine for failing to comply with a summons. The mode in which the jurisdiction so vested in the Court is to be exercised is indicated by O. 16. It follows therefore that the jurisdiction to impose fine can only be exercised in the manner laid down by O. 16. [P 852 C 1]

(b) Civil P. C., O. 16, R. 12—Order under R. 12 can be passed only if proclamation has been issued or a warrant for arrest is issued or order for attachment is passed.

An order under R. 12 can be passed only if a proclamation has been issued under Cl. (2), R. 10 or if no proclamation has been issued either a warrant has been issued for the arrest of the witness or an order for attachment of his property has been passed or if a proclamation as well as a warrant has been issued or an order for an attachment of the property of the witness has been passed. If neither of these conditions are satisfied, the Court has no jurisdiction to impose fine under R. 12: 31 *C. L. J.* 363; 57 *I. C.* 302 and *A. I. R.* 1925 *Mad.* 1247, *not Foll.* [P 853 C 2]

*** (c) Civil P. C., Ss. 30 and 32 — Fine can be imposed only upon persons not appearing in obedience to summons to give evidence and required to give evidence and not on persons not required subsequently to produce evidence.**

By S. 30 the Court is authorized to issue summonses to persons only when their presence is required to give evidence etc., and by S. 32 the Court is given power to enforce the attendance of such persons for that purpose by imposing fine. In other words fine can be imposed only on a person who is required to attend the Court in connexion with a case and does not appear in obedience to the summons of the Court and not on a person who after failure to attend on the date for which he was summoned is not required to give evidence etc. and has not been called upon to appear on a subsequent date. [P 853 C 2, P 854 C 1]

*** (d) Civil P. C., O. 16, R. 10 (2)—Court can issue proclamation only when evidence or document is material.**

The Court can issue proclamation under R. 10 (2) only on being satisfied that the evidence

of the witness or the production of the document is material and that he has without lawful excuse failed to attend or produce the document. [P 854 C 1]

(e) Interpretation of Statutes — Proper course is to examine language and find out natural meaning — Judge should not go outside the letter of enactment according to its true construction.

It is a well settled rule of interpretation that where a question arises as to the construction of the particular provision of the statute, the proper course is to examine the language of the Act and to find out its natural meaning. If the meaning is plain it is not permissible to give a go-by to that meaning simply on the ground that that meaning would lead to undesirable results.

[P 854 C 1]

S. B. Johari and *Ram Sarup* — for Applicant.

Uma Shankar Bajpai — for the Crown.

Judgment.—This application in revision is directed against an appellate order of the District Judge of Pilibhit, affirming an order of the learned Munsif of Pilibhit by which that officer imposed a fine of Rs. 50 on the applicant under S. 32, Civil P. C.

The applicant was summoned as a witness in a civil suit by the plaintiff of that suit. The summons was duly served on him and he was required to attend the Court on 19th May 1927, but he failed to appear on that date. The plaintiff filed an application that, before the evidence is recorded, arguments be heard on a question of law that called for determination in the case. This application was granted and the Court decided the case on a preliminary point and no evidence was recorded.

The learned Munsif called on the applicant to show cause why he should not be fined under S. 32, Civil P. C. The applicant filed a written statement embodying the reason for his failure to attend the Court on 19th May 1927, and prayed that he be excused for having disobeyed the summons. The learned Munsif, however, was disposed to take a serious view of the matter because the applicant :

"is a lawyer and is expected to care for law more than an ordinary man"

and passed the order referred to above.

The applicant filed an appeal in the Court of the District Judge. In appeal before him it was argued that there was sufficient cause for the applicant's failure to appear in Court in obedience to the summons and that in any case, without a previous order of attachment under O. 16, R. 10, the learned Munsif had no jurisdiction to impose fine on the petitioner. The learned Judge came to the conclusion that no sufficient cause had been made out by the petitioner for his failure to attend the Court on 19th May 1927. This finding of the learned Judge is a finding on a question of fact and cannot be, and has not been assailed, before us.

In support of the argument that the learned Munsif had no jurisdiction to pass the order, reliance was placed on behalf of the applicant on two cases decided by the Calcutta High Court viz. : *Ram Gopal* v. *Secy. of State* (1) and *Ashutosh Mullick* v. *Secy. of State* (2). Both are single Judge decisions and in those cases it was held that no order can be passed under R. 12, O. 16, unless there has been a previous order of attachment under R. 10, O. 16. The learned Judge after noticing the fact that "no distinction can be founded upon the fact" that the order was passed by the Munsif under S. 32 and not under O. 16, R. 12 of the Code, proceeded to examine the provisions of O. 16, Rr. 10 and 12, and came to the conclusion .that a Court has jurisdiction to pass an order imposing a fine under S. 32 and O. 16, R. 12 of the Code, even though there has been no previous order for attachment. He gave the following two reasons for not following the decisions of the Calcutta High Court. In the first place he pointed out that as attachment under Cl. (3), R. 10 is to be an attachment of property of the witness:

"to such an amount, not exceeding the amount of the costs of attachment and of any fine which may be imposed under R. 12,"

it follows that

"imposition of fine under R. 12 takes place before the order of attachment under R. 12."

The second reason assigned by him was that the wording of R. 12 by which the Court :

"is authorized to order the property of the witness to be attached and sold, or, if it has already been attached under R. 10 then to be sold,"

confirms the view that the fine may be imposed even in cases where there has been no attachment.

This application was put up for hearing before a learned Judge of this Court and his attention was drawn to the case

(1) [1918] 31 C.L.J. 363=55 I.C. 425.
(2) [1918] 57 I.C. 302.

of *Peta Nagayya, In re.* (3), in which it has been held that neither the issue of a proclamation, nor an order for attachment of property under R. 10, O. 16, Civil P. C., is a condition precedent to the imposition of a fine under R. 12 and he, in view of the conflict between the decisions of the Calcutta and the Madras High Courts, has referred this case to a Bench of two Judges.

The learned counsel for the applicant has, on the authority of the Calcutta decisions, argued that the order of the learned Munsif was without jurisdiction and, the learned Government Advocate has supported the order on the grounds assigned by the learned District Judge.

After giving the matter our best consideration, we have come to the conclusion that the argument of the learned counsel for the applicant is well founded and ought to prevail.

The Code of Civil Procedure consists of that which is termed the "body of the Code" and of the rules. The body of the Code is fundamental and creates jurisdiction, while the rules lay down the mode in which that jurisdiction is to be exercised. The body of the Code has to be read in conjunction with the particular provisions of the rules. The provisions relevant to the matter before us are to be found in Ss. 30 and 32, in the body of the Code and in Rr. 10, 11 and 12 of O. 16. S. 30 gives jurisdiction to the Court to issue summonses to persons whose attendance is required either to give evidence, or to produce documents etc, and S. 32 vests the Court with jurisdiction to issue a warrant for the arrest of the witness, or to attach and sell his property, or to impose a fine upon him, or to order him to furnish security for his appearance. The mode in which the jurisdiction so vested in Court is to be exercised is indicated by O. 16. It follows therefore, that the jurisdiction to impose fine can only be exercised in the manner laid down by O. 16.

We, therefore, proceed to examine the provisions of the relevant rules of that order. The procedure to be followed by a Court, where a witness fails to comply with a summons, is provided for by R. 10 and it is laid down by sub-Cl. (2) of that rule that when the Court is satisfied that the evidence of the witness or the production of the document that he has been called upon to produce is material, and that the witness has, without lawful excuse, failed to appear or to produce the document in compliance with the summons or has intentionally avoided service, the Court may issue a proclamation requiring him to attend to give evidence or to produce the document and by Cl. (3) of that rule the Court is further empowered :

"in lieu of or at the time of issuing such proclamation or at any time afterwards"

to issue a warrant for the arrest of the witness and

"make an order for the attachment of his property to such an amount as he thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under R. 12."

Rule 11 has reference only to those cases in which an order of attachment has been passed. Then comes R. 12, which provides that :

"the Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such a fine not exceeding Rs. 500 as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under R 10, be sold for the the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any."

In the case of *Ram Gopal* v. *Secretary of State* (1) a learned Judge of the Calcutta High Court held that the Court can only proceed under R. 12 where there has been previous order of attachment of property under R. 10, and repelled the contention that R. 12 must be read immediately after Cl. 1, R. 10, that is, that a Court has jurisdiction under R. 12 to impose a fine on a witness who has failed to obey the summons issued by the Court though the Court has not passed an order of attachment. As already stated, to the same effect is the decision of another learned Judge of the same High Court in *Hosan Ali Bepari* v. *Emperor* (4). On the other hand two learned Judges of the Madras High Court in *Peta Nagayya, In re* (3), held that a Court has jurisdiction under R. 12 to impose a fine on a witness simply on the ground of the failure of the witness to obey the summons of the Court, and that it is not at all necessary for the exercise of jurisdiction under that rule to issue a proclamation or to

(3) A.I.R. 1925 Mad. 1247=48 Mad. 941.

(4) [1918] 24 C. W. N. 624=57 I. C. 101=21 Cr. L. J. 581.

issue a warrant or pass an order for attachment of property under Cls. 2 and 3, R. 10. The learned Judges were of opinion that:

"to say that a Judge cannot fine a witness for disobedience of summons unless the preliminaries are first gone through of attaching his property or issuing a proclamation against him is to put an unnecessary limitation on the powers of Court to deal with the refractory witnesses."

There is no decision of this Court to guide us in the present matter but, on an examination of the provisions of Ss. 30 and 32 and of O. 16, Rr. 10 and 12 we are, with all respect, unable to agree either with the decisions of the Calcutta High Court or with the decision of the Madras High Court.

In our judgment the Court can only proceed under R. 12 when the provisions of Cl. 2 or Cl. 3, R. 10, have been complied with. In other words fine can be imposed on a witness under R. 12 only where the Court has already issued a proclamation, calling upon the witness to attend to give evidence or to attend to produce the document, or has issued a warrant of arrest or passed an order for attachment of property. The words "such a person" in R. 12 clearly have reference to the person to whom proclamation has been issued under Cl. (2), R. 10, or against whom proceedings have been taken under Cl. (3), R. 10 and who does not appear, or on appearance fails to satisfy the Court that he had lawful excuse for not obeying the summons of the Court. The reasons assigned by the learned Judges of the Madras High Court for holding that the words "such person" in R. 12 have reference to a person to whom a summons has been issued and who has failed to attend does not commend itself to us. R 12 provides not only with respect to cases where the witness does not appear but also with respect to cases where the witness appears but fails to satisfy the Court that he had lawful excuse for not appearing. To accept the interpretation put by the learned Judges of the Madras High Court would be to totally ignore the following words in R. 12: "or appears but fails to satisfy the Court."

The words quoted above cannot have reference to a witness who has failed to attend the Court on the date for which he was summoned to appear, but have application to the case of a person who having failed to obey the summons of the Court appears on a subsequent date to show cause for his failure and, therefore, the words 'such person' in R. 12 cannot have reference to a person who has not been called upon by a proclamation to attend the Court on a particular date, or against whom proceedings have not been taken under Cl. 3, R. 10

We are further of opinion that if a proclamation has been issued under Cl. 2 the passing of an order for attachment, or the issue of a warrant under Cl. 3, R. 10, is not essential to vest the Court with jurisdiction to proceed under R. 12, but if no proclamation has been issued then the Court cannot impose a fine under R. 12 without either issuing a warrant or passing an order for attachment. The issue of a warrant or the order of attachment contemplated by Cl (3) is entirely in the discretion of the Court, and may be made to take the place of proclamation or may be in addition to the issue of proclamation.

In short the conclusion at which we have arrived is as follows:

An order under R. 12 can be passed only:

(1) If a proclamation has been issued under Cl. (2), R. 10, or;

(2) If no proclamation has been issued, either a warrant has been issued for the arrest of the witness or an order for attachment of his property has been passed or;

(3) If a proclamation as well as a warrant has been issued or an order for attachment of the property of the witness has been passed.

If neither of these conditions are satisfied the Court has no jurisdiction to impose fine under R. 12.

It further appears to us that the power of the Court to issue a proclamation or a warrant, or to pass an order for attachment, or to impose a fine is circumscribed by other limitations. By S. 30 the Court is authorized to issue summonses to persons only when their attendance is required to give evidence etc., and by S. 32 the Court is given the power to enforce the "attendance" of such persons for that purpose by imposing a fine. In other words fine can be imposed only on a person who is required to attend the Court in connexion with a case and who does not appear in obedience to the summons of the Court, and not on a person

who after his failure to attend on the date for which he was summoned, is not required to give evidence or produce a document and has not been called upon to appear on a subsequent date. In the present case, as we have already stated, the applicant's attendance was not at all necessary for the purpose of giving evidence as the case was decided on a preliminary point.

Equally so, the Court can issue a proclamation under Cl. (2), R. 10 only on being satisfied that the evidence of the witness or the production of the document which he is called upon to produce is material and that he has, without lawful excuse, failed to attend or to produce the document.

Before closing our judgment we would like to say a few words as regards the observations of the learned Judges of the Madras High Court that to interpret the sections and rules noted above as we do must lead to:

"a great and unnecessary limitation on the powers of Courts to deal with refractory witnesses."

It is well settled rule of interpretation that, where a question arises as to the construction of the particular provisions of a statute, the proper course is in the first instance to "examine the language of the Act and to ask what is its natural meaning." If the meaning is plain, it is not permissible to give a go-by to that meaning simply on the ground that that meaning would lead to undesirable results. In our judgment it is not within the province of a Judge to disregard or to go outside the letter of the enactment according to its true construction

For the reasons that we have given above we allow this application, set aside the order imposing fine on the applicant and direct that the fine, if paid, be refunded to him.

R.M./R.K. *Application allowed.*

* * A. I. R. 1929 Allahabad 854

SULAIMAN AND PULLAN, JJ.

Uma Shankar Lal and *others*—Plaintiffs—Appellants.

v.

Mahabir Prasad and *others*—Defendants—Respondents.

First Appeal No. 400 of 1926, Decided on 26th June 1929, against decree of Dist. Judge, Ghazipur, D/- 27th April 1926

*** * (a) Hindu Law—Alienation—Head of joint Hindu family cannot transfer by gift immovable property to stranger unless for spiritual benefit.**

A head of joint Hindu family has no authority to transfer a part of family immovable property by way of gift to a person who is not a near relation of his, the transaction not being for any pious purpose or for spiritual benefit, even though he is under obligation to the donee (the donee having educated and helped donor's sons in difficulties.) [P 855 C 1]

(b) Transfer of Property Act, S. 51—Transferee of immovable property making improvements in good faith is entitled to compensation on eviction.

Where transferees spend considerable sums in overhauling a house, acting in good faith and on assurance that they are entitled to it, it is just and equitable that they should be paid the amount spent, on eviction. [P 855 C 2]

(c) Hindu Law—Alienation—Gift declared void—Compensation cannot be awarded in lieu of it.

Either a gift is good and binding upon the family or it is not. But where once the gift has been declared to be void the donor's heirs cannot be deprived of their property and compelled to take compensation for it. [P 855 C 1]

N. P. Asthana—for Appellants.

Janki Prasad—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for recovery of possession of a house in the city of Ghazipur. On the finding of the Court below this house belonged to the ancestor of the plaintiffs Munshi Lachhman Prasad. Lachhman Prasad was Kayasth by caste and had a Rajput girl as his wife or mistress from whom a son Dip Narain was born. In either view he was an illegitimate son. He died leaving a son Mahabir Prasad, defendant 1. The plaintiffs are the sons of Ramapat Lal, a grandson of Lachhman Prasad who jointly with his nephew Dip Narain Lal executed a deed of gift of this house on 5th June 1913 in favour of Mahabir Prasad. At that time no son had been born to Dip Narain Lal but Ramapat Lal had sons alive who were minors. The plaintiffs' case was that the family was joint and that the gift was without authority. The plea taken in defence was that this house was acquired by Lachhman Prasad for his Rajput mistress and had been in occupation of the defendants all along. In the alternative it was pleaded that the defendant had spent a large sum of money in overhauling the house which could not be given back to the plaintiffs without payment of compensation.

The learned Subordinate Judge has found that Dip Narain Lal and Ramapat Lal were separate, that the house had not been acquired for the Rajput girl but was a part of the ancestral property and that the defendant had overhauled the house and spent Rs. 1,050 on it. He, however, held the plaintiffs were not entitled to possession of any portion of the house but should be given Rs. 250, half of the value of the house at the time of gift.

The plaintiffs have appealed and the defendants have filed cross-objections. The evidence in favour of the finding that Dip Narain Lal and Ramapat Lal were separate is convincing and we see no reason to disturb that finding. It is also clear that the house was a part of the family property and therefore Dip Narain Lal had a half share in this house. At the time when he made the transfer he had no other member of his joint family in existence and was fully competent to transfer it. It is, therefore, obvious that the plaintiffs are not entitled to claim the half share of Dip Narain Lal.

As regards the remaining half share in which the plaintiffs have jointly an interest the order of the Court below cannot be supported. Either the gift was good and binding on the family or it was not. The plaintiffs cannot be deprived of their immovable property and compelled to take compensation for it.

It seems to us that Ramapat Lal as a head of a joint Hindu family had no authority to transfer a part of the family immovable property by way of gift to a person who was not a near relation of his, the transaction not being for any pious purpose or for spiritual benefit. No doubt the recitals in the document and the evidence suggest that Rampat Lal felt himself under an obligation to Mahabir Prasad inasmuch as the latter had educated his sons for a long time and had been helping them in their difficulties. It is also a fact that Mahabir Prasad and his family had been occupying this house for a very long time. In spite of all this the Hindu law does not authorize the head of a joint family to make a gift in view of such considerations. The alienation therefore cannot be upheld.

The learned Subordinate Judge has taken a further view that inasmuch as the house was actually overhauled the transaction might be treated as a license which has ceased to become revocable because of the permanent constructions that have been made. The deed does not purport to grant a license to the donee, nor was it ever the case of the donee that he had been given permission to build a house upon this land. This view therefore cannot be accepted.

At the same time it is quite obvious that the house at the time was in a tottering condition and dangerous to live in. Acting in good faith and on the assurance received from Ramapat Lal and his nephew the defendants believed that they were entitled to retain this house and spent considerable sums in overhauling it. This finding of the Court below is that Rs. 1,050 in all were spent on it.

We, therefore, think that it will be just and equitable to order that the plaintiffs should be allowed the possession of half the house on payment of half the amount spent by the defendants for improvements, that is to say Rs. 525.

We accordingly allow this appeal and modifying the decree of the Court below decree the claim of the plaintiffs for recovery of possession of half the house on payment of Rs. 525 within three months from this date. The rest of the claim would be dismissed.

In view of our findings in the appeal the cross-objections have no force. In view of the special circumstances of this case we direct that the plaintiffs should bear their own costs throughout and pay half the costs of the defendants. If the amount is not paid within the time fixed the whole suit shall stand dismissed with costs in both Courts.

R.M./R.K. *Decree modified.*

A. I. R. 1929 Allahabad 855

MEARS, C. J., AND BENNET, J.

Nathu—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 382 of 1929, Decided on 11th June 1929, against order of Sess. Judge, Etah, D/- 6th April 1929.

Evidence Act, S. 26—Statement made in presence of police officer is not admissible.

A statement made in the presence of a Sub-Inspector and a constable who had the accused under arrest at the time and not re-

corded by Magistrate under S. 164, Criminal P.C., is not admissible in evidence. [P 856 C 2]

Uma Shankar Bajpai—for the Crown.

Judgment.—This is an appeal by one Nathu Brahmin against a sentence of death passed on him under S. 302, I.P.C., and a reference for confirmation of that sentence. Nathu has not been represented by counsel before us because it was reported that he had sufficient means to employ counsel. He has not done so, but the case has been very fairly placed before us by the learned Government Advocate.

The facts are that the deceased Munshi and his brother Kashi Ram who has become a Sadhu owned a half share in an occupancy holding in Sarauth village and the accused Nathu owned the other half share. Nathu formerly lived in a village about a mile from Sarauth called Jasrathpur and in that village also lived one Mt. Rainka who was married to Baldeo Brahmin, and the mother of Baldeo Brahmin was a sister of the mother of Nathu. Baldeo died when Mt Rainka was a young girl of about 15 or 16 years of age and after his death, she states that she became the mistress of both the accused and the deceased. Subsequently, the accused and deceased removed her to the house in mauza Sarauth and lived with her to the knowledge of each other. In September 1927 Munshi disappeared, and subsequently his brother Kashi Ram on his return to the village made enquiries from the accused as to what had happened to Munshi. The accused made evasive replies and in consequence of this Kashi made several petitions to the District Magistrate, of which two have been placed on the record. In these applications Kashi Ram accused Nathu and other persons of murdering Munshi. Investigations were made, but the Sub-Inspector was not able to find any trace until 10th October 1928. On that date the Sub-Inspector received information to the effect that the bones of the deceased would be found buried in an old well a few paces from a house where deceased and accused had lived in Sarauth. That information was apparently derived from Ram Narain and Umrao Singh and they in turn had derived that information from the witness Mt. Gomti who is the aunt of the deceased and the accused.

Mt. Gomti some two or two and a half months previously had come to stay with the accused in the house in Sarauth and her suspicions had been aroused by the fact that this well had been filled in and that she found the accused putting more earth on it when it subsided during the rains. The Sub-Inspector excavated the well and found in it a number of human bones which have been stated by an expert to be those of a young man and to have been buried for a number of months. The expert found injuries on the bones—one cut on the left lower jaw and another cut on the cervical vertebrae. These two injuries could have been caused by the chopper which belonged to Mt. Rainka. The Sub-Inspector states that the accused handed over this chopper to him on 11th October 1928. The Sessions Judge has allowed evidence to be given of a statement or confession alleged to have been made by the accused on that date to a Deputy Magistrate who is a resident of the village of Sarauth and who was then on leave. As that statement was made in the presence of a Sub-Inspector and a constable who had the accused under arrest at the time, we consider that that statement is not admissible in evidence. No record was made of the statement under S. 164, Criminal P. C. We note, however, that the learned Judge has not laid much stress on this confession because he considers that the other evidence on the record is sufficient for the conviction of the accused. That other evidence consists mainly in the very full and detailed statement made by Mt. Rainka. In this she describes how the accused struck the deceased with the chopper two blows at midnight and killed him and how he subsequently disposed of the body in the blind well two nights after the murder. We consider that that statement of Mt. Rainka is worthy of credit. In addition to this evidence there is also the conduct of the accused. After Munshi disappeared, the accused made no report whatever of the disappearance. He falsely represented to Munshi's brother Kashi Ram that Munshi had gone to look for Kashi Ram ; and the accused disposed of various articles of property such as a harmonium, books and other things which had belonged to the deceased.

For all these reasons we consider that the case has been brought home to the appellant Nathu beyond any doubt whatever and we confirm the conviction

under S. 302, I. P. C., and the sentence of death. The appeal is dismissed.

R.M./R.K. *Appeal dismissed*

A. I. R. 1929 Allahabad 857

MEARS, C. J. AND BENNET, J.

Sayiduddin—Applicant.

v.

Abdul Bari—Opposite Party.

First Appeal No. 4 of 1929, Decided on 8th July 1929 from an order of Dist. Judge, Moradabad, D/- 21st December 1928.

Guardians and Wards Act, S. 17—Guardianship—Right to custody of minor child depends upon circumstances concerning welfare of minor.

The circumstances that the mother of the minor girl has been forced to leave the house of the person claiming guardianship, that there has been litigation between them, that the person claiming guardianship is the legal heir of the minor girl and that the minor girl wishes to remain with the person who helped her mother and for whom she has life-long affection, make it desirable that girl should remain in the custody of the person with whom she has so long stayed. [P 857 C 2]

M. A. Aziz—for Applicant.

Mushtaq Ahmad—for Opposite Party.

Jugdent.—In this case the interests of the minor must be our first consideration, and we can'have no doubt that the interests of the minor can only be protected and her life continue to be happy by maintaining her in the house where she was a child of nine months old. The position is that Abdul Bari had a son named Akhtar Husain. He married Mt. Habiba Bano, and he having died on 9th January 1920, Abdul Bari was guilty of some conduct, not exactly specified, towards Mt. Habiba Bano which made it necessary for her brother-in-law to interfere and apply to the Magistrate under S. 100, Criminal P. C. for an order for her protection. The evidence is that at that time Abdul Bari was proposing to marry Habiba Bano, the widow, to some undesirable person. It appears that she had some property. Sayiduddin having obtained a warrant for her removal from the house of Abdul Bari, the warrant was executed and she came over to live with her sister who had married Sayiduddin. Later she married Fakhruddin the brother of Sayiduddin and he died in May 1925. Thereupon she married Sayiduddin, and she herself died on 13th January 1928. Throughout all this period the minor child, who is the subject of this litigation, had lived with her mother or with Sayiduddin and Fakhruddin. Immediately on the death of Habiba Bano, Abdul Bari became active. He has been made a guardian of the property of the minor and to that Sayiduddin offers no objection, but he strenuously resists Abdul Bari being made a guardian of the person of the minor on the ground that he, throughout the child's life, has stood in the position of a father to her, and further that this child, now of about nine years of age, herself wishes to remain with Sayiduddin, and there is the further grave objection that Abdul Bari is the legal heir of this child and would become the owner of her property in the event of her untimely death.

We think that these considerations are quite sufficient for us to reverse the decision of Mr. Hunter, who did not, in our opinion, sufficiently consider the circumstances under which Habiba Bano was forced to leave the house of Abdul Bari, nor the circumstances of the litigation which Habiba Bano and Abdul Bari had engaged in, nor the circumstances that this child can have no affection whatever for Abdul Bari, but has a life-long affection for Sayiduddin and the final circumstance that Abdul Bari is the legal heir of the minor. All these circumstances in our opinion make it desirable for us to order that the child do remain in the custody of Sayiduddin.

In view of the circumstance, which Mr. Mushtaq Ahmad has mentioned, that his client proposes to carry on litigation as against Sayiduddin, we deem it desirable to call the attention of the District Judge to this circumstance, and we order that Abdul Bari, as guardian of the property of this minor girl, shall furnish accounts to the District Judge at no longer interval than twelve months and that he is to provide either Rs. 1,000, in cash as security, or any other security in the sum of Rs. 1,000, so that if he indulges in reckless litigation the minor's estate is not to suffer.

We, therefore, set aside the decision of Mr. Hunter, and whilst declaring Abdul Bari to be the guardian of the property to the extent that we have mentioned, we order that the custody of the child do remain with Sayiduddin. We have no

knowledge of the annual income of this property, and therefore we direct the District Judge to look into this matter and to summon the parties before him and to make such order as is in his opinion fair and proper for payment of the maintenance of the minor to Sayiduddin.

There appears to be Rs. 2,000, in cash and a sum of Rs. 1,000 dower-debt, although whether that item is actually an item in expectancy or not is not clear, but at all events if there is any considerable sum in cash, the District Judge will no doubt order it to be paid into Court and will invest it in Government securities.

The cross-objection is dismissed.

In the circumstances we make no order as to costs.

R.M./R.K. *Order accordingly.*

A. I. R. 1929 Allahabad 858

YOUNG AND SEN, JJ.

Santi Lal and *another*—Insolvents—Appellants.

v.

Raj Narain and *another* — Respondents.

First Appeal No. 14 of 1928, Decided on 15th July 1929, from order of Dist. Judge, Agra, D/- 12th September 1927.

(a) Civil P. C., O. 43, Allahabad High Court Rules Rr. 2 and 3—Filing of formal order after limitation does not bring appeal outside limitation so long formal order is filed before hearing.

The filing of the formal order outside the limitation period for the filing of an appeal does not bring the appeal itself outside limitation. It is sufficient if the order is filed before the hearing. [P 858 C 2]

(b) Provincial Insolvency Act (1920), S. 42 (1) (a)—Where insolvent gives no evidence of discharge onus of which is on him, no order of discharge can be passed.

Where it is clear that the bankrupt is not paying a sum equal to eight annas in the rupee on the amount of unsecured liabilities, the onus is upon him according to S. 42 (1) (a) to show that the reason for this state of affairs had arisen from circumstances for which he could not be justly not responsible. Where no evidence to discharge the onus is given, the Court has no jurisdiction to pass an order of discharge. [P 859 C 1]

B. Mallik—for Appellants.

S. K. Dar—for Respondents.

Judgment.—In this case Sant Lal was adjudicated a bankrupt on 26th March 1926. He was ordered as is usual to apply for discharge within six months. On 18th October 1926, he applied for his discharge. Notice of this application was served on Raj Narain, the only creditor. On 13th December 1926, no objection having been received, or no one appeared on behalf of the objector, the insolvency Court passed an order of discharge. On 15th January 1927, Raj Narain filed an appeal. This appeal was not accompanied by a copy of the formal order which had been drawn up on 13th December 1926. On 16th March 1927, Sant Lal objected to the appeal on the ground that it was not accompanied by a formal order. On 21st March 1927, Raj Narain applied for a copy of the formal order and on 26th March, he obtained it and filed this copy. On 21st April 1927, Raj Narain, the appellant, took the point that the notice of the application to discharge was not served upon him. The District Judge directed an issue on this point to the insolvency Court, and, on 15th July 1927, the insolvency Court found that notice had been served. On this being returned to the District Judge, the District Judge allowed the appeal and annulled the order of discharge. The bankrupt comes up here in appeal. The first point taken by Mr. Malik on behalf of the appellant is that a copy of the formal order not having accompanied the appeal and not having been filed until the 26th March 1926, the appeal itself therefore is out of time owing to the operation of limitation.

We do not think it is possible to agree with him on this point. There is no authority as far as we are aware which lays down that the filing of the formal order outside the limitation period for the filing of an appeal, which was itself filed within time, will bring the appeal itself outside limitation. So long as the formal order is filed before the hearing we consider it to be sufficient. It is only when the matter comes up for hearing without a formal order that the rule of this High Court applies i. e. O. 43, Rr. 2 and 3, Civil P. C. The second point was that as the notice had been duly served upon Raj Narain he ought not now to have been allowed to agitate the matter afresh, but it is pointed out by the learned counsel for the respondent that S. 42, Prov. Ins. Act has not been complied with by the insolvency Court. Raj Narain could certainly appeal on a

point of law against an ex parte decree against him. It was clear from the application for discharge itself that the bankrupt was not paying a sum equal to eight annas in the rupee on the amount of the unsecured liabilities. Therefore the onus was upon him according to S. 42 (1) (a) to show that the reason for this state of affairs had arisen from circumstances for which he could not be justly held responsible. In the proceedings before the insolvency Court Sant Lal gave no evidence to discharge the onus which was upon him. The proceedings before the insolvency Court were therefore undoubtedly faulty and the insolvency Court had no jurisdiction to pass the order which it in fact did. It appears to us that the proper order to pass in this case is that the matter be remanded to the insolvency Court for its decision, after having taken the necessary evidence, as to whether the fact that the insolvent's assets are not equal to eight annas in the rupee is due to circumstances over which he cannot be justly held responsible, This being so both the appellant and the respondent should have an opportunity of leading evidence on this matter. The appeal is allowed and the order for remand as indicated above is made. Costs will abide the result.

R.M./R.K. *Case remanded.*

A. I. R. 1929 Allahabad 859

SULAIMAN AND PULLAN, JJ.

Gadhu Singh and *another*—Plaintiff—Appellants.

v.

Bansgopal and *others* — Defendant—Respondents.

Second Appeal No. 1754 of 1927, Decided on 11th July 1929, against decree of Addl. Sub-Judge, Banda, D/- 8th September 1927.

(a) Agra Pre-emption Act (1922), S. 20—If gift of property in dispute to vendees is liable to be defeated they do not get indefeasible right.

Every gift by a widow is not necessarily defeasable. If it is for the spiritual benefit of the soul of her deceased husband and is allowable under Hindu Law, it may be good and binding on the reversioners and may therefore be indefeasible. If the gift of property in dispute to vendees is liable to be defeated, the vendees do not acquire an indefeasible right : *A. I. R.* 1926 *All.* 680, *Expl.* ; *A. I. R.* 1927 *All.* 575, *Ref.* [P 860 C 2]

(b) Agra Pre-emption Act — Pre-emptor can show real nature of alienation.

Pre-emptor cannot be prevented from raising the question that the transaction which is ostensibly one of gift is in reality one of sale. [P 860 C 2]

(c) Hindu Law—Suit by reversioners if collusive does not bind reversioner succeeding to estate.

A suit by reversioners which is dismissed without evidence being adduced, if proved to be collusive, being instituted with a view to create evidence in favour of the donees does not bind the reversioner who happens to succeed to the estate. [P 860 C 2]

N. P. Asthana—for Appellants.

P. L. Banerji—for Respondents.

Judgment—Second Appeal No. 1754 of 1927 arises out of a suit for pre-emption and is connected with Second Appeal No. 1755 of 1927. It appears that on 15th and 18th June 1925, two sale deeds were executed by the vendors in favour of the vendees and two separate suits for pre-emption were instituted on 15th June 1926, by the present plaintiffs. There were certain other rival suits for pre-emption with which we are not now concerned. While these suits were pending the vendee on 19th November 1926, obtained a deed of gift of a plot of land from a Hindu widow and the deed described them as the gurus of her and her deceased husband. A plea was raised on the strength of this deed of gift that the plaintiffs had ceased to have preference as against the vendees. On 24th February 1927, the present plaintiffs instituted a third suit to pre-empt this last mentioned transaction alleging it to be a sale.

We may also mention that on 13th December 1926, a suit was instituted by the reversioners of the deceased husband of the Hindu widow, the donor but on 25th February 1927, it was dismissed on their statement that they did not want to proceed any further with the case. The suit brought to pre-empt the property covered by the deed of gift is still pending in the first Court because it has been stayed and the question whether the transaction was a sale or gift has not yet been decided in that suit.

Both the Courts below have dismissed the plaintiffs' suit holding that the deed of gift taken by the vendees from the Hindu widow who is still alive is good and not defeasible and therefore the plaintiffs cannot succeed as against the vendees. There is no clear finding whether the transaction of 19th November

1926, was in reality a sale or it was a genuine gift. The lower appellate Court has thought that it is not open to the plaintiffs in this suit to raise that point. There is also no clear finding whether the deed of gift made by the Hindu widow in favour of her alleged gurus was for the spiritual benefit of her deceased husband and was in respect of such a fractional share in the estate as to be binding on the reversioners. The lower appellate Court has dismissed the suit on the main ground that the vendees having taken the gift from a Hindu widow who is still alive have acquired an indefeasible right for the time being and can defeat the plaintiffs. The learned Judge relies on the case of *Naurang Rai* v. *Ram Sumer Rai* (*A. I R.* 1926 *All.* 680). That case was distinguished in the subsequent case in *Deo Narain Singh* v. *Ajodhya Prasad* (1).

The last mentioned case is a clear authority for the proposition that the word 'indefeasible' in S. 20, Pre-emption Act, does not merely mean liable to pre-emption but means liable to be defeated and that there seems to be no reason why the process by which the vendees attain this position should be different in the cases provided for in Ss. 19 and 20 respectively. In this latter case it was supposed that the facts in *Naurang Rai* v. *Ram Sumer Rai*, were similar and that in that case it was held that the vendees could defeat the claim for pre-emption on having taken a gift from a Hindu widow. The facts of *Naurang Rai's* case, however, were not so strong as was supposed. It was a converse case in which the plaintiff was claiming pre-emption on the strength of his rights acquired under a deed of gift from a Hindu widow. The question which the Bench had to consider was whether he was a cosharer within the meaning of S. 4, sub-Cl. 1 of the Act and not whether the transfer in his favour was defeasible or indefeasible under S. 19. Thus the question was entirely different and it was merely laid down that having acquired the rights and interest of a Hindu widow who was alive and having got himself entered as a proprietor he was a cosharer entitled as a proprietor to any share because the widow represented the estate for the time being and could validly transfer the proprietary interest to him during her lifetime. That case is not authority for the proposition that a vendee taking a gift from such a widow after his sale deed takes an indefeasible interest while the widow is alive so as to defeat a claim for pre-emption.

We think that in view of the definition of the word 'indefeasible' given in *Doo Narain Singh's* case mentioned above, if the gift is obviously liable to be defeated the vendee has not acquired an indefeasible right.

It does not, however, follow that every gift made by a Hindu widow is necessarily defeasible. If it is for the spiritual benefit of the soul of a deceased husband and is to an extent allowable under the Hindu Law, it may be good and binding on the reversioners and may therefore be indefeasible.

We also think that the learned Judge was not right in preventing the plaintiffs from raising the question that the transaction which is ostensibly one of gift was in reality one of sale. It may be that soon after the gift was made the plaintiffs were not in a position to assert that it was a transaction of sale and that they discovered the fraud subsequently. If that be the case it would be unfair to prevent them from raising the question.

The defendants rely on the fact that the suit brought by the reversioners for the cancellation of this gift was allowed to be dismissed and urge that the suit being a representative suit brought on behalf of and in the interest of the whole body of reversioners has the effect of a binding character on all the reversioners and the suit having been dismissed it is no longer open to any reversioner to say that the gift was not valid. The suit, however, was filed about the time when these pre-emption suits were pending and it was allowed to be dismissed without any evidence having been adduced. If the suit was of a collusive nature it would not bind the reversioner who happens to succeed to the estate.

We therefore think that we cannot dispose of the appeal finally without clear findings on the three following issues :—

(1) Whether the deed of gift dated 19th November 1926, was really a sale transaction or a genuine gift ?

(2) Were the proceedings in suit No. 866 of 1926, filed on 13th December 1926 and allowed to be dismissed on 25th Feb-

(1) A.I.R. 1927 All. 575 =49 All. 696.

ruary 1927, collusive with a view to create evidence in favour of the donees ?

(3) Whether the gift made by the Hindu widow to the vendees was for the spiritual benefit of her deceased husband and whether it was of such a fractional share as is permissible under the Hindu law ?

Parties will be at liberty to adduce fresh evidence on the issues remitted. The findings will be returned within three months and on return of the findings the usual 10 days will be allowed for objections.

R.M./R.K. *Findings ordered.*

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* A. I. R. 1929 Allahabad 861

BENNET AND IQBAL AHMAD, JJ.

Kora Mal and *another* — Plaintiffs—Appellants.

v.

Raghubir Lonia and *others* —Defendants—Respondents.

Second Appeal No. 1344 of 1926, Decided on 17th July 1929, against decree of Addl. Sub-Judge, Jaunpur, D/- 20th April 1926.

(a) Civil P. C., O. 34, R. 1 — Attaching creditor has no right to be made party in mortgage suit—His attachment creates no lien or title.

An attaching creditor has no right to be made a party in a mortgage suit because his attachment creates no lien or title, but simply prevents alienation of the property attached in accordance with the provisions of S. 64. [P 861 C 2]

(b) Civil P. C., S. 100—Proper effect of proved fact is question of law—Appellate Court can draw inference from facts admittedly proved.

The proper effect of a proved fact is a question of law. It is open to the appellate Court to draw inference of fact of fraud from circumstances proved in a particular case : *A. I. R.* 1927 *P. C.* 102, *Rel. on.* [P 862 C 1]

*** (c) Civil P. C., O. 9, R. 9—Mortgagees fraudulently allowed suit to be dismissed for default—Attaching creditors are not bound by dismissal.**

When the mortgagees fraudulently allow their suit for possession to be dismissed for default the attaching creditors are not bound by the dismissal. A fresh suit for possession by the attaching creditors who have purchased the mortgagee's rights in the meanwhile against the former defendants is not barred under O. 9, R. 9. [P 862 C 1,2]

S. K. Dar—for Appellants.

Haribans Sahai—for Respondents.

Judgment.—This is a second appeal by the plaintiffs whose decree for possession granted by the Court of first instance has been set aside by the lower appellate Court on the sole ground that the suit of the plaintiffs is barred by O. 9, R. 9, Civil P. C. The facts are as follows :

There was a simple mortgage-deed executed on 6th October 1906, in favour of Ram Dehal, and it was executed by Raghubir on his own behalf and guardian of three minors, Sheojagat, Bharat and Har Lal. As interest was not paid in accordance with the mortgage-bond, Ram Dehal brought a suit No. 27 of 1911 and obtained a decree for possession of half the property. It was held that Raghubir was only entitled to mortgage the half which belonged to him. That decree was obtained in 1911 and possession was delivered to Ram Dehal in 1914, and Ram Dehal remained in possession until his death some time later. Subsequently defendants 4 to 6 Jainandan etc. who are the sons and heirs of Ram Dehal, brought suit No. 436 of 1923 for possession and for sale against defendants 1 to 3 and defendant 7 who represent the mortgagors. This suit was brought on the ground of dispossession after the death of Ram Dehal. During the pendency of this suit the plaintiffs who had obtained a simple money decree against the estate of Ram Dehal attached the mortgagee rights of defendants 4 to 6, on 2nd and 3rd November 1923. On 15th February 1924, the plaintiffs applied to be made parties to the suit, alleging that they feared the suit might be allowed to go by default by collusion of defendants 4 to 6. We may note that an attaching creditor has no right to be made a party in a mortgage suit, because his attachment creates no lien or title, but simply prevents alienation of the property attached in accordance with the provisions of S. 64 Civil P. C. On 27th February 1924 suit No. 436 of 1923 was dismissed for the default of defendants 4 to 6, who were plaintiffs in that suit. Subsequently Jainandan made an application for restoration of that suit, but on the date fixed for hearing his application he was absent and merely sent a telegram asking for adjournment. His application for restoration was, therefore, dismissed. After the dismissal for default on 27th February 1924 the mortgagee rights of defendants 4 to 6 were put up for sale and were purchased by

the present plaintiffs on 28th May 1924 at an auction-sale Having acquired the rights of the mortgagees the present plaintiffs have brought their suit for possession and other reliefs on 15th November 1924. They alleged that they are not bound by the dismissal for default, because the former plaintiffs were acting in collusion with the former defendants. The evidence for fraud and collusion was partly oral and partly circumstantial. The trial Court rejected the oral evidence, but held that the circumstantial evidence was sufficient for the finding of fraud. The lower appellate Court dealt with this question as follows :

"Now I am called on by the respondents' pleader to infer fraud from the very circumstances that the mortgagees Jainandan and others allowed the case to go off for default. I am not prepared to accede to the contentions put forth on behalf of the respondents. For if this were so, so many dismissals for default taking place in civil Courts daily will have to be held to be tainted with fraud and the heirs and representatives of the plaintiffs will have a way open to them to lodge fresh suit and O. 9, R. 9 Civil P. C., will be successfully circumvented."

It was argued that this Court was bound by this finding, as it was a finding of fact. It has been laid down in *Danna Mal* v. *Moti Sagar* (1), at p. 581 of 8 *Lah.* as follows :

"Their Lordships are well aware that questions of law and of fact are often difficult to disentangle. It is clear, however, that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them, in a case like the present, to be a legal inference from fact and not itself a question of fact."

We consider that in the present case it is open to this Court to draw the inference of fraud from the circumstances which are admittedly proved in this case After the rights of the mortgages were attached by the creditors of Ram Dehal on 2nd and 3rd November 1925 the plaintiffs in suit No. 436 of 1923 had no pecuniary advantage to be gained by continuing that suit. Under these circumstances the action of those plaintiffs in failing to appear on 27th February 1924, when the suit was fixed for hearing and failing to be present on the later date when the application for restoration was fixed for hearing, appears to us to be facts which warrant the inference that the action of those plaintiffs in that suit was fraudulent. Accordingly we consider that the circumstantial evidence does prove fraud in the present case. That being so, the appellant-plaintiffs are not bound by the order, dismissing the suit No. 436 of 1923, under O. 9, R. 9, and there is no bar to the present suit. In the appeal before the lower appellate Court, as is shown on p. 19, line 4 of the paper-book, the appellant-defendants confined themselves to two grounds only. One of these grounds in regard to limitation was held in favour of the plaintiffs. We have now held the other ground in favour of the plaintiffs. Accordingly there is no question which remains to be decided by the lower appellate Court. We, therefore, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance for possession to the plaintiffs. The contesting defendants will pay the costs of the plaintiffs in all Courts and bear their own costs.

R.M./R.K. *Decree set aside.*

(1) A. I. R. 1927 P. C. 102 = 8 Lah. 573=54 I. A. 178 (P.C.).

A. I. R. 1929 Allahabad 862

MUKERJI, J.

Chotey and *others*—Defendants—Appellants.

v.

Dal Chand and *another* — Plaintiffs—Respondents.

Second Appeal No. 1913 of 1927, Decided on 5th July 1929, from decree of Addl. Sub-Judge, Bulandshahr, D/- 14th June 1927.

(a) Civil P. C., S. 100—Scope.

The finding whether a right of easement has been acquired is a finding of law and can challenged in second appeal. [P 863 C 2]

(b) Easements Act, S. 8—Scope.

A tenant can acquire an easement against property held by another tenant. [P 864 C 1]

M. A. Aziz—for Appellants.

S. C. Goyel—for Respondents.

Judgment.—This is the defendant's appeal and arises out of the following circumstances. The plaintiffs brought the suit for recovery of Rs. 600, as damages on the allegation that they had a right to irrigate four plots of land namely Nos. 2671, 2672, 2673 and 2674 with the water taken from a well situated in plot 2670, that they had grown potatoes in all the plots except plot 2671, that the defendants, without any rhyme or reason stopped the plaintiffs from

irrigating the potatoe field and that a loss was caused to the plaintiffs. The defence was that the well belonged to the defendants themselves, that the plaintiffs had no right to cultivate their lands with the water of the well, that the defendants themselves had been cultivating the four plots which are now in plaintiff's possession and that the plaintiffs were not entitled to recover any damages.

It will be noticed that the plaintiffs did not explain in the plaint what was the nature of the right which was claimed by them. The learned Munsif held that the plaintiffs' right was in the nature of a customary right and decreed the claim for Rs. 300 only. There was an appeal by the defendants. The learned Subordinate Judge who heard the appeal, reduced the claim to Rs. 200, but otherwise dismissed the appeal. He found that on defendants' own evidence and on the admission of one of the defendants himself the plots in question "had always been" irrigated with the water of the well in question. He modified the decree of the Court below and as regards costs, he directed that the plaintiffs should get their costs proportionate to their success throughout. As regards the defendants he directed that they should get one-half of the costs of the appeal from the respondents.

In this Court it has been contended that the Courts below have entirely missed the fact that the defendants themselves cultivated the plots 2672 to 2674 and irrigation by the defendants themselves with water from their own well could not confer any right of easement on the tenant under whom the defendants cultivated the lands. It appears that the plots were the occupancy holding of two persons Bhola and Ramdei and the plaintiffs got those plots in 1926 by some sort of exchange with those people. If Bhola and Ramdei acquired a right of easement to irrigate the plots 2672, 2673 and 2674 with the water from the well situated in plot 2670, then alone the plaintiffs would be entitled to that right of easement. If it be true that the defendants themselves cultivated the three plots in question with the water from their own well, it will be a matter for consideration whether their act, although extending over more than 20 years, would confer on the principal tenants Bhola and Ramedi a right of easement as against the defendants themselves. This seems to be the most important point in the case but has been entirely missed by the Courts below. There is a cross-objection as regards costs filed by the plaintiffs. It will be time to look into the cross-objection when the whole appeal is decided. For the present, I propose to remit the following issues to the Court below for a finding. I may note that the first Court found that the well in plot 2670 belongs to the defendants and the lower appellate Court has not dissented from this finding.

The issues that I remit are as follows :

1. How long have the plots 2672, 2673 and 2674 been irrigated with water taken from the well in question situated on plot 2670?
2. For what period, out of the aforesaid period of irrigation, the defendants cultivated the aforesaid plots 2672 to 2674?
3. Whether Bhola and Ramdei, the predecessors of the plaintiffs have acquired any right of easement to cultivate the aforesaid three plots out of the water taken from the well in question?

Six weeks are allowed for return of the findings. No additional evidence shall be adduced by the parties. Ten days are allowed for filing objections. On return of the findings, the judgment proceeded). The facts of the case will be found given in my judgment dated 10th April 1929 by which I remanded three issues to the Court below, The learned Subordinate Judge has returned answers to the three issues as follows :

1. The plots 2672, 2673 and 2674 have been irrigated with water taken from the well situated in plot 2670 for the last 66 years.
2. The defendants cultivated the plots 2672, 2673 and 2674 for 30 to 35 years out of the said period of 66 years, this period ending with 1926.
3. No right of easement has been acquired.

The parties have not filed any written objections but on behalf of the respondents, exception has been taken to the finding on point No. 3. This finding being a finding of law may be challenged in appeal and I proceed to consider it.

The learned Judge of the lower appellate Court was of opinion that in spite of the user of the well for 30 years, no right of easement accrued to the occupiers of plots 2672 to 2674, because the holders of these plots and plot 2670 were tenants of the same landholder. By S. 8, Easements Act, an easement may be imposed by a person who has no full title in his property provided he has a right to transfer the interest. Such imposition of the easement will not last

beyond the tenure of the person imposing the easement. In this view, the broad proposition laid down by the lower Court that a tenant cannot acquire an easement against property held by another tenant is not based on any sound principle. It is common ground that the defendants are tenants, but so far as the well is concerned, they derived their title by purchase. The learned Subordinate Judge found that the defendants acquired the well by purchase under the sale-deed dated 20th May 1896. Evidently then, the well was a saleable property. The owner or occupier of it who transferred it to the defendants could impose an easement on the well by 30 years' user, which lasted, roughly speaking, between 1860 and 1890. The respondents acquired a right of easement over the well. After 1890, the appellants obtained a sub-lease from the original tenants of plots 2672 to 2674 and in that capacity they cultivated the lands for 30 to 35 years. During most part of this period, the dominant and servient heritages were vested in the same person, with the result that the easement remained suspended for the time being; see S. 49, Easements Act. After the discontinuance of possession on the part of the plaintiffs, the easement was revived and the respondents were entitled to enforce it. I hold that the plaintiffs had a right of easement to irrigate their lands with the water from the well owned by the appellants. In the result, the appeal fails. There is a cross-objection on the part of the respondents. It relates to costs. The costs were at the discretion of the Court below and I see no valid reason to interfere in the matter of costs. In the result, the appeal is dismissed with costs as also the cross-objection with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 864

BENNET AND IQBAL AHMAD, JJ.

Koer Singh and *others*—Defendants—Appellants.

v.

Pahalwan Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1225 of 1926, Decided on 12th July 1929, against decree of Dist. Judge, Shahjahanpur, D/- 21st May 1926.

(a) Transfer of Property Act, S. 58 (c)—Mortgage by conditional sale is voluntary alienation.

Clause (c) lays down that there is an ostensible sale at the time of execution of the mortgage by conditional sale and that that sale becomes absolute in default of payment of mortgage money. What remains with the mortgagor is a right of redemption which is lost by a decree for foreclosure. There is no doubt whatever that mortgage by conditional sale is a voluntary alienation. [P 865 C 1]

(b) Agra Tenancy Act (2 of 1901), S. 10—Mortgage by conditional sale gives rise to exproprietary tenancy in *sir*.

Mortgage by conditional sale being a voluntary alienation gives rise to exproprietary tenancy in the *sir* land. The fact that the mortgagees have not made the application to the collector to fix exproprietary rent for mortgagor is not a matter which would prevent the mortgagor being in possession as exproprietary tenants. [P 865 C 2]

Baleshwari Prasad—for Appellants.

M. N. Raina—for Respondents.

Judgment.—This is the second appeal by the defendants against the decree of the lower appellate Court setting aside a decree of an Assistant Collector for the ejectment of the defendant-appellants as sub-tenants of certain plots. The plaintiffs were owners of a zemindari share in a mahal in which *sir* plots were situated, and these plots were originally the *sir* of the plaintiffs and were so recorded in F. 1332. For that year the defendants were entered as sub-tenants of 12 and 18 years. On 12th March 1913, there was a deed of mortgage by conditional sale executed by the plaintiffs of the whole of their zemindari share in this mahal in favour of the defendants. A preliminary decree was obtained by the defendants for foreclosure of that mortgage on 12th March 1922 and a final decree on 2nd December 1922 and, on 16th February 1923, the defendants obtained possession from the civil Court of the zemindari share. The plaintiffs claim that as a result of a transfer of their zemindari share the plaintiffs had become exproprietary tenants in their *sir* plots, and that they are entitled to eject the defendants who are still their sub-tenants On the other hand, the learned counsel for the appellants contends that no exproprietary tenancy arose on this transfer, because it was on a decree of foreclosure and that S. 10, Act 2 of 1901, does not refer to a decree of foreclosure. Originally S. 7, Act 12 of 1881 provided :

"Every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as *sir* in such mahal at the date of such loss or parting."

Under that section there was a ruling in *Sheobarut Rai* v. *Ram Rai* (1), in which it was laid down that a mortgage by a deed of conditional sale resulted in the creation of exproprietary rights. In Act 2 of 1901 the language used in S. 10 is as follows :

"Every proprietor whose proprietary rights in a mahal or in any portion thereof, whether in any share therein, or in any specific area thereof, are transferred, on or after the commencement of this Act, either by sale in execution of a decree or order of a civil or revenue Court, or by voluntary alienation, otherwise than by gift or by exchange between cosharers in the mahal shall become a tenant with a right of occupancy in his *sir* land, etc."

and there is a further provision that a usufructury mortgage shall be deemed to be a transfer within the meaning of this section. In the present Agra Tenancy Act, Act 3 of 1926, the wording has been made more specific and includes a decree of foreclosure, but the case before us is governed by the language of Act 2 of 1901.

The Transfer of Property Act, S. 58 (c) states :

"Where the mortgagor ostensibly sells the mortgaged property :
on condition that on default of payment of the mortgage money on a certain date sale shall become obsclute, or on condition that on such payment being made the sale shall become void; or
on condition that on such payment being made the buyer shall transfer the property to the seller,
the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale."

This clause, therefore, lays down that there is an ostensible sale at the time of execution of the mortgage by conditional sale and that that sale becomes obsolute in default of payment of the mortgage-money. What remains with the mortgagor is a right of redemption and by a decree of foreclosure that right of redemption is lost. There is no doubt whatever that the mortgage by conditional sale is a voluntary alienation. The question before us is whether there is anything in the fact that the right of redemption is subsequently lost by the decree of foreclosure to prevent that voluntary alienation giving rise to a right of exproprietary tenancy under S. 10, Act 2 of 1901. Having given the matter our earnest consideration, we come to the conclusion in the negative and we consider that in the case of a mortgage by conditional sale the right of exproprietary tenancy arose in the plaintiffs. Under S. 34, Land Revenue Act, when the defendants obtained possession of the proprietary share in the mahal, i. e., after their decree for foreclosure and after they obtained possession from the civil Court, it was for the defendants to apply to the Tahsildar for entry in the khewat, and under S. 35 it was for the defendants to apply to the Collector in that proceeding for specification of the exproprietary rent of the plaintiffs. The fact that the defendants have not made the application to the Collector to fix exproprietary rent for the plaintiffs, is not a matter which would prevent the plaintiffs being in possession as exproprietary tenants. As found by the lower appellate Court the plaintiffs have all along been in possession of the holding in question through the defendants as their sub-tenants.

Accordingly we consider that the finding of the lower appellate Court is correct, and we dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

(1) [1884] A. W. N. 273.

A. I. R. 1929 Allahabad 865

DALAL, J.

Sohan Lal—Plaintiff—Appellant.

v.

Peare Lal and *others*—Defendants—Respondents.

Second Appeal No. 1036 of 1927, Decided on 13th February 1929, against decree of Sub-Judge, Bulandshahr.

(a) Hindu Law—Joint family — Gift by father of 1/8th share of entire property to a Brahmin richer than himself and a legal practitioner is not valid.

The gift by a Hindu father of the 1/8th share of his whole property made to a Brahmin who is richer than himself and practising at the Bar cannot be valid for it is not a gift of a reasonable portion of the family property for charitable purposes. [P 866 C 2]

(b) Hindu Law — Joint family — Gift of portion of family property by father — Gift beyond authority and so invalid — Son not

avoiding gift — Still donee cannot sue father's representatives for possession.

Where a gift of a portion of the joint family property made by the father was beyond his authority and so invalid, the donee has no locus standi to sue for possession the father's representative-in-interest, whatever may be the state of his title, and in spite of the fact that the son of the donor did not avoid the gift ; 33 *All.* 783 (*F. B.*) ; *A. I. R.* 1917 *P. C.* 61, *Rel. on.*; 19 *Cal.* 123, *Discussed*; 10 *A. L. J.* 112, *Dist.* [P 866 C 2, P 867 C 1, 2]

U. S. Bajpai—for Appellant.

Panna Lal—for Respondents.

Judgment.—A question of law not considered by the lower appellate Court as it was not placed before it is the only point for decision in this case. As to the rest relating to ground 3 of appeal, I have not the slightest hesitation in agreeing with the excellent judgment of the appellate Court.

One Hem Singh who was father in a joint Hindu family consisting of himself and his son at the time executed a deed of gift of 17 bighas of land in favour of the plaintiff Sohan Lal, a legal practitioner and a Brahman, on 3rd March 1920. Fifteen months later on 2nd June 1921 he sold his entire property of 136 bighas to the defendant Piare Lal. Piare Lal took possession of the entire property, and Sohan Lal brought the present suit for recovery of the area gifted to him in 1920. The suit was decreed by the trial Court. Various issues were raised there. The learned Judge of the lower appellate Court did not consider the different issues, but decided the appeal, set aside the decree of the trial Court and dismissed the plaintiff's suit on this one ground that a gift by a father of a joint Hindu family was not valid as it was not made for religious purposes and exceeded the power given to a father to make a gift of a small portion of his property for religious purposes. As pointed out by the learned Judge, the plaintiff Pt. Sohan Lal is as secular a person as one would wish to see. The learned Judge must have had the advantage of the acquaintance of Mr. Sohan Lal in Court, and his opinion is, therefore, entitled to carry weight. The Court has further pointed out that Mr. Sohan Lal is well blessed with the riches of this world and did not require any addition thereto. He also pointed out that some vague mention in the deed of the building of a temple and dharmashala was put in merely by way of comouflage so that an appearance of religiosity may be given to the transaction. There can be no doubt that the purpose of Hem Singh was to make a free gift without any condition. The other point rightly dwelt upon by the learned Judge referred to the extent of the gift. A father of a joint Hindu family is permitted to transfer a reasonable portion of the family property for charitable purposes, but not, as in this case, one-eighth of his earthly possessions to a Brahman who was richer than himself and who tried to be still more opulent by practice at the Bar. It is also to be remembered that the property was encumbered at the time.

This disposes of ground 3 of appeal. The more important matter for consideration is the argument that the gift was voidable at the instance of the son of the donor, and not void, and, therefore, the defendant who is only the representative-in-interest of the father cannot resist the plaintiff's suit for possession. In reality the argument reverses the ordinary consideration that a plaintiff must prove his case. The plaintiff is not defending his possession but is seeking to enforce transfer in his favour, and it lay on him to prove that his transfer was valid and enforceable without regard to the title of the person in possession. Chamier, J., put this matter succinctly in his judgment in the Full Bench case of *Muhammad Muzamil Ullah* v. *Mithu Lal* (1) at p. 790 :

"The majority of the Full Bench in the case of *Chandradeo Singh* v. *Mata Prasad* (2) seem to have held that a father in a joint Hindu family governed by the Mitakshara cannot execute a mortgage of the joint family property except for family necessity or to meet an antecedent debt, and that the mortgage is in other circumstances invalid even in respect of the father's share ..... In accordance therewith I feel bound to hold that the mortgage to the plaintiffs conferred no title upon them. If that is so, it follows that the defendant is entitled to resist the plaintiff's suit on the ground that the mortgage is invalid,"

whatever defects there may be in the plaintiffs title. Similarly, in the present case we have held the gift by the father to be beyond his authority in a

(1) [1911] 33 All. 783=11 I. C. 220=8 A. L. J. 901 (F. B.).

(2) [1909] 31 All. 176=1 I. C. 479=6 A. L. J. 263 (F. B.).

joint Hindu family governed by the Mitakshara. So, such a gift can give no title to the plaintiff nor can he sue for possession under that title whatever may be the state of the title of the defendant. The learned counsel for the appellant quoted a Bench ruling of this Court in *Jogeshar Pande* v. *Deo Dat Pande* (3) that an alienation by the manager of a joint Hindu family without necessity is not absolutely void but is voidable at the instance of the persons whose interests are affected by it. The facts of that case were different. There also the plaintiff failed. He desired to challenge an alienation made by the father as mortgagor of a joint Hindu family which the son who had a right to challenge did not challenge during the father's lifetime. There also the defendant was permitted to say to the plaintiff :

"Who are you to come and disturb my possession when the person properly entitled to challenge my possession has not come forward ?"

The reasoning of that case rather favours the respondent than the appellant in this case. In my opinion it was not necessary for the purposes of that case for the learned Judges to decide whether the transfer was voidable or void. The plaintiff of that case had no locus standi to bring the suit. The opinion that the transfer was voidable and not void appears to be in conflict with the categorical pronouncement of their Lordships of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (4) at p. 442 *of* 39 *All.* Their Lordships in unequivocal terms emphasised the general principle applicable to such a case :

"It is well to keep the general principle applicable to such a situation in mind. There have been so many decisions by Courts of law on the exception to the principle that the principle itself has been apt to be forgotten. Under the law of the Mitakshara the joint family property owned, as stated, by all the members of the family as coparceners, cannot be the subject of a gift, sale or mortgage by one coparcener except with the consent, express or implied, of all the other coparceners. Any deed of gift, sale or mortgage granted by tne coparcener on his own account of or over the joint family property is invalid, the estate is wholly unaffected by it and its entirety stands free of it."

In the present case when the property in suit is unaffected by the gift and stands free of it the plaintiff has no title to certain a decree for possession. To modify the force of this pronouncement the case of *Hanuman Kamat* v. *Mandur* (5) was quoted on behalf of the appellant. In that case their Lordships were not called upon to decide the point definitely and did not base their decision on the point whether a sale by a Hindu father should be considered void or voidable. Their Lordships were :

"inclined to think that the sale was not necessarily void, but was only voidable if objections were taken to it by the other members of the joint family."

The case, however, was decided on another point that the consideration paid by the purchaser failed when the purchaser found himself unable to obtain possession of the property purchased and that, therefore, the suit was within time. To such observations of doubt made in 1891 the same importance cannot be attached as to a definite pronouncement of a principle of law made subsequently in 1917. Another case of which support was sought on behalf of the appellant is that of *Bishambhar Dayal* v. *Parshadi Lal* (6). In that case it was held by a single Judge that the mortgagor-father could not set up the invalidity of the mortgage as against his mortgagee merely on the ground that the other coparceners had not joined in executing the mortgage. In such a case there would be consideration of estoppel also. Where the mortgagor has been paid money under certain representations, the person who made those representations would be prevented from denying the consideration. I am of opinion that the plaintiff cannot claim possession on the basis of an invalid gift even though that gift has not been avoided by the son of the Hindu father who made the gift. I dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

(3) A. I. R. 1924 All. 51=45 All. 654.
(4) A. I. R. 1917 P. C. 61=39 All. 437=44 I. A. 126 (P. C.).
(5) [1892] 19 Cal. 123=18 I. A. 158=6 Sar. 91 (P. C.).
(6) [1912] 10 A. L. J. 112 =16 I. C. 629.

A. I. R. 1929 Allahabad 863

MEARS, C. J., AND BENNET, J.

Abdul Rahim—Plaintiff—Appellant.

v.

Mohammad Salim—Defendant— Respondent.

Letters Patent Appeal No. 30 of 1927, Decided on 24th June 1929, from judgment of Dalal, J., D/- 18th January 1927.

Agra Tenancy Act (2 of 1901), S. 79—Heir of Mahomedan occupancy tenant not obtaining possession actual or constructive—Suit by him for possession against other heirs recognized as tenants by landlord in compromise in ejectment suit lies in a civil Court.

Where an heir of a Mahomedan occupancy holding has not obtained possession of the holding, either actual or constructive, he can bring a suit for possession in a civil Court against the other heirs who have been acknowledged by the landlord as tenants by effecting a compromise of his ejectment suit against the other heirs. The compromise between the landlord and other heirs in the ejectment suit does not afford a ground for holding that the landlord has wrongfully ejected the plaintiff. [P 868 C 2, P 869 C 1]

Shiva Prasad Sinha and *S. D. Sinha*—for Appellant.

A. M. Khawaja—for Respondent.

Judgment.—This is a Letters Patent Appeal against a decree of a learned Judge of this Court dismissing the second appeal of the plaintiff-appellant. The plaintiff Abdul Rahim is found by the lower appellate Court to be the son of Nazir Ali and the full brother of Sadiq. Sadiq was the last holder of an occupancy holding and he died about March 1924. After his death that holding was in the possession, as is found by the lower appellate Court, of the two defendants who are the sons of a daughter of Sadiq. In the year 1924 the zemindar filed a suit for ejectment against the defendants, and on 7th July 1925 a compromise was entered into between the zemindar and the defendants by which he acknowledged them as tenants of the occupancy holding at an enhanced rent. The plaintiff brought the present suit on 15th September 1925, that is, within a period of six months from the compromise of 7th July 1925. The plaintiff states that he had no knowledge whatever of that litigation between the zemindar and the defendants or of that compromise. The Court of first instance decreed the suit of the plaintiff for possession of the holding. The lower appellate Court reversed that decree on the ground that the suit should have been brought under S. 79, Tenancy Act, against the zemindar, and that the civil Court had no jurisdiction. That view has been upheld by the learned Judge of this Court. None of the rulings which have been cited deal with facts which are exactly similar to those which have been found by the lower appellate Court in the present case. In the present case the plaintiff is the heir of Sadiq, the last occupancy tenant, and entitled to succeed under S. 22, Act 2 of 1901, as the brother of Sadiq. But the plaintiff made no attempt whatever to take possession of the occupancy holding subsequent to the death of Sadiq. On the contrary he allowed the defendants to hold the occupancy holding, and he took no action whatever until he brought the present suit on 15th September 1925. In the other rulings which have been shown, either the plaintiff has obtained possession and been dispossessed by the landholder, or the plaintiff has at least obtained entry of his name in revenue records and the Courts have held such entry to amount to constructive possession.

The present case differs entirely from these rulings as there is no possession of any kind, constructive or otherwise, by the plaintiff of this holding. We consider that it would be straining the language of S. 79, Act 2 of 1901, if we were to hold that the plaintiff had been ejected otherwise than in accordance with the provisions of that Act by his landholder. We consider that the plaintiff cannot have been ejected by the landholder, because the plaintiff was never in any kind of possession whatever. The claim of the plaintiff was merely to succeed to his brother Sadiq as an heir under S 22, Act 2 of 1901. No procedure is laid down by that Act for the enforcement of such a claim. But apparently if such a claim were resisted by the landholder, then the claimant may sue under S. 79. Here, however, the plaintiff has not made a claim against the landholder and the landholder has not resisted such a claim. The claim of the plaintiff is against the actual tenant in possession of the holding and such suits against a rival tenant properly lay in the civil Court when Act 2 of 1901 was in force. We note that the procedure under the Tenancy Act 3 of 1926 in this respect has been altered; so the

present ruling applies merely to Act 2 of 1901. An argument was advanced that on account of the compromise of 7th July 1925 the landholder had constructivey dispossessed the plaintiff. The plaintiff was no party to that suit, and it is not proved that he had knowledge of that suit or of that compromise. We consiler therefore that that compromise does not afford a ground for holding that the landholder had wrongly ejected the plaintiff. Accordingly we allow this appeal and restore the judgment of the Court of first instance. As the plaintiff alleged in his plaint that he had been in possession of this holding until within one week of the date of filing his plaint, and as that allegation has been found to be absolutely untrue, we consider that the plaintiff should not receive costs in any Court accordingly the parties will pay their own costs throughout.

P.N./R.K. *Appeal allowed.*

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* A. I. R. 1929 Allahabad 869

MUKERJI AND NAIMATULLAH, JJ.

M. Abdullah Khan—Plaintiff—Appellant.

v.

Kanhaiya and *others*— Defendants—Respondents.

Second Appeal No. 1296 of 1927, Decided on 15th July 1929, against decree of Offg. Dist. Judge, Agra, D/- 28th April 1927.

Agra Tenancy Act (1926), S. 44—Lambardar being entitled to let out lands according to S. 3 (6) is landholder— Lambardar ejecting person—Cosharers stealthily taking possession are liable to be ejected.

According to S. 44 a person who is in possession without the consent of the landholder is liable to ejectment. According to S. 3 (6) a lambardar can be said to be the landholder as he is entitled to let out the land. The lambardar ejecting a person and taking possession through the Court is entitled to continue in possession of it. Cosharers taking possession of the land either by stealth or by force in teeth of the lambardar's right to let out the land are liable to be ejected : 18 *Cal.* 10 (*P. C.*), *Ref.* [P 870 C 1]

Gopi Nath Kunzru—for Appellant.

N. P. Asthana—for Respondents.

Judgment.—The plaintiff of the Court of first instance is the appellant before us. He brought the suit out of which this appeal has arisen on the allegation that he had let out the plots detailed in the plaint to defendant 1, that defendant 1 was ejected through the revenue Court from those plots, but with his help the two other defendants who were his son and nephew, occupied the lands. The plaintiff accordingly sued for recovery of possession.

Defendants 2 and 3 did not contest the suit. Defendant 1 alone appeared. He said that he was a cosharer in the village and therefore he was not liable to be ejected under S. 44, Agra Tenancy Act 1926, under which section the plaintiff purported to institute the suit.

The Court of first instance held that the defendant were trespassers in respect of certain plots but were cosharers in two khewats, viz., Nos. 50 and 51. In the result, the learned Assistant Collector decreed the suit in respect of lands situated in khewats other than Nos. 50 and 51 and dismissed the suit in respect of lands which are situated in khewats 50 and 51.

There was an appeal by the plaintiff and his appeal was dismissed.

In this Court the plaintiff contends that his suit should have been decreed in respect to the lands situated in khewats 50 and 51. He also contends that he should have been allowed a larger amount of compensation than has been awarded to him with respect to lands for which he got a decree.

In this Court the question has been debated whether S. 44, Agra Tenancy Act 1926, applies to the facts of this case or not. It has been found that the plaintiff was a lambardar. He as such lambardar granted a lease to defendant 1 of lands comprised in khewats 50 and 51. Defendant 1, the tenant, who held under the lambardar, was ejected by the lambardar through the revenue Court. The quesiton then is whether some of the cosharers of khewats 50 and 51 could in the teeth of the lambardar s right to let out the lands, take possession of the lands and say that because they were cosharers in those lands, they were entitled to remain in possession.

On the face of it, the contention of defendant 1 seems to be unsound. The learned counsel for the respondents has urged that as between lambardar and cosharer, the cosharer has as much right to occupy land after the tenant has been ejected as the lambardar himself. He takes his stand on the well-known Privy Council case of *Watson & Co.* v. *Ram-*

chund Dutt (1). The very principle decided by their Lordships of the Privy Council would go against Mr. Asthana's contention. The person who has actually ejected the tenant in due course of law and has taken delivery of possession is entitled to be in possession of those lands and the more so if he happens to be the lambardar. Another cosharer should not be allowed to take possession of those lands either by stealth or by force. The mere fact that at the moment of taking possession by the cosharer, the lambardar was not in physical possession would not remove the lambardar's possession.

Coming to the language of S. 44, Agra Tenancy Act, we find that a person who is in possession without the consent of the landholder is liable to ejectment. A landholder, under the definition given in the Act: see S. 3, Cl. (6), is the person who is entitled to recover the rent or in other words is the man who is entitled to let the land out. The person who has ejected the tenant and has taken possession through the Court is the person who is entitled to continue in possession of it. The possession of the defendant-respondent is in the teeth of the landholders' possession and we are of opinion that the respondents were liable to be ejected even from the lands comprising khewats 50 and 51.

We note that in the grounds of appeal filed by the plaintiff-appellant, instead of describing the Nos. 50 and 51 as khewats the appellant has described them as plots. We also note that the Courts below have not stated specifically what are the plots which are comprised in khewats 50 and 51. We take it that at the time of execution the matter will be cleared up.

The second point relates to the question of damages. The damages allowed by the Courts below were one year's rent. The matter was in the discretion of the Court below and we need not interfere. As regards the damages to which the plaintiff is entitled for his success in this Court, we assess them at Rs. 19-15-6 having regard to the fact that the Court below has awarded one year's rent, and this amount will make up the entire rent for one year, namely Rs. 75.

There is a cross-objection on behalf of the respondents. On the principle on which we have decided this appeal, the cross-objection fails and it is hereby dismissed with costs.

R.M./R.K. *Appeal allowed.*

(1) [1891] 18 Cal. 10=17 I. A. 110=5 Sar. 535 (P. C.).

A. I. R. 1929 Allahabad 870

SULAIMAN AND PULLAN, JJ.

Municipal Board, Allahabad—Defendant—Appellant.

v.

B. Sarkar Bahadur Johari—Plaintiff—Respondent.

First Appeal No. 59 of 1928, Decided on 17th July 1929, against order of Addl. Sub-Judge, Allahabad, D/- 3rd February 1928.

Limitation Act, S. 23—Under S. 228 (b), U. P. Municipalities Act 1916, it is duty of Board to allow owner to connect his house with the main pipe—Disconnexion amounts to continuous breach giving rise to continuous cause of action.

Section 228 (b), U.P. Municipalities Act 1916 refers to the duty of the Board to allow the owner to connect his house for the purpose of obtaining water from the main. If therefore the connexion is cut off and the owner is prevented from obtaining water from the main pipe by means of his communication pipe, there is a continuing breach giving rise to continuing cause of action inasmuch as the owner is continually prevented from connecting his house with the main pipe. The duty of the Board is continuing duty and the continuing breach of it gives cause of action to owner from day to day. [P 871 C 1, 2]

Shabd Saran—for Appellant.

S. P. Sinha—for Respondent.

Sulaiman, J.—This is an appeal from an order of remand by the lower appellate Court arising out of a suit for damages brought by the plaintiff against the Municipal Board of Allahabad. The Court of first instance framed three issues, the third one being one of limitation. It dismissed the suit on the ground of limitation only without deciding the other issues. The lower appellate Court has taken a contrary view and has held that the claim was not barred by limitation and has accordingly remanded the case.

It appears that the plaintiff is the occupier of a house which has been assessed to a prescribed minimum water tax and his house was connected with the main pipe of the municipal system of water supply upto March 1926. On 31st March 1926 his house was disconnected. After that date the Board

admittedly for a long time did not allow him to connect his house with the main. The plaintiff served a notice on the Board on 9th October 1926 but waited for some time before instituting his suit which was actually filed on 30th March 1927.

The plea of limitation raised by the Board was to the effect that the cause of action accrued in favour of the plaintiff, if at all, on 31st March 1926 and he was bound to sue within 8 months of that date (including the two months allowed for notice) and that there was no fresh cause of action or no accruing cause of action in his favour.

Under S. 228 (a) there is a statutory duty imposed upon the Board;

(a) (i) to maintain a system of water supply through pipes;

(ii) to lay on water at a prescribed pressure and during prescribed hours;

(iii) to supply water in all the chief streets, and

(b) to allow the owner or occupier of any building or land assessed to a prescribed minimum water tax to connect, for the purpose of obtaining water for domestic purposes, the building or land with a main by means of a communication pipe of the prescribed size and description.

The house of the plaintiff was previously connected. If the disconnexion amounted to a refusal to allow the occupier to connect his house with the main pipe there may be a continuing breach of the duty cast upon the Municipal Board. On the other hand if the disconnexion was an isolated act and the cause of action was not only complete but was exhausted, the plaintiff might be compelled to institute his suit within 8 months of the first disconnexion.

Section 228 (b) does not speak of the Board connecting the house with the main pipe or disconnecting it. It refers to the duty of the Board to allow the owner to connect his house for the purpose of obtaining water from the main. If therefore the connexion is cut off and the owner is 'prevented from obtaining water from the main pipe by means of his communication pipe, there is, in my opinion, a continuing breach inasmuch as the owner is continuously prevented from connecting his house with the main pipe. This is a continuing refusal to permit him to get the connexion. In such a case there would be a continuing cause of action in his favour and the mere fact that the initial disconnexion took place more than 8 months ago would not deprive him of all remedy to sue for damages for the subsequent period. If the argument advanced on behalf of the Board were to be accepted the result would be that after the expiry of the period of 8 months from the date of the first disconnexion there would be no remedy left to the owner to claim damages for the breach of the duty as there would be no recurring cause of action at all.

I am of opinion that this could not possibly have been the intention of the legislature. The duty of the Board is a continuing duty and the breach of it is also continuing and gives a cause of action to the owner accruing from day to day. In this view the plaintiff would be entitled to claim damages for the period of 8 months prior to the institution of the suit.

The lower appellate Court has pointed out that the plaintiff has cut down his claim and is prepared to confine his relief to only that much period preceding the suit.

The learned advocate for the appellant has also contended that there ought to have been subsequent notices if the plaintiff wanted to claim damages for the period subsequent to the date on which the two months prescribed for the notice expired. This would be an intolerable state of affairs and would be casting upon an occupier an unreasonable duty to go on serving successive notices so long as he does not actually institute the suit and even if he does institute the suit he would be prevented to claiming damages pendente lite. The notice was quite sufficient. This contention therefore cannot be accepted.

The view taken by the Court below was therefore correct and I would dismiss the appeal.

Pullan, J.—I am entirely in agreement with the order already pronounced and I would merely add that the view taken by the Board as to the meaning of S. 228 (1) (b) appears to me to be illogical. If the words "to allow the owner &c. to connect" refer only to the original act of connexion the only liability which the Board would incur would be owing to a refusal to allow the connexion to be

made, and not to a subsequent stoppage of the connecting pipe. Such a view would be so narrow that it would render the Board liable to practically no suit for damages, and would also make that portion of S 231, which refers to the liability of the Board under S. 228, for failure to supply water meaningless. It may be pointed out that this is the only liability mentioned in S. 231 and nothing is said about liability arising from a refusal on the part of the Board to allow an owner or occupier of premises to make a connexion. In my opinion the only reasonable interpretation of this section is that the words "to allow an owner or occupier &c. to connect" mean to allow the said person to keep a connexion open once it is made. I agree in the order proposed.

R M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 872

YOUNG AND BENNET, JJ.

Prakash Narain—Defendant—Appellant.

v.

Ram Charan and *another*—Plaintiff and Defendant—Respondents,

Second Appeal No. 1313 of 1926, Decided on 18th July 1929, against decree of 1st Addl. Sub-Judge, Cawnpur, D/- 10th April 1926.

(a) Civil P. C., S. 100—Proper effect of proved fact is a question of law.

The question whether Rs. 100 is or is not a grossly inadequate consideration for a house which is found to be by the lower appellate Court to be worth Rs. 200 is a question of law as it is an inference from proved facts: *A. I. R.* 1927 *P. C.* 102, *Rel. on.* [P 872 C 2]

(b) Transfer of Property Act, S. 53—Transfer by judgment debtor subsequent to decree of only property in possession to uncle for half of actual value can be concluded to be fraudulent.

Where a transfer is made by a judgment-debtor subsequent to the decree passed against him, of the only remaining property which he possesses, to his uncle for a sum which is found to be half the actual value of the house at the time of the transfer, the circumstances lead to the inevitable conclusion that the transaction was fraudulent within the meaning of S. 53 and that the transfer was intended to defeat the creditors of the transferrer and the transferee was a party to the fraud.

[P 873 C 1, 2]

S. N. Varma—for Appellant.

K. C. Mital and *Shambhu Nath Seth*—for Respondents.

Judgment.—This is a second appeal by defendant 1 in a suit in which the lower appellate Court has granted to the plaintiff a decree declaring that his sale-deed of 11th December 1922, is a genuine document and that the house which he has purchased by that document from defendant 2 is not liable to attachment and sale in execution of the decree of defendant 1 against defendant 2. The facts, as found by the lower appellate Court, are that on 8th August 1921, defendant 1 obtained this decree against defendant 2. In execution of that decree he attached the house in question. Subsequent to that attachment the judgment-debtor, defendant 2, executed a sale-deed in question in favour of the plaintiff. It is further found by the lower appellate Court that the sale consideration was only Rs. 100, and the value of the house at the date of the transfer was Rs. 200. It is also found that the judgment-debtor had left himself without any other property whatever. The Munsif dismissed the suit of the plaintiff on the ground that the transaction in question was fraudulent within the meaning of S. 53, T. P. Act, being for an inadequate sum and with the intention of defeating the creditors of the transferrer. The lower appellate Court reversed that finding chiefly on the following grounds:

"I do not think that Rs. 100 were grossly inadequate consideration for it . . . . I have shown above that the sale took place in pursuance of an agreement made on the 19th November 1920. Therefore I hold that the disputed sale-deed is not a transaction fictitious and collusive and entered into with intent to defeat any creditor. The plaintiff was a bona fide transferee for consideration."

It is objected that on the finding that there was no fraudulent transfer, no appeal lay to this Court, and reference was made to: *Durga Chaudhrani* v. *Jawahir Singh* (1). But in *Dhannamal* v. *Moti Sagar* (2) (at p. 962 of 25 *A. L. J.*), their Lordships of the Privy Council had laid it down in 1927:

"It is clear, however, that the proper effect of a proved fact is a question of law."

Accordingly we consider that the question of whether Rs 100 is or is not a grossly inadequate consideration for a house which is found to be by the lower appellate Court worth Rs. 200 is a ques-

(1) [1891] 18 Cal. 23=17 I. A. 122 P.C.).
(2) A. I. R. 1927 P. C. 102=8 Lah. 573=54 I. A. 173 (P.C.).

tion of law, as it is an inference from proved facts. Similarly there is no doubt that the construction of the sale-deed in question and of the agreement of 19th November 1920, are questions for the consideration of this Court, The agreement of 19th December 1920, provided that defendant 2 would sell to the plaintiff all his property within one month. That agreement was not carried out within one month, and therefore it appears to us that the agreement came to an end.

On 11th December 1922, the sale-deed in this suit was executed by defendant 2 in favour of the plaintiff, and it contained no reference whatever to any previous agreement. On the contrary, it states that the plaintiff is in want of money to release certain ornaments which he had pledged and mentions that he had tried to sell the house in question to other persons and finally was selling it to his uncle for Rs. 100. We consider that on a true construction of these two documents the finding of the lower appellate Court is incorrect that the sale-deed of 1922 was made in pursuance of an agreement of 1920. The importance of this matter is that the sale-deed is undoubtedly of a date subsequent to the decree of defendant 1 against defendant 2. As we have held that it was not executed in pursuance of the agreement of 1920, the fact that that agreement was of a date prior to the decree of defendant 1 is of no importance. We note that it has been found as a fact by the lower appellate Court that tenants are in possession of the house on behalf of the plaintiff.

But the lower appellate Court also found that the daughter of defendant 2 is living with the plaintiff, and the Munsif has found as a fact, and that finding is not reversed by the lower appellate Court, that defendant 2 is beyond any dispute the nephew of the plaintiff. Accordingly the mere fact that the tenants, who are in actual possession of the house, are tenants of the plaintiff is not in our opinion of sufficient weight in view of the inference to be drawn from the circumstantial evidence in the present case. We have firstly a transfer made by a judgment-debtor subsequent to the decree passed against him and a transfer made of the only remaining property which he possessed, and that transfer made to his uncle for a sum which is found to be half the actual value of the house at the time of the transfer. We consider that these circumstances lead to the inevitable inference that this transaction was fraudulent within the meaning of S. 53, T. P. Act, and that the transfer was intended to defeat the creditors of the transferrer, and the transferee was a party to that fraud. Accordingly we allow this appeal, and dismiss the suit of the plaintiff with costs in all Courts.

The plaint in this case has been drawn to our attention, and in particular paras. 3 and 5. These two paragraphs are both scandalous and irrelevant. They offend against the rules of pleading and are merely personal abuse. They are drafted by a pleader called B. Durga Prasad, and in para. 5 he accuses in a manner totally irrelevant to the suit a brother pleader and calls him an expert in telling lies apparently on the ground that he is a pleader. It is difficult to say anything too severe about conduct of this sort. We direct that copy of these remarks of ours be sent to the pleader in question.

R.M./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 873

BENNET AND IQBAL AHMAD, JJ.

Shujauddin Khan — Defendant—Appellant.

v.

Mehdi Raza—Plaintiff — Respondent.

Second Appeal No. 1130 of 1926, Decided on 9th July 1929, from decree of Addl. Dist. Judge, Moradabad, D/- 20th March 1926.

(a) Evidence — Court may find evidence unworthy of credit—There can be no finding unless based on legal evidence.

It is open to the Court to find that the evidence of a person is not worthy of credit; but it cannot arrive at a finding in absence of legal evidence. [P 874 C 1]

(b) Civil P. C., S. 35—Witnesses attending but not examined—Still diet money can be charged when defence is not disclosed.

Diet money of plaintiffs who attended the Court but were not produced before the Court is correctly charged as cost where the number of witnesses is not excessive and where the defendant does not disclose the line of defence. But costs of document unnecessarily produced cannot be awarded.

[P 874 C 2; P 875 C 1]

B. Malik and *H.P.Sen*—for Appellant.

Haidar Mehdi and *Zafar Mehdi*—for Respondent.

Judgment.—This is an appeal by a defendant lambardar against a decree of the lower appellate Court awarding the plaintiff-respondent Rs. 2,569-2-9 for the plaintiff's share of the profits under S. 164, Act 2 of 1901. The plaintiff sued for his share of profits for 1328, 1329 and 1330 Faslis. The plaintiff produced as sole witness the patwari. The patwari gave evidence that the total rent for these years was as follows:

F	1328	Rs. 1,207-7-6
,,	1329	,, 3,576-6-2
,,	1330	,, 1,475-15-6

The figures given in the plaint for the rental for these years were co nsiderably in excess of those stated by the patwari and were as follows:

F	1328	Rs. 3,571
,,	1329	,, 3,620
,,	1330	,, 3,620

The lower appellate Court has accepted the figures stated in the plaint as correct with the exception of a slight variation in regard to the rental assessed on khudkasht for which it accepted the statement of the patwari. In the result, therefore, the lower appellate Court accepted rentals of over Rs. 3,000 for each of the years in suit, a total of approximately Rs. 10,000 rental as compared with Rs 6,260 0-2 stated by the patwari. The ground on which the lower appellate Court disregarded the evidence of the patwari on this point was firstly that the patwari stated in evidence that the rental for 1328 and 1330 was less than that for 1329 because 1329 was an exceptionally good year and the rental being by batai, variations can easily be made in it from year to year: but on a previous occasion in another suit the defendant lambardar stated that the produce of Fasli 1329 was average. The second reason given by the lower appellate Court is that the patwari in a previous suit had stated "Defendant's mother was not purdah to me and thought me her son." It was no doubt open to the lower appellate Court to find that the evidence of the patwari was not worthy of credit, but it was not open to the lower appellate Court to find that the rental amounted to Rs. 9,955-8-4 without any legal evidence to that effect. We consider, therefore, that this finding of the lower appellate Court must be set aside. There is, therefore, no evidence to show that the rental was more than that stated by the patwari.

The next point is whether the lower appellate Court was justified in reversing the finding of the Court of first instance on the question of alleged negligence by the lambardar defendant. For this finding of negligence the lower appellate Court relies solely on the statement that the defendant had collected only 57 per cent. of the assets in a batai village. There is no legal evidence to prove that the total of ths assets was Rs. 9,955-8-4. Accordingly there is nothing to show that the collections stated by the patwari Rs. 5,701-13-4 was a small percentage of the assets. In fact the percentage of the assets collected given by the patwari was high amounting to over 90 per cent. It was open to the plaintiff to prove negligence of the lambardar by calling certain tenants, of whom there must be a large number in the village, who could have shown, if indeed it had been a fact, that they had paid rent to the lambardar for the years in suit, and that this payment of rent had not been entered by the lambardar in the siaha. But the plaintiff did not call a single witness to prove these points. In regard to the representation of the learned counsel for the plaintiff-respondent that it is difficult for the plaintiff after a lapse of three years to produce evidence of what was the exact rental for the three years in suit, it is sufficient if we point out that the plaintiff might have brought his suit at an earlier date without waiting for the lapse of three years. Accordingly we set aside the finding of the lower appellate Court, that the lambardar was negligent and that the decree should, therefore, be based on the assets. On this point we restore the decree of the Court of first instance which was that the plaintiff should receive Rs. 1,500-14-1 on collections. We were addressed on two other points in the grounds of appeal, one being in regard to Rs. 61-2-0 diet money for witnesses called by the plaintiff who attended on three occassions but were never produced before the Court.

We agree with the lower appellate Court that this sum was correctly charged as costs by the plaintiff because the number of witnesses was not excessive, and because the defendant did not disclose his exact line of defence. A

further point on which we were addressed in appeal is in regard to Rs. 155-3-0 costs which the plaintiff charged for documents which he filed in this case. There are 15 such documents, but it was only necessary to produce two or three documents. Moreover the plaintiff quite unnecessarily produced copies of the whole of the khataunis relating to the years in suit, whereas all that was necessary for him to produce were copies of the totals in those khataunis. Details of entries in regard to each tenant in those khatuanis had no bearing on the case. Accordingly we consider that the charge of Rs. 155-3-0 by the plaintiff should not be allowed in the present case. The result is that we modify the decree with full costs of this Court and with proportionate costs in the two lower Courts and we restore the decree of the Court of first instance that the plaintiff will receive a decree for Rs. 1,500-14-1 and that the item of Rs. 153-5-0 for papers in the list of costs of the plaintiff will be disallowed. Interest as decreed by the Court of first instance will be allowed up to the date of payment.

R.M./R.K. *Decree modified.*

A. I. R. 1929 Allahabad 875

IQBAL AHMAD, J.

Mohammad Kamil and *others*—Plaintiffs—Appellants.

v.

Muhammad Salim and *others*—Defendant—Respondents.

Second Appeal No. 549 of 1928, Decided on 11th July 1929, against decree of Sub-Judge, Basti, D/- 23rd January 1928.

(a) Civil P. C., S. 100—Inference from proved facts is question of law.

Findings on questions of facts are undoubtedly binding on appellate Court in second appeal. But inference from proved facts is always a question of law and therefore any inference drawn by lower appellate Court from proved facts is not binding on appellate Court if in arriving at that inference the lower appellate Court has misdirected itself on any matter of law. [P 876 C 1]

(b) Adverse Possession—Possession of property as mortgagee—He cannot prescribe title as absolute owner.

Where the names of the mortgagees are by mistake entered as mortgagees as regards the land which is not mortgaged and they remain in possession of the land for more than 12 years, they cannot prescribe title as absolute owners of the land. Their possession is in the capacity of mortgagees and not as absolute owners and they cannot plead adverse possession. [P 876 C 2]

M. Waliullah—for Appellants.

Mahmud Ullah—for Respondents.

Judgment.—This is a plaintiffs' appeal and arises out of a suit for a declaration that the plaintiffs are the owners of certain zamindari share in mahal 5 of mauza Hatwa, and in the alternative for recovery of possession of of that share by redemption of a mortgage.

The suit was decreed by the trial Court, but it was dismissed by the lower appellate Court on the ground that the defendants had prescribed a title to the share in dispute by adverse possession for more than 12 years. There is no controversy about the facts. Jagram Singh and others owned a 4 pie and 14 chhataks share in mahal 2 and 3 pies 13 chhataks and 476 tils in mahal 5, Hatwa. On 18th December 1909 they usufructuarily mortgaged their entire share in mahal 2 to defendant 1 and the predecessors-in-title of the other defendants for a sum of Rs. 107. Thereafter the mortgagees applied for mutation of names and, by mistake, their names were entered as mortgagees, not only as against the share of the mortgagors in mahal 2, but also as regards their share in mahal 5.

On 14th May 1914, the mortgagees purchased 2 pies 15 chhataks share of mahal 2 from the mortgagors, and a portion of the sale consideration was set off in liquidation of the mortgage debt to the extent of Rs. 60.

On 20th April 1922, the mortgagors sold the balance of their share in mahal 2 and the whole of their share in mahal 5 to the plaintiff-appellants. The mortgagees pre-empted that sale and, on 16th November 1923, their claim with respect to the share in mahal 2 was decreed, and as regards the share in mahal 5 was dismissed. By the decree the balance of the mortgage debt was also set off and, thus, the mortgage was discharged.

After the decision of the pre-emption suit, the plaintiffs filed an application in the revenue Court for mutation of names as regards the share in mahal 5. That application, on objection by the defendants, was dismissed.

The plaintiff's case was that they acquired title to the share in mahal 5 by virtue of the sale-deed of 1914, and that the defendants had no title to the same.

The defence to the suit was that the defendants were in adverse possession of the share in mahal 5 for a period of more than 12 years and, that the plaintiff's suit was time barred. The trial Court overruled the contention of the defendants and decreed the suit. On appeal by the defendants the lower appellate Court has reversed the decree of the trial Court and dismissed the plaintiff's suit.

In appeal before me it is argued by the learned counsel for the appellants that the lower appellate Court was wrong in assuming that it was nobody's case that the defendants' possession over the share in mahal 5 was as mortgagees and not as absolute owners, and that that Court was wrong in holding that the defendants, by remaining in possession for more than 12 years, had acquired a complete title to the property in dispute.

On the other hand it is argued by the learned counsel for the respondents that the finding of the lower appellate Court, on the question of the nature and effect of the possession of the defendants, is a finding on a question of fact, and is binding on me in second appeal.

I confess that the case is not free from difficulty, but, after giving the matter my best consideration, I have come to the conclusion that the decree of the trial Court was correct and ought to be restored.

So far as findings on questions of fact recorded by the lower appellate Court are concerned, they are undoubtedly binding on me in second appeal. But inference from proved facts is always a question of law, and, therefore, any inference that the lower appellate Court may have drawn from proved facts is not binding on me in second appeal if, in arriving at that inference, the lower appellate Court has misdirected itself on any matter of law.

In this case the lower appellate Court has found that the defendants were in possession of the share in dispute for a period of more than 12 years. This finding, I must accept in second appeal. But the question of law that arises for consideration is, as to whether by their long possession defendants prescribed absolute title to the property in dispute, or only a title as mortgagees. In my opinion, on the proved and admitted facts of the case, it must be held that the title prescribed by the defendants was in the capacity of mortgagees and not as absolute owners.

As stated above, the defendants' names were entered as mortgagees against the share in mahal 5. This entry of their names was in consequence of the execution of the mortgage deed of 1909 by the mortgagors. Therefore, there is no escape from the conclusion that the defendants secured entry of their names as regards the share in mahal 5 under colour of their title as mortgagees. They all along continued to be recorded as mortgagees. When the defendants brought the pre-emption suit they alleged in the plaint of that suit that the mortgagors were owners of the share in mahal 5. It is to be noted that that suit was brought more than 12 years after the date of the mortgage, and, therefore, if the defendants had professed to remain in possession as absolute owners of the share in mahal 5, one would have expected them to say so in the plaint of the pre-emption suit. From these facts the conclusion is irresistible that the defendants professed, and did intend, to remain in possession of that share in the capacity of mortgagees, and as such, they could not prescribe title as absolute owners with respect to that share. In short the conclusion at which I have arrived is that the defendants, by their long possession, prescribed only a limited title to the share in dispute. The mortgage money has been paid in full, and, therefore, the mortgage has come to an end and, accordingly, the defendants have no title to retain possession of the share in mahal 5.

For the reasons given above I allow this appeal, set aside the decree of the lower appellate Court and restore the decree of the trial Court with costs in all Courts.

R.M./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 877

YOUNG, J.

Kazim Husain—Plaintiff—Appellant.

v.

Ram Sarup and *another*—Defendants—Respondents.

Second Appeal No. 608 of 1928, Decided on 19th July 1929, from decree of Sub-Judge, Ghazipur, D/- 9th January 1928.

(a) Acquiescence—Essentials—Where defendants do not make mistake as to their legal rights there is no acquiescence.

In case of acquiescence the onus is on the defendants to show (1) that they made a mistake as to their legal rights, (2) that they had expended money on the faith of that belief, (3) that the plaintiff knew of the existence of his own right which was inconsistent with the rights claimed by the defendants, (4) that the plaintiff knew of the defendants' mistaken belief in his rights and (5) that the plaintiff must have encouraged the defendants in their expenditure of money directly or by abstaining from asserting his legal right. Where therefore the necessary elements are lacking and there is no evidence that the defendants made a mistake as to their legal rights, there can be no acquiescence : *Willmott* v. *Barber* (1800) 15 *Ch. D.* 96 and *A. I. R.* 1926 *All.* 324, *Ref.* [P 877 C 2]

(b) Specific Relief Act, S. 56 (j)—Injunction should be refused where conduct of the claimant has been such as to disentitle him to assistance of Court.

Though an injunction against a joint owner to demolish structures built without permission on a joint land can be obtained, the granting of such an injunction is discretionary. Where the applicant brings a suit after an unreasonable delay, which is deliberate and for improper motive, his conduct is such as to disentitle him to the assistance of the Court. Injunction should be refused as it is an equitable remedy and plaintiff does not come into Court with clean hands.

[P 878 C 1]

Syed Majid Ali—for Appellant.

A. P. Pandey—for Respondents.

Judgment.—This is a plaintiff's appeal from the Subordinate Judge of Ghazipur. The facts found in the lower appellate Court are these : The plaintiff and the defendants are joint owners of the plot in suit. About two years before the action was brought by the plaintiff the defendants started to build a house on a part of the land within the zamindari which was parti or waste land. They proceeded with their building without any objection on the part of the plaintiff and spent some Rs. 1,300 upon it. When the building was almost completed the plaintiff brought an action for a mandatory injunction directing the defendants to demolish the building and so to establish their joint possession. It is to be noted that the plaintiff was heavily indebted to the defendants and both the trial Court and the lower appellate Court have found that the reason for the plaintiff's action was not so much his desire to enforce his right as joint owner but rather to bring pressure to bear upon the defendants in order that they might give up some portion of the debt. The question for determination is whether a mandatory injunction should issue, directing the defendants to remove the building.

The trial Court dismissed the suit on the ground that the plaintiff had failed to show that he had suffered any special damage. The lower appellate Court dismissed the plaintiff's appeal on the ground of the plaintiff's acquiescence.

In my opinion, on the facts of this case, neither the trial Court nor the lower appellate Court came to a correct conclusion in law. It is clear that the authority, *Parsram* v. *Sherjit* (1), relied upon by the trial Court has been overruled in subsequent decisions of this High Court, e. g., in *Ram Bahadur Pal* v. *Ram Shankar Prasad* (2), which was a Full Bench decision. With regard to aequiescence the law has been laid down once and for all in *Wilmott* v. *Barber* (3). The decision in that case lays down several rules for determining whether acquiescence has taken place or not. The onus would be upon the defendants to show : (1) that they had made a mistake as to their legal rights, (2) that they had expended some money or done some act on the faith of their mistaken belief, (3) that the plaintiff knew of the existence of his own right which was inconsistent with the right claimed by the defendants, (4) that the plaintiff knew of the defendants' mistaken belief in his rights and (5) that the plaintiff must have encouraged the defendants in their expenditure of money directly or by abstaining from asserting his legal right. In this case it is clear that the necessary elements are lacking. There is no evidence for instance as to whether the defendants made a mistake as to their legal rights. The case of *Willmott* v

(1) [1887] 9 All. 661=(1887) A. W. N. 259.
(2) [1905] 27 All. 688=2 A. L. J. 455=(1905) A. W. N. 158 (F.B.).

Barber (3) has been followed in this High Court in *Jai Narain* v. *Jafar Beg* (4).

While undoubtedly one joint owner can, according to the decisions of this Court, obtain an injunction ordering another joint owner to demolish structures built without permission upon the joint land, the granting of such an injunction is discretionary. Whether an injunction should be granted depends on the facts of each case. In all the cases to which reference has been made the suit has been brought without unreasonable delay. In this case there was a delay of nearly two years in bringing the suit, and, although that fact by itself does not in law amount to acquiescence, it is very material as to whether or not the discretion of the Court should be used in favour of the plaintiffs. Further when, as in this case, it is also found as a fact that the delay was deliberate on the part of the plaintiff, and for an improper motive, it is clear that the Court ought not to assist the plaintiff by granting an injunction. An injunction is an equitable remedy and the plaintiff does not come into Court with clean hands. This principle is laid down for India in S. 56, Specific Relief Act, where the issue of an injunction is prohibited if the conduct of the applicant has been such as to disentitle him to the assistance of the Court.

It is clear in this case that an injunction should not be granted. The plaintiff has his remedy in a suit for partition. I agree with the result arrived at in the two lower Courts but on different grounds. The appeal is dismissed with costs. I refuse the appellant's application for leave to appeal under the Letters Patent.

R.M./R.K. *Appeal dismissed.*

(3) [1880] 15 Ch. D. 96=28 W. R. 911=43 L. T. 95.

(4) A. I. R. 1926 All. 324=48 All. 353.

A. I. R. 1929 Allahabad 878

DALAL, J.

Kishun Mal—Plaintiff—Appellant.

v.

Sakal Raj Mal—Defendant—Respondent.

Second Appeal No. 555 of 1928, Decided on 12th July 1929, from a decree of Dist. Judge, Azamgarh, D/- 4th January 1928.

Malicious prosecution—Plaintiff should not be required to prove that he was innocent of charge upon which he was tried.

In a suit for malicious prosecution plaintiff should not be required to prove that he was innocent of the charge upon which he was tried. To throw the burden of proof on the plaintiff to prove that the charge brought by the defendant against him wss false is tantamount to putting the plaintiff to the proof of his innocence without giving him the benefit of acquittal obtained by him in the criminal Court. The burden of proof shifts to the defendants that the charge disbelieved by the criminal Court was true : *A. I. R.* 1926 *P. C.* 46 and 25 *Bom.* 332, *Rel. on.* [P 879 C 1]

A. P. Pandey—for Appellant.

P. L. Banerji—for Respondent.

Judgment. — These are two suits brought against the same defendant Sakal Raj Mal, for damages on account of an alleged false prosecution. The defendant prosecuted the plaintiff in the two suits for an offence of theft. The charge brought by the defendant was that early in the morning of 27th October 1925, at 3 a. m, he got up and went out to feed his cattle, when he saw the plaintiff removing hay from his cattle shed. An alarm was raised, whereupon the plaintiff's friends arrived, and there was a lathi fight and the plaintiff was rescued. In fact some of the plaintiff's friends were badly injured and their story, according to a complaint subsequently lodged, was that there was a dispute for possession of a tree which ended in a lathi fight between the parties. The criminal Court held the theft story of the defendant to be false and acquitted the plaintiff, while the defendant was convicted for causing hurt to the plaintiff.

The present suits for damages were decreed by the trial Court. On appeal, the learned Judge of the lower appellate Court put before him the following issue for decision :

Whether the complaint brought by Sakal Raj Mal against the plaintiffs in both cases was false to his knowledge?

In my opinion this was not a correct point for determination. The law has now been laid down in great detail by their Lordships of the Privy Council in *Balbhaddar* v. *Badri Sah* (1). According to their Lordships :

"In an action for malicious prosecution the plaintiff has to prove :

1. That he was prosecuted by the defendant ; 2. That the proceedings complained of

(1) A. I. R. 1926 P. C. 46=1 Luck. 215=29 O. C. 163.

terminated in favour of the plaintiff, if from their nature they were capable of so terminating ; 3. That the prosecution was instituted against him without any reasonable and probable cause ; 4. That it was due to a malicious intention of the defendant, and not with the mere intention of carrying the law into effect. "

In the present case the defendant himself was present at the time of the alleged occurrence. According to his version he did not act on any information received. If his complaint was not true, no question of reasonable and probable cause can arise because if it was untrue, he could have had no legitimate cause to launch the prosecution. Malice also would be presumed from the action taken by him. Their Lordships deprecated the burden of proof laid on the plaintiff by the Courts in India, that he was innocent of the charge upon which he was tried In my opinion, the lower appellate Court has laid the same burden on the plaintiff though in different words. To throw the burden on the plaintiff to prove that the charge brought by the defendant against the plaintiff was false was tantamount to putting the plaintiff to proof of his innocence, without giving him the benefit of acquittal obtained by him in the criminal Court. As observed by their Lordships in *Pestonji Manekji Mody* v. *Queen Insurance Co.* (2) the acquittal of a plaintiff of a a charge made against him must be taken to mean that prima facie he was innocent. The burden will therefore shift on to the defendant to prove in the civil Court that the charge disbelieved by the criminal Court was true, and under the circumstances of the present case, no particular burden of proof is thrown on the plaintiff. The civil Court is called upon from a balance of the evidence, and after taking into consideration the acquittal of the plaintiff by the criminal Court to record a definite finding whether the complaint instituted by the defendant was false or true. The evidence of both sides should be considered and a definite finding recorded.

As the lower appellate Court threw the burden of proof wrongly on the plaintiff, it is not clear whether it has arrived at a just conclusion in this case or not.

The following issues are remanded to that Court for decision. No further evidence shall be recorded or admitted. Counsel of both parties may be heard over again.

1. Was the complaint brought by Sakal Raj Mal against the plaintiffs in both suits true or false ? 2. What was the amount of damages suffered by the plaintiffs in each case ?

A return shall be made within four months of to-day's date when ten days shall be granted to lodge objections.

R.M./R.K. *Findings ordered.*

(2) [1901] 25 Bom. 332.

A. I. R. 1929 Allahabad 879

BENNET AND IQBAL AHMAD, JJ.

Dip Chand—Defendant—Appellant.

v.

Munni Lal and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 1322 of 1926, Decided on 16th July 1929, against decree of Addl. Sub-Judge, Mirzapur, D/- 12th June 1926.

(a) Limitation Act, Art. 44—Art. 44 applies whether transfer is by ordinary or certificated guardian.

The words of Art. 44 are very general and have application to every case in which a ward on attaining majority impugnes the transfer made by his or her guardian during his or her minority and there is absolutely no warrant for restricting the application of that article to cases of transfers made by a certificated guardian. [P 880 C 2]

(b) Guardians and Wards Act, S. 4 (2) (3) —Word "guardian" is of general import and includes natural and testamentary guardians and guardians appointed by Court.

From the definitions of "guardian" and "ward" as given in S. 4 it appears that the word guardian is of general import and includes natural and testamentary guardians and guardians appointed by Court. [P 880 C 2]

(c) Limitation Act, Art. 144—Art. 144 and not Art. 44 applies in case of transfer of minor's property by unauthorized person.

Where the property of a minor has been transferred by wholly unauthorized person, the transaction is void ab initio and it is not necessary for the minor in order to recover possession of property transferred to have the transfer set aside. In such cases Art. 44 will have no application and the suit will be governed by Art. 144 : 20 *C. W. N.* 1016; 30 *Mad.* 393; 44 *Bom.* 742; *A.I.R.* 1925 *Lah.* 619 and *A.I.R.* 1928 *Lah.* 115, *Ref.*; 32 *All.* 392, *Dist.* [P 881 C 1]

K. N. Katju—for Appellant.

S. N. Varma—for Respondents.

Judgment.—This is a defendant's appeal and arises out of a suit brought by the plaintiff-respondent for possession of certain zemindari share by cancellation of a sale-deed, dated 12th May 1917, exe-

cuted by the plaintiff's mother during the plaintiff's minority. The plaintiff's case was that there was no necessity for the sale and that the sale was not binding on him.

The defence to the suit was that the sale was for necessity and for the benefit of the minor and therefore, it was binding on him. It was further pleaded in defence that the plaintiff's age was 25 and not 21, as stated in the plaint, and that the suit was time barred.

The consideration for the sale was Rs. 640, and both the Courts below agreed in holding that, out of the sale consideration, a sum of Rs. 480 was for the benefit of the plaintiff and was binding on him and that the necessity for the remaining sum of Rs. 160 had not been proved by the vendee. On the question of limitation both the Courts below held that the suit was governed by 12 years rule of limitation and was not time barred. In arriving at this conclusion the lower appellate Court placed reliance on decision of this Court reported as *Bachchan Singh* v. *Kamta Prasad* (1). In view of the findings noted above, both the Courts below passed a decree in the plaintiff's favour for possession of the zamindari share in dispute conditional on the payment of Rs. 480 by the plaintiff to the defendants vendees. One of the defendants has preferred this second appeal, and it is argued on his behalf that the article applicable to a suit of the present description is Art. 44 and not Art. 144, Sch 1, Lim. Act, and that the suit was time barred.

It is argued by the learned counsel for the appellant that Art. 44 applies to every case in which a transfer has been made by guardian of a minor and, if a suit to set aside an alienation made by such guardian is not brought by the ward within three years of his attaining majority, a decree for possession by avoidance of the transfer cannot be passed on his favour. It is further contended that Art. 144, Lim. Act, can have no application to such a case, inasmuch as a decree for possession can be passed in favour of the plaintiff in such a suit, only if the plaintiff succeeds in getting the transfer made by his guardian cancelled.

On the other hand it is argued by the learned counsel for the respondents that the present suit was a suit, in fact and substance, for recovery of possession of immovable property which, according to the plaintiff, had been alienated by his guardian during his minority without lawful authority, and that the prayer for a declaration that the sale is not binding on the plaintiff was only ancillary to the substantive claim for possession and, as such, the suit is governed by Art. 144, Sch. 1, Lim. Act. In support of this contention reliance is placed on the Division Bench ruling of this Court to which reference has been made by the learned Judge of the lower appellate Court. He further argues that Art. 44 has no reference to cases of alienations made by guardians other than guardians appointed by Court.

In our judgment the contention of the learned counsel for the appellant is correct and ought to prevail.

Article 44 provides for a suit by a ward, who has attained majority, to set aside the transfer of property by his guardian, and the prescribed period of limitation is three years. The words of this article are very general and have application to every case in which a ward, on attaining majority, impugnes the transfer made by his or her guardian during his or her minority, and there is absolutely no warrant for restricting the application of that article to cases of transfers made by a certificated guardian.

The Limitation Act does not contain the definition of "guardian" and "ward," but by S. 4 (2), Guardians and Wards Act, "guardian" is defined as meaning a person having the care of the person of a minor or of the property, or of both his person and property, and "ward" is defined by Cl. (3) of the same section, as meaning a minor for whose person or property, or both, there is a guardian. It would thus appear that the word "guardian" is of general import and includes natural and testamentary guardians and guardians appointed by Court We find no justification for interpreting the word "guardian" in Art. 44 as having reference only to a guardian appointed by the Court and the word "ward" in that article as having reference only to a minor the guardian of whose property has been appointed by the Court.

(1) [1910] 32 All. 392=5 I. C. 585=7 A. L. J. 337.

The powers of a guardian to transfer the property of a minor are circumscribed by certain limitations vide Ss. 27, 28 and 29, Guardians and Wards Act. A natural guardian is bound to deal with the property of a minor as carefully as a man of ordinary prudence would deal with his own and can alienate the minor's property, only if the alienation is for the minor's benefit. If a sale is made by a natural guardian of a minor, and the sale is not for the benefit of the minor, the transaction is undoubtedly voidable at the option of the minor, but this option must be exercised by the minor within three years of the date of his attaining majority, if he wants to have the transfer set aside. If he allows the period of three years to elapse, his title to the property will be extinguished, inasmuch as the transferee holds the property transferred by the natural guardian not under a void but a voidable transaction. After the expiry of three years from the date of attaining majority the transfer cannot be set aside, and then a suit for possession of immovable property cannot be maintained by the ward, inasmuch as, during the subsistence of a valid deed of transfer which has not been avoided by the ward the title to the property must be deemed to be with the transferee.

It is otherwise in those cases in which the property of a minor has been transferred by a wholly unauthorized person. In such cases the transaction is void ab initio and it is not necessary for the minor in order to recover possession of the property transferred to have the transfer set aside. In such cases Art. 44 will have no application and the suit will be governed by Art. 144, Sch. 1, Lim. Act.

For the reasons that we have given, we are unable to agree with the decision of this Court reported as *Bachchan Singh* v. *Kamta Prasad* (1). It is further to be noted that the question whether Art. 44 does or does not apply to cases of the description that we are considering was never considered by the learned Judges in that case, and indeed, the point was never argued by the learned counsel who represented the transferee in that case.

The view that we take is in consonance with the decisions of the Calcutta, Madras, Bombay and Lahore High Courts: vide *Brojendra Chandra Sarma* v. *Prosanna Kumar Dhar* (2), *M. Latchiah* v. *P. Mukkalinga* (3), *Fakirappa Limannar* v. *Lumanna Mahadu* (4), *Labha Mal* v. *Malak Ram* (5) and *Khushia* v. *Faiz Muhammad Khan* (6).

For the reasons we have given, we hold that the plaintiff-respondent had a period of three years from the date of his attaining majority to avoid the transfer made by his mother, who was his natural guardian. There is no finding recorded by either of the Courts below as to the age of the plaintiff. If the plaintiff filed his suit before completing the age of 21, the suit would undoubtedly be within time; otherwise it would be time barred.

In order to decide this appeal we must have a finding from the lower appellate Court on the following point:

What was the age of the plaintiff on the date of the institution of the suit?

As no specific issue on the point was framed by the trial Court, we think it desirable that the parties should be allowed to adduce evidence on the point, and we allow the parties to do so.

The finding must be submitted to this Court within three months from today's date. On receipt of the findings the usual ten days will be allowed for filing objections.

R.M./R.K. *Case remanded.*

(2) [1920] 24 C. W. N. 1016=59 I. C. 489=32 C. L. J. 48.
(3) [1907] 30 Mad. 393=17 M. L. J. 220.
(4) [1920] 44 Bom. 742=58 I.C. 257=22 Bom. L. R. 680.
(5) A. I. R. 1925 Lah. 619=6 Lah. 447.
(6) A. I. R. 1928 Lah. 115=9 Lah. 33.

A. I. R. 1929 Allahabad 881

SULAIMAN AND PULLAN, JJ.

Mohammad Unis—Judgment-debtor—Appellant.

v.

Janeshar Das and *others*—Decree-holders—Respondents.

Execution First Appeal No. 245 of 1928, Decided on 25th July 1929, from a decree of Sub-Judge, Muzaffarnagar, D/- 22nd March 1928.

(a) Civil P. C., O. 34, R. 8—Refusal by treasury officer to take money though tendered in time does not amount to default.

The refusal of the treasury officer to take money paid as decretal amount, though tendered in time cannot amount to a default on the part of the judgment-debtors. [P 882 C 2]

(b) Limitation Act, Art. 74—Waiver—Acceptance of instalment after default amounts to waiver.

Where the decree-holder accepts the payment of instalments even after the whole decretal amount has become payable by default, his act amounts to a waiver on his part. [P 882 C 2]

(c) Civil P. C., O. 34, R. 4—Decree under, can be passed in terms of compromise—Period can be extended by Court

A preliminary decree under O. 34, R. 4 can be passed in terms of a compromise, and such compromise can have the effect of extending the period allowed for payment in accordance with the wishes of the parties and must not be strictly limited to the period of six months prescribed by R. 2 (b), O. 34 : *A. I. R.* 1927 *All.* 167 (*F. B.*), *Dist.* [P 883 C 1]

(d) Civil P. C., O. 34, R. 4—Decree-holders are bound to apply for final decree before proceeding to execution.

Where parties agree that the decree should be drawn up under O. 34, R. 4, it can be assumed that they are aware of the law which requires a final decree under R. 5. The decree-holders are therefore bound to apply for final decree before they can proceed to execution and they are barred from making an application for sale in an execution Court. [P 883 C 1]

M. Waliullah, *K. C. Mital* and *Kedar Nath Sinha*—for Appellant.

Peary Lal Banerji and *Gidhari Lal Agarwala*—for Respondents.

Judgment.—The learned Judge does not appear to have applied his mind to the facts of this case and to have dismissed the objection of the judgment-debtors quite wrongly. In the application for execution itself it was admitted that under the decree annual instalments have to be paid by 31st July every year and in case of non-payment of two consecutive instalments the interest was to be chargeable and the entire decretal amount was to become payable. There is not a word in the judgment of the learned Judge to suggest that he had in his mind the idea that there ought to be a default in the payment of two consecutive instalments. The whole order is based on the supposition that there was a default because the instalment was not paid on 31st July 1923, but was accepted by the treasury on 1st August 1923. What happened on that date was that the judgment-debtors went to the treasury officer with the money and asked him to deposit it. The treasury officer wrote on the tender that on that day the treasury had been closed at 12 O'clock and the amount could not be taken. The officer himself was present on that occasion. Presumably it being the last day of the month the treasury for the sake of convenience was closed early so that the cash in hand might be counted. In any event the refusal of the treasury officer to take the money although it was tendered before 4 o'clock cannot amount to a default on the part of the judgment-debtors. The money was accepted the next day. Furthermore, it appears that the decree-holder waived his claim to recover the whole amount even if he had one. Again he accepted the instalment paid on 30th July 1924. The acceptance of these two instalments amounted to a clear waiver on his part. The learned Judge has not considered this point at all. Even the application for execution did not disclose cause of action for claiming the entire amount because two consecutive defaults were not even mentioned. The application as worded was misconceived and was premature. We would not, however, be disposed to reject the application on this score alone for the judgment-debtor himself admitted in his objection that the entire remaining decretal amount became due in a lump sum on 31st July 1926. Thus although the decree-holder made his application for execution under a complete misapprehension of the terms of the compromise decree there had actually been a default on the part of the judgment-debtor which would have authorized the decree-holder to apply for execution against the property in respect of the amount due on 31st July 1926.

There is, however, another objection raised by the judgment-debtor which is in our opinion fatal to the decree-holder's claim. The compromise contained the following prayer :

"It is prayed that under O. 34, R. 4, a decree may be passed for recovery of the money by instalments and in accordance with the aforesaid conditions."

On that application the Court passed an order for a decree in the terms of the compromise under O. 34, R. 4, Civil P. C., and a decree was prepared in that form. Moreover, it is apparent from the order of the Court dated 5th September 1916, that only one defendant agreed to the compromise, the other being absent, and there can be no question whatever that the order passed against the other defendants was one under O. 34, R. 4. The Judge of the Court below who decided this matter

in a manner as unsatisfactory as that in which he decided the other questions before him considered that the case was governed by the decision of a Full Bench of this Court reported in *Askari Hasan* v. *Jahangiri Mal* (1). As it happens both of us were parties to that decision. The point there decided was that where a compromise decree provides for the payment of mortgage money in instalments and does not provide for payment on a fixed date within six months from the date of declaring the amount due, O. 34, R. 6 has no application to the case. But in that case the parties had not agreed that the decree should be passed under O. 34, R. 4, as they have in the present case. In our opinion this is an essential difference. We are aware of no decision to the effect that a preliminary decree under O. 34, R. 4, cannot be passed in the terms of a compromise, and clearly such a compromise can have the effect of extending the period allowed for payment in accordance with the wishes of the parties, and must not be strictly limited to the period of six months prescribed by R. 2 (b), O. 34. This period can be extended at any time by the Court and failing authority to the contrary we are of opinion that it can be extended by the parties themselves in a compromise which is accepted by the Court. As the parties agreed that the decree should be drawn up under O. 34, R. 4, we are bound to assume that they were aware of the law which requires a final decree under R. 5. (And there is no question that the Court in passing the decree against all the defendants including those who were absent intended that the decree should be one under O. 34, R. 4.) The decree-holders therefore were obliged to apply for a final decree before they can proceed to execution and they were debarred from making an application for sale in an execution Court.

A further point was raised on behalf of the judgment-debtor, namely that this decree has abated. One of the decree-holders Ugar Sen died in the year 1919 and no steps were taken within six months to substitute the name of his son in the decree. On the other hand the judgment-debtor continued to make his annual payments to the son Janeshtar Das up to the year 1924, and furthermore this is a case of a joint Hindu family, and we are unable to hold under those circumstances that the decree abated because the son of one of the deceased members of the family did not have his name substituted for that of his father within six months of the latter's decease. But the decision of this point is not material to the present case, as we are of opinion that the decree-holders were incompetent to apply for the sale of the property without obtaining in the first instance a final decree under O. 34, R. 5.

We accordingly allow this appeal with costs and allow the objection of the judgment-debtor and order that the application for execution be dismissed with costs.

R.M./R.K. *Appeal allowed.*

(1) A. I. R. 1927 All. 167=49 All. 297 (F.B.).

A. I. R. 1929 Allahabad 883

IQBAL AHMAD, J.

Kasim Abbas—Plaintiff—Appellant.

v.

Hans Ram and *others*—Defendants—Respondents.

Second Appeal No. 647 of 1928, Decided on 22nd July 1929, from decree of Addl. Sub-Judge, Farrukhabad, D/- 10th February 1928.

Adverse possession — Possession of parti plot of land by ryot is not adverse but permissible — Rule has no application to possession of abadi plots.

The possession by a ryot of a parti plot of land belonging to a zamindar is not necessarily adverse. The use of parti plots of lands is common in this country and does not usually arrest the attention of a zamindar. Such possession far from being adverse must be deemed to be permissive. But there are cases of possession of abadi plots by a tenant to which the rule has no application. Where a plot of land has been used by a tenant for his domestic and agricultural purposes, for such a long time so as to warrant a presumption that his occupation of the plot is a part of his original contract of tenancy, the zamindar cannot disturb his possession during the subsistence of the contract of a tenancy : 16 *Bom.* 338 ; 21 *Mad.* 53 ; 8 *I. C.* 708 ; *A. I. R.* 1926 *All.* 66, *Ref.* [P 884 C 2 ; P 885 C 1]

M. A. Aziz—for Appellant.

Baleshwari Prasad—for Respondents.

Judgment.—This is a plaintiff's appeal and arises out of a suit for possession over a portion of abadi plot 24 and for recovery of Rs. 60 as the price of two nib trees alleged to have been wrongfully cut by the defendants.

Originally twelve persons were arrayed as defendants to the suit but nine of

those defendants did not claim any interest in the plot in dispute and were exempted. The contest was between the plaintiff and defendants 10 to 12.

The house of the contesting defendants is situate on abadi plot 18, which is to the west of plot 24. Both plots 18 and 24 adjoin each other.

As regards the nib trees the trial Court held that only one tree was cut and that

"the tree that was cut was standing on the west of No. 24 and belonged to Hans Ram,"

defendant. The trial Court on this finding dismissed the claim for recovery of the price of nib trees. The lower appellate Court has agreed with this finding of the trial Court. The only point argued before me with respect to the nib tree is that the finding of the learned Munsif was very indefinite and that, in the absence of a clear finding that the tree cut was on plot 18, plaintiff's claim with respect to the same should not have been dismissed. I am unable to agree with this contention. The finding that the tree belonged to Hansram and was towards the west of plot 24 amounts to a finding that the tree was on plot 18 and therefore the plaintiff had no title to the same.

Now I proceed to consider the claim as regards possession of a portion of plot 24. That plot has been described in this litigation as a khandhal (house in ruins). According to one of the defendants' witnesses the khandhal was owned by a person named Dammar, who died about forty years ago. The plaintiff's case was that he, as zamindar, was entitled to possession of that plot and that the defendants had taken unlawful possession of the same. The contesting defendants, on the other hand, alleged that they were in possession of the plot as a ryot for more than twelve years. The learned Munsif held that the defendants had been "in possession for 20 or 25 years at least" and being of opinion that the plaintiff was not entitled to sue for possession after the lapse of 12 years from the date of commencement of the defendants' possession, dismissed the claim.

The lower appellate Court has affirmed the finding of the trial Court as to the duration of the defendants' possession over the plot and has upheld the decree of that Court.

In appeal before me it is argued by the learned counsel for the appellant that the defendants, by remaining in possession of a parti plot of land for more than 12 years, could not prescribe a title against the zamindar, nor could the nature of that possession be deemed to be adverse in law. On the other hand it is argued on behalf of the respondents that the peaceful possession of the defendants extending for a period of more than 12 years entitles them to have that possession protected and the plaintiff zamindar is not entitled to dispossess them.

In my judgment there is considerable force in the contention of the learned counsel for the appellant. The answer to the question whether or not possession was adverse, must necessarily depend on the nature of the property and the relative positions of the real owner and of the person in possession. The possession by a ryot of a parti plot of land belonging to the zamindar is not necessarily adverse. So long as the zamindar is not in need of putting the parti land to some use, it does not matter to him if that plot is put to temporary use by his ryots. The use of parti plots of land by the ryots in villages is common in this country and does not usually arrest the attention of the zamindar, but such possession is insufficient to give a title to the tenant by adverse possession. Such possession, far from being adverse, must be deemed to be permissive. The view that I take is in consonance with the view taken in the case of *Framji Cursetji* v. *Gocul Das Madhowji* (1), *Chockalinga Naicken* v. *Muthusami Naicken* (2) and *Bechu* v. *Lachmi Kuar* (3). In the last mentioned case it was held that the structures of a purely temporary nature that had been made by a tenant for the convenient use of his house do not constitute such an assertion of right on the part of the tenant as would justify the conclusion that he intended to, and did in fact, set up an adverse claim to the ownership of the soil and, therefore, can be no evidence of adverse possession.

On the authority of cases noted above I hold that possession of a tenant or a ryot over a parti plot of land cannot ordinarily be held to be adverse. But there are cases of possession of abadi plots by a tenant to which this rule has

(1) [1892] 16 Bom. 338.
(2) [1893] 21 Mad. 53.
(3) [1910] 8 I. C. 708.

no application. For instance if an open plot of land, which is close to a tenant's house has been used by him for his domestic or agricultural purposes for such length of time as to warrant a "presumption that his occupation of the plot is a part of his original contract of tenancy"; the zamindar is not to disturb his possession during the subsistence of the contract of tenancy : vide *B. Bhagwan Rai* v. *Jaddu Rai*, *A. I. R.* 1926 *All.* 66.

In the present case the necessary facts have not been ascertained by either of the Courts below and, therefore, I am unable to decide whether the case comes within the purview of the case of *B. Bhagwan Rai* v. *Jaddu Rai*, or is governed by the principle of law enunciated in the first three cases noted above. If facts are proved which justify the presumption that plot 24 had been in occupation of the contesting defendants as part of their original contract of tenancy, then the plaintiff will not be entitled to a decree for possession. On the other hand, if proved facts do not warrant such a presumption, then the mere fact of the defendants' possession over plot 24 for a period of more than 12 years would be no justification to deny to the plaintiff zamindar a decree for possession.

In the view that I take, I cannot decide this appeal without having a finding from the lower appellate Court on the following point :

Has the plot in dispute been in occupation of the defendants for such length of time as to raise the presumption that, as part of their original contract of tenancy, they were allowed to use the plot for their domestic or agricultural purposes ?

Parties will be allowed to adduce additional evidence. The findings must be submitted to this Court within three months from to-day's date. On receipt of the findings ten days will be allowed for filing objections.

R.M./R.K. *Finding ordered.*

A. I. R. 1929 Allahabad 885

BENNET AND IQBAL AHMAD, JJ.

Bhagwan Das—Plaintiff—Appellant.

v.

Bibi Iqbal Sultan Banu Shahar Khurshed Begam—Defendant—Respondent.

Second Appeal No. 1399 of 1926, Decided on 23rd July 1929, against decree of Second Addl. Sub-Judge, Aligarh, D/- 26th June 1926.

(a) Civil P. C., S. 100—Finding of fact cannot be reversed in second appeal.

It is not open for an appellate Court to reverse a finding of fact in second appeal even though it would have come to a different finding on the evidence before the lower appellate Court. [P 886 C 1]

(b) Easements Act, S. 7, Illus. (e)—S. 7 does not apply to land burdened with building—S. 15 should be applied to such case—Easements Act, S. 15.

Section 7, Illus. (e) applies to cases where the land is in natural condition and does not apply to land burdened with a building and there is artificial pressure by the building itself. In such cases S. 7 does not apply and the question of easement can be decided by applying S. 15. [P 886 C 2]

Panna Lal—for Appellant.

T. A. K. Sherwani—for Respondent.

Judgment.—This is a second appeal by the plaintiff who got a decree for damages to the extent of Rs. 200 from the Court of first instance which was reversed by the lower appellate Court. The suit was brought on the allegations that the house and the shop of the plaintiff have been enjoying the right of easement of support from the wall of the defendant's shop for more than 30 years, and that the defendant had altered the course of a deep drain bringing it close to the boundary of the plaintiff's land, with the result that the southern wall and the ground floor and the upper storey of the plaintiff's house along with a roof had fallen down. The facts as regards the cause of the damage is as follows :

"The learned Munsif has come to the conclusion that the damage caused to the plaintiff's house and shop was chiefly due to the excavation of the nala. I agree with the learned Munsif in this finding."

But the lower appellate Court also came to the finding :

"There is no definite evidence to show that the period of 20 years had been completed before the alleged encroachment. I am of opinion that the plaintiff failed to establish any right of support for his building."

We may note that this finding is also the finding of the Munsif. In second

appeal it was argued that the sanction granted by the Municipality for raising constructions and the final report about their completion were public documents, and the Court below was wrong in discarding the latter as unreliable. On 4th April 1904, the plaintiff made an application to build his house. Under S. 87 (4), Act 1 of 1920, it was necessary for the plaintiff to commence his building within one year of sanction being granted on that application. The exact date of granting sanction is not shown. The plaintiff next relied on a report dated 11th March 1905, by a municipal jamadar to the effect that completion had been made according to the order. In those days apparently there was no further inspection of buildings. The lower appellate Court deals with this evidence as follows :

"An application for sanction to build the house was made in 1904, but there is no satisfactory evidence to show when the construction was completed. The municipal jamadar's report is not a very reliable or convincing decument, and the probability is that the jamadar was concerned only with constructions abutting on the municipal streets. The oral evidence on the point consists of the statements of the plaintiff and Chiraunji Lal. They have both given a vague period of 20 or 22 years. There is no definite evidence to show that the period of 20 years had been completed before the alleged encroachment."

We are of opinion that no doubt we would have come to a different finding on the evidence before the lower appellate Court but we consider that it is not open to us to reverse that finding in second appeal, and accordingly we are bound by that finding

The next ground advanced in second appeal was that on the facts found the plaintiff's right of support to his building was legally established, and that the view of law taken by the Court below as to the plaintiff's right of support from adjacent land and the defendant's right to dig a drain just close to the plaintiff's wall was unsound and incorrect The argument of the learned counsel for the appellant was that quite apart from the period of 20 years his client having made a wall on the ground had a right of support from the subjacent wall of the defendant under S. 7, Easements Act. He referred for this proposition to illustration (e) and the explanation to that illustration. In this connexion we may refer to Peacock's Law relating to Easements in British India, Edn. 3, p. 139, which states as follows :

"The right of support for land in its natural condition by adjacent land is a natural right and incidental to the ownership of property. Any change in the land supported which converts its natural character into an artificial character such as would be caused by placing buildings upon it or excavating it would obviously impose a changed or increased burthen upon the adjoining land the effect of which would not alter or increase the previous obligation unless the existence of an easement could be proved."

We are of opinion that although the plaintiff has a right to support from the subjacent soil of the defendant there is nothing in the evidence in the present case to show that that right has been infringed. An infringement of that right would take place if for instance the digging of the drain by the defendant had resulted in a portion of the soil of the plaintiff's land falling into that drain. The finding of the learned Munsif is that the wall of the plaintiff in question is at a distance at the western extremity of 2 "2" from the drain and at a less distance at the eastern extremity. But there is no finding whatever of the lower appellate Court that any portion of the plaintiff's wall has fallen into the drain. On the contrary the finding is that the wall of the plaintiff has collapsed because the drain having been dug to a depth of nine feet and this depth being 4'5" below the foundation of the wall of the plaintiff the wall of the plaintiff has collapsed. S. 7, Ill. (e) clearly states that land is in its natural condition when it is not excavated and not subjected to artificial pressure. In the present case there is artificial pressure from the building of the plaintiff and that artificial pressure has produced a greater stress than the stress which the soil is able to bear when deprived of the support of the subjacent soil of the defendant We consider therefore that the lower appellate Court was correct in applying the right of easement by prescription of 20 years under S. 15, Easements Act, and that it is S. 15 and not S. 7 which applies to the facts of the present case. Some further argument was made on ground 5 of appeal that the nala in question was an actionable nuisance but the finding of fact by the lower appellate Court is to the contrary, and we are bound by that finding.

Accordingly we dismiss the appeal of the plaintiff. In regard to costs the following facts must be taken into consideration. The defendant was very well aware that for a long time the plaintiff's wall had been in that position. It would have been quite easy for the defendant to make her drain a slightly greater distance from the wall of the plaintiff, and in that case no damage to that wall would have ensued. Not only did the defendant take an action in regard to her land which, though she was legally entitled to take it, caused damage to the plaintiff but the defendant took advantage of the fact that her husband was at the time the Chairman of the Municipal Board in order to get this drain altered in its course for the private advantage of the defendant. Under these circumstances we consider that the equitable order of this Court will be that the parties should pay their own costs in all Courts.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 887

SEN, J.

Gopalji Maharaj—Plaintiff — Applicant.

v.

Krishna Sunder Nath Kaviraj—Defendant—Opposite Party.

Civil Revn. No. 2 0 of 1928, Decided on 16th July 1929, against the order of Sm. C. C. Judge, Muttra, D/- 23rd June 1928.

Hindu Law — Religious Endowment — Idol — Person not manager though in charge of deity cannot represent idol—Civil P. C., contains no rule for suits on behalf of idols.

The Civil P. C. contains no rule for regulating the conduct of suits on behalf of a Hindu idol. A Hindu idol has juridical status with the power of suing and being sued. Its interests are attended to by a manager. But where a person even though he has the diety in his charge, is not in law the manager of the deity, he is not competent to represent the deity in an action: 33 *All.* 735 (*F. B.*); *A. I. R.* 1923 *All.* 160; *A. I. R.* 1925 *P. C.* 139, *Ref.*; 37 *Cal.* 885 (*P.C.*); 40 *Mad.* 212 (*F. B.*), *Dist.* [P 888 C 1, 2]

N. P. Asthana, N. Upadhya and *Benod Behari Lal*—for Applicant.

P. L. Banerji and *R. C. Ghatak*—for Opposite Party.

Judgment.—This is an application for civil revision under S. 25, Small Cause Courts Act and arises under the following circumstances: A suit for arrears of rent in respect of a house was instituted in the Court of Small Causes of Muttra by the plaintiff Sri Gopal Ji Maharaj who is the idol of a Hindu temple situate at Bindraban in the district of Muttra. The suit was brought through one Smami Keshwanandji who claimed to be the manager of the shrine. The trial Court held that the defendant was a tenant of the plaintiff idol. It held, however, that Swami Keshwanandji did not in law represent the idol. The defendant is the lessee of the idol on behalf of one Naudin Chand Goshain who was the mutwalli of the plaintiff idol. Swami Keshwanandji claimed to be the manager of the plaintiff idol through one Mt. Basant Kumari who was not the mutwalli. On these grounds the suit was dismissed.

The application for revision was heard by Ashworth, J. who referred the following issue to the trial Court:

"On the death of the late shebait Naudip Chand Goshain was Mt. Basant Kumari a member of the founder's family and were there any other members known to exist ?"

The finding of the Small Cause Court Judge is that:

"the Jagdish Kunj was founded by Jagdish Pandit, that Mt. Basant Kumari does not belong to the said founder's family and that Madho Suddan Das Goswami, Narhari Das Goswami, Naudip Chand Goswami deceased were members and now Brij Gopal Goswami is the sole surviving member of the said founder's family."

A long and elaborate objection has been filed by the plaintiff applicant against the findings arrived at by the Small Cause Court The objections are directed against the findings of fact and cannot be entertained.

Shortly put the case is this: The house leased out to the defendant appertained to Jagdish Kunj of which the plaintiff idol is the owner The house was let out on behalf of the plaintiff to the defendant and the relation between the parties is that of landlord and tenant. The defendant is liable to pay the rent of the house to the plaintiff idol. The objection raised by the defendant is purely technical. The objection raised by the defendant is directed against the frame of the suit. The shibaitship or mutwallishiip of the temple vests in the family of Jagdish Pandit, the founder, and Brij Gopal is the sole surviving member of the founder's family. Mt. Basant Kumari had no right to appoint

Swami Keshwanandji as manager of the shrine. The question is whether the suit was properly framed having been instituted on behalf of the plaintiff idol by a person who was not the mutwalli or shebait of the temple and who was not appointed the shebait or manager of the temple by or on behalf of Brij Gopal Goswami who is the sole surviving member of the founder's family. The Civil Procedure contains no rule for regulating the conduct of suits on behalf of a Hindu idol. Dr. Katju relies upon O. 32, R. 4, Civil P. C. which provides in sub-Cl. (1) that any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit. A Hindu idol although not a sentient being is a juristic person and has been regarded as occupying a position analogous to that of an infant. It is doubtful whether O. 32, R. 4, Civil P. C. can be applied to the case of a Hindu idol. In *Jodhi Rai* v. *Basdeo Prasad* (1) it was ruled that a suit on behalf of an idol must be carried on by some person who represents the idol, usually the manager of the temple in which the idol is installed. Swami Keshwanandji is not a person who represents the idol. He cannot be described as ths manager of the temple, not having been appointed to the administration of the temple and its property either under powers granted by the original founder or under the authority of his successor. In *Sheo Ramji* v. *Ridhnath Mahadeo Ji* (2) the facts were peculiar. Ajudhia Puri who was the original manager of the temple property was dead. His chela and successor was a minor. One of the persons who was appointed to supervise the management was Ram Kishna Das. Ram Kishna Das appointed Vivekanand guardian of the property of the idol on behalf of the minor. In a suit brought by the idol through Vivekanand as next friend to recover possession of the property which had been wrongfully sold by a relative of Ajudhia Puri, it was held that that Vivekanand had a sufficient interest in the subject matter of the suit to be entitled to bring the suit in the name and on behalf of the idol. It is not shown in the present case what interest Swami Keshwanandj has in the idol or in the property belonging to the idol. Reference has been made to *Damodhar Das* v. *Lakhan Das* (3). This case is beside the point, the question of limitation alone having been considered in the case. In *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (4) the Judicial Committee directed that the idol might appear by a disinterested next frend to be appointed by the Court. Dealing with the legal position of the idol their Lordships observed as follows:

"A Hindu idol is, according to a long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of law, a "juristic entity." It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is, in law, its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir."

Swami Keshwanandji Maharaj may have the deity in his charge at the date of the suit but not being in law the manager of the deity, he is not competent to represent the minor in the action. Matters might have worn a different complexion if the Court had appointed him the next friend of the minor idol on the evidence that he was a disinterested person and as such qualified to represent the idol. Reference was also made to *Kalyana Venkata Ramana* v. *Kasturiranga* (5). This was a suit by two of the worshippers of a temple for themselves and others under O. 1, R. 8, Civil P. C. and has therefore no relevancy to the question in hand. The judgment of the Court below is clearly right and ought to be affirmed.

The plaintiff asks for leave to withdraw the suit with permission to institute a fresh suit upon the same cause of action. This application is opposed by the other side upon the ground that the parties having fought out the case in the Court below upon evidence, the application ought to be refused at this stage. I should have been inclined to grant the application upon the ground

(1) [1911] 33 All. 735=11 I.C. 47=8 A. L. J. 817 (F.B.).
(2) A. I. R. 1923 All. 160=45 All. 319.
(3) 1910] 37 Cal. 885=7 I. C. 240=37 I. A. 147 (P.C.).
(4) A. I. R. 1925 P. C. 139=52 Cal. 809=52 I. A. 245 (P.C.).
(5) [1917] 40 Mad. 212=31 M. L. J. 777=5 M. L. W. 625 = 38 I. C. 73=(1917) M. W. N. 400 (F.B.).

that the plaintiff having failed upon a technical ground with reference to the frame of the suit, the permission asked for should be granted in this case. But upon further consideration I have thought it advisable to reject the prayer. The suit on behalf of the idol not having been brought by any person who in law or fact properly represented the idol there is nothing to prevent the idol from instituting a fresh suit upon the same cause of action provided that the proper formalities have been fulfilled and the suit has been launched through the proper agency. I dismiss this application. In view of the peculiar circumstances of the case I direct that the parties bear their own costs.

R.M./R.K. *Application dismissed.*

A. I. R. 1929 Allahabad 889

DALAL, J.

Tirbeni Misir—Plaintiff—Appellant.

v.

Babu Mangal Chand — Defendant—Respondent.

Second Appeal No. 495 of 1928, Decided on 17th July 1929, against decree of Dist. Judge, Azamgarh, D/- 19th December 1927.

(a) Decree—Setting aside — Declaration that property in possession of party to mortgage suit should be saved from burden of mortgage decree cannot be obtained by the party who remains absent, and decree is not tainted by fraud.

Where a mortgagee obtains a decree for sale of the property mortgaged and another person who is in possession of the property having purchased it in a money decree is made defendant and chooses to remain absent the latter cannot obtain a declaration that the property in his possession should be saved from the burden of the decree, while it stands and is not tainted by collusion or fraud. [P 890 C 2]

(b) Transfer of Property Act, S. 82 — Mortgage—Confining claim to certain property of head of joint family does not amount to release of property so as to reduce money on mortgage by proportionate amount.

Where a mortgagee confines his claim to the property of the mortgagor who is the head of a joint family, his act does not amount to releasing any property that would have been liable to be sold under his mortgage so as to make him reduce his claim by a proportionate amount. 34 *All.* 606 and 40 *Mad.* 968, *Ref.* [P 890 C 2]

N. Upadhiya and *P. Pandey*—for Appellant.

Ambika Prasad—for Respondent.

Judgment.—The facts and law have been carefully explained to the Court by Mr. Pandey and Mr. Ambika Prasad. The property in suit relates to a share in three shops and those only will be referred to in this judgment in reference to various transfers. Moti Lal along with the members of a joint Hindu family owned eight annas share in these shops as head of the family. Out of this property, four annas share he mortgaged to Mangal Chand on 2nd February 1927. Subsequently Tribeni Misir the plaintiff obtained a simple money decree against Moti Lal alone and purchased the eight annas share in execution of the decree. The sons of Moti Lal, however, were able by a suit to render the sale ineffective as regards two-thirds of the property so what Tirbeni Misir obtained ultimately was Moti Lal's two annas eight pies share in the shops. The litigation ended in 1921. After 1921 Mangal Chand sued for sale on his mortgage of 1917, and in that suit Tribeni Misir was a party defendant. Moti Lal and his two sons were also defendants. As is usual to the Indian habit Tribeni Misir took no interest in the suit, did not turn up to watch it, and waited on events. On 2nd April 1924, the mortgagee Mangal Chand and Moti Lal and his two sons entered into a compromise and under which a decree was passed against Moti Lal's two annas eight pies share in the shops. The Court held the claim to be proved against Tribeni Misir also and passed a decree against him as well. This was an ex parte decree. When the decree was passed Tribeni Misir woke up to the danger to his interest and started the inevitable proceedings to be taken by a dilatory man ; he applied for re-hearing and for review. His applications were dismissed and the decree in favour of Mangal Chand remained. The decree was for Rs. 2,156/- and after realising Rs. 1,437 from the other properties Mangal Chand turned his attention to the two annas eights pies share of the shops in the possession of Tribeni. Tribeni thereupon instituted the present suit for a declaration that the decree of 1925 was not binding on him and that the share of the shops in his possession was not liable to sale in execution of the decree, and in the alternative he sought for a declaration that the payment of Rs. 97- will be a

full discharge on his part of that decree. The way he worked out the sum of Rs. 97- was this; according to him as the decree for sale was passed against two-thirds of the mortgaged property, the amount of the mortgage money should have been proportionately reduced and if so reduced, it would amount to Rs. 1,437; deducting the amount already realized by Mangal Chand, the balance would be Rs. 97.

Both the subordinate Courts have held that the decree of 1924 was not tainted with fraud or collusion, that it was binding on Tribeni, and that by reason of the binding character, Tribeni could not obtain the declaration which he sought. At the back of the minds of both Judges there appears to be a doubt as to the propriety and correctness of the decree of 1924. This doubt was raised by reason of a Bench ruling of this Court in *Jugal Kishore* v. *Kedar Nath* (1). It was held there that if a mortgagee released a part of the mortgaged property he was bound to reduce his claim for money on the mortgage by a proportionate amount. Mr. Ambika Prasad drew the attention of the Court to a different view taken by a Full Bench of the Madras High Court subsequently in *Piru Mal Pillai* v. *Raman Chetti* (2). The learned Judges have slurred over the definite pronouncement of this Court. There can, however, be no doubt as to the conflict of authority. The subordinate Courts as well as this Court of a single Judge would, however, be bound by a Bench ruling of this Court. Accepting that view, I do not think that the doubt of the subordinate Courts need have been entertained. The Munsif, a young gentleman presumably, is very hard on the Court which passed the decree of 1924, obviously thinking that if the matter had been before him, he himself would have been more wide awake, would have looked at the plaint and the written statement, not been hoodwinked by the compromise and passed a just decree. I think that this criticizm is misplaced. Mangal Chand did not have a straightforward suit against the party who may have executed the mortgage bond in his favour. He had against him the thorny hedge of the Hindu sons. Just as Tribeni himself did not derive full benefit of his auction purchase the mortgage in favour of Mangal Chand having been executed by Moti Lal alone, it was open to the sons to escape liability. Possibly Mangal Chand had no evidence to prove legal necessity and it was the right and proper course for him to accept the situation that Moti Lal's property only was liable under the mortgage. In the compromise, there is no mention made by him of the mortgaged property being released, from the burden of the mortgage. It is obvious to me that he accepted the inevitable and confined his claim for recovery of the money from Moti Lal's property. In my opinion Mangal Chand did not release any property that would have been liable to be sold under his mortgage. Moti Lal was liable to pay the whole amount and his property was consequently liable to bear the entire burden of the mortgage. A decree was certainly passed against Tribeni. There is a specific order of the Court that the claim was proved against the absent defendants. While that decree stands, Tribeni cannot obtain a declaration that the property in his possession which is the property of Moti Lal should be saved from the burden of the decree. Both the subordinate Courts have held that the decree was not tainted by fraud. The District Judge put it in these words: "It cannot therefore be said that the decree was tainted by fraud." He rightly pointed out that no specific fraud was alleged in the plaint, and the other point which also might be noticed is that there is no prayer for the setting aside of the decree on the ground of fraud. This appeal is dismissed with costs. Permission is granted to file a Letters Patent Appeal.

R.M./R.K. *Appeal dismissed.*

(1) [1912] 34 All. 606=16 I. C. 401=10 A. L. J 211.

(2) [1917] 40 Mad. 968=33 M. L. J. 211=6 M L.W. 450=42 I. C. 352=(1917) M. W. N. 752 (F.B.).

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* A. I. R. 1929 Allahabad 890

SULAIMAN AND BOYS, JJ.

Ram Din Hazari Lal—Plaintiff—Appellant.

v.

Mansa Ram Murlidhar—Defendant—Respondent.

First Appeal No. 102 of 1923, Decided on 25th June 1929, against decree of Small Cause Court Judge, Cawnpore, D/- 25th November 1922.

*** (a) Guardian and Ward — Certificated guardian—Powers to start new and speculative business are very limited.**

The position of a certificated guardian is analogous to that of a trustee. The powers of a certificated guardian in respect of starting new and speculative business are not wider than those of a karta. He has no power to start an entirely new business of a risky character unless compelled by necessity and for protection and benefit of the family: *A.I.R.* 1922 *P.C.* 237 and 20 *C. W. N.* 500, *Rel. on.* [P 893 C 1]

(b) Contract Act, S. 30—"Wagering contract"—Mere fact that contract is of highly speculative nature is not sufficient.

The mere fact that the contracts are of a highly speculative character is insufficient in itself to render them void as wagering contracts. To produce the result of a wager there must be proof that the contracts were entered into upon the terms that the performance of the contract shouldnot be demanded, but that differences only should become payable: *A.I.R.* 1928 *P.C.* 39 and 29 *Cal.* 461, *Ref.* [P 893 C 1]

*** (c) Guardians and Wards Act, S. 30—Contract with a certificated guardian is voidable—Benefit received must be restored —Contract Act S. 64.**

A contract entered into by a certificated guardian without authority is not void but only voidable and the party rescinding the contract must, if he has received any benefit thereunder from the other party to the contract restore such benefit so far as may be: 42 *Mad.* 36 and *A. I. R.* 1923 *Lah.* 250, *Ref.* [P 893 C 2]

Tej Bahadru Sapru and *K N. Katju* —for Appellant.

Uma Shankar Bajpai and *M. A. Aziz* —for Respondent.

Boys, J.—This is a plaintiff's appeal arising out of a suit for damages for breach of contract and the refund of earnest money.

The plaintiffs' case was that they entered into certain contracts with the firm of Mansaram Murlidhar, defendant, for the phrchase of sugar; that they paid the sum of Rs. 11,750 of the total earnest money on seven contracts, and that they received only certain small quantities of sugar on some of the contracts by means not apparently of actual physical delivery of the sugar, but of delivery orders; that the firm was now owned by Ramsaran, a minor son of Murlidhar, the last original proprietor who died in 1912, the said minor being represented by his certificated guardian Mt. Janki Kunwar; that the contracts were entered into between 15th March 1919 and 18th June 1919; that some of the contracts were actually signed by Ramcharan, a minor son-in-law of Mt. Janki Kunwar, the certificated guardian, and that some were signed by a munib, Sheolal, and that all the contracts were negotiated by the principal munib, Bhawani Shankar.

The defence began by a total denial of everything and the further case as set up may be broadly stated as follows: that the sugar business was a new business and that as such the certificated guardian had no power to start it; that in fact the certificated guardian never did start it but such acts as were done by Ramcharan, Sheolal and Bhawani Shankar were done without the authority of the proprietors of the firm and were done in their own interest; and, lastly, that the contracts were in any case wagering contracts and as such void, and the plaintiffs could not even ask for the return of their earnest money, supposing the pavment of such to have been even proved.

The trial Court framed five issues:

(1) Whether Ramsaran is the sole proprietor of the defendant firm and whether he is a minor? Is the suit as framed maintainable?

(2) Whether the disputed contracts were entered into with any person duly authorized by the contesting defendants?

(3) Whether the disputed contracts are genuine or fictitious?

(4) Whether the disputed contracts are merely wagering contracts?

(5) Is the plaintiff entitled to damages? If so, to what amount?

The first issue is decided in the plaintiff's favour, that Ramsaran was the sole proprietor of defendant firm, and being a minor was properly represented by his mother as certificated guardian and the suit as framed was maintainable. No further contention has arisen before us in regard to this issue. Issue 2 the trial Court sub-divided into four subsidiary issues and on these it held, firstly, that the seven contracts were executed by Ramcharan and Sheolal; secondly, that Ramcharan, who was himself a minor could not act as an agent for the proprietors of the firm so as to bind them, and that Sheolal had no implied authority to start a new business; thirdly, that there was no evidence of ratification of these contracts by the certificated guardian, and fourthly that the defendants were not estopped from denying liability. Having decided these two issues as above the trial Court thought it unnecessary to decide issue 3 or 4, but proceeded to the decision of issue 5 and held that

the plaintiff was not entitled to any damages and dismissed the suit.

After the first hearing of the case had proceeded to a certain length we thought it desirable that the two issues not decided by the trial Court should be decided as it appeared likely that they would eventually call for decision, and this has proved to be the case. We accordingly directed the trial Court to hear arguments afresh on these two issues and to record its finding. On the issue 3 the trial Court has now held that the contracts were genuine contracts, and on the issue that 4 they were not wagering contracts.

The grounds of appeal and the arguments thereon have raised before us what I think may be reduced to five main questions :

(1) Had the certificated guardian power to start these dealings in sugar ?

(2) Were the persons who negotiated and signed the contracts acting on behalf of the firm or acting only on their own behalf ?

(3) Was the earnest money alleged to have been paid actually paid, and if so, can it be held to have reached the proprietor of the firm and are the plaintiffs entitled to recover it ?

(4) Were the contracts wagering contracts ?

(5) To what relief, if any, are the plaintiffs entitled ?

The first question may be disposed of briefly. It is beyond dispute and no suggestion has been made to the contrary that in the time of the last proprietor, Murlidhar, and for seven years after his death, the business of the defendant firm was confined to dealing in cloth and money dealings commonly known as "len den," and that the firm did not enter into, nor was its name used to cover dealings in sugar until the beginning of 1919. It is beyond dispute, therefore, that a new business was started in the beginning of 1919. The absence of any power in a certificated guardian to start such a new business, at any rate without the sanction of the Court, is in my view settled by the decision of their Lordships of the Privy Council in *Sannyasi Charan Mandal* v. *Krishadhan Banerji*, (1). In that case the origina owner of the firm died leaving five sons, three of them majors, two of them minors one of the latter of whom came of age during the proceeding. The father had left two businesses, one dealing with fuel wood and the other with rice and other articles. The family was governed by the Dayabhaga law. Nilratna, the eldest brother and the karta of the family, was appointed guardian of the minor. He started a new business in rice at a new place, Orphanganj. This new business which also dealt in rice was found as a fact not to be merely an extension of the ancestral business, but to be a new business. Their Lordships did not themselves discuss the powers of a karta or of a certificated guardian to start on behalf of the minors in the family and to incur responsibility for a new business, but they said, at p. 568:

"The inability of a karta to impose on a minor coparcener the risks and liabilities of a new business started by himself is fully discussed by both Courts, and their Lordships agreeing with the conclusion at which they have arrived on this point do not deem it necessary to enter on a further discussion of the case. Their Lordships do not, therefore, lay down directly any proposition of law in this respect themselves."

To ascertain to what propositions they gave their assent it is necessary to refer to the judgment of the High Court at Calcutta, reported in *Krishnadhan Banerji* v. *Sannyasi Charan Mandal* (2). Their Lordships of the High Court held on the facts of the case that the starting of the Orphanganj business could not be justified on the ground of necessity assuming that, had there been necessity, that necessity would have been a justification. They further held that the embarking of a new and speculative trade by the karta of a family cannot be said to be for the benefit of the estate. These are, as I understand the judgments, the propositions of law, material to the present case, with which their Lordships of the Privy Council declare their agreement so far as the powers of a karta are concerned. I am unable to distinguish the material facts of this case from the material facts of the case I have been considering in so far as these propositions are concerned. It cannot be seriously contended, in view of the mass of evidence on the

(1) A. I. R. 1922 P. C. 237=49 Cal. 560=49 I. A. 108 (P. C.).

(2) [1919] 23 C. W. N. 500=51 I. C. 597=29 C. L. J. 280.

record, that the starting of a new sugar business on behalf of the firm of Mansaram Murlidhar was in the nature of a speculation. In the present case we are immediately concerned with the powers of a certificated guardian. Their Lordships of the Calcutta High Court said further that "whatever the powers of a karta may be, the powers of a guardian are more limited," and described a guardian as being in the position of a trustee. It is true that their Lordships of the Privy Council did not specifically express their agreements with these observations of the High Court at Calcutta, they made no reference to them, but I think it may be taken that the powers of a certificated guardian are in this respect at least not wider than those of a karta. I would hold, therefore, that the certificated guardian had not in the present case any power, assuming that she purported to exercise such power, to start a new and speculative business. This, however, may not conclude the matter before us. (His Lordship discussed evidence and proceeded.) The fourth question is whether the defendant can show that these were wagering contracts. If he can, the plaintiff's suit must be dismissed, even though the findings hitherto arrived at might entitle him at least to a recovery of the money paid by him. There can be no question but that the contracts in question were of a speculative nature. But that is not sufficient. I am unable to take this case out of the decision of their Lordships of the Privy Council in *Sukhdevdoss Ramprasad* v. *Gobindoss Chaturbhuja Doss & Co.* (3). Their Lordships there said after holding that the mere fact that the contracts were of a highly speculative nature was insufficient in itself to render them void as wagering contracts:

> "The authorities cited show that to produce that result there must be proof that the contracts were entered into upon the terms that the performance of the contracts should not be demanded, but that differences only should become payable. Now, in the present case no such definite agreement or understanding was proved. The law does not affect to enforce mere courtesies."

In the present case, counsel for the defendants has been unable to refer us to a single line in either the documentary or the oral evidence that points to any agreement when these contracts were made that actual delivery could not be forced upon or demanded by either side respectively. The most that he has been able to show is that there was a boom in sugar speculation at about the period of these contracts and that in many cases obligations were being settled merely by the payment of differences. On the other hand, there is the definite contract proved between the defendants and Begg Sutherland for the actual delivery of 150 bags of sugar. It would be idle for us to speculate on the meaning of this transaction, for on behalf of defendants no explanation at all is offered. The defence therefore that these were wagering contracts must fail.

The fifth and final question is, to what relief if any is the plaintiff entitled? On the conclusions at which we have hitherto arrived, the plaintiff would prima facie at least be entitled to a refund of the money which was received by the firm even though he may not be entitled to enforce further his contracts or the consequences of the breach thereof. The relevant provisions of the law are to be found in S. 64, Contract Act, and S. 30, Guardians and Wards Act. We are not dealing here with the case of a contract made with a minor direct, but a contract made with a certificated guardian. We think that by analogy with S. 30, Guardians and Wards Act, the contract was clearly not a void contract but was a voidable contract, and under that section the party rescinding the contract must, if he has received any benefit thereunder from the other party to the contract restore such benefit so far as may be. On behalf of the defendant it has been contended that it would have to be proved that the money received in this case was received not merely by the guardian but by the minor on whose behalf the guardian acted. This is so, but the question whether the benefit reached the minor need not necessarily be proved by direct evidence. It may be established also by inference from the general facts of the case. For the same reasons that we have given in arriving at our conclusion that the money was paid and received to and on behalf of the firm we hold that the inference is justified that it was received by the minor. It is manifest that direct evi-

(3) A. I. R. 1928 P. C. 30=51 Mad. 96=55 I. A. 32 (P.C.).

dence that the money reached the pocket of the minor could not in many cases possibly be available. The minor might and probably would be of such tender age that no such physical transaction would be possible. It would reach the minor by being credited in the books of the firm of which he is proprietor. We need not labour the conclusions to be drawn in this case from the failure to produce the account books.

We are satisfied therefore that there is no force in the objection that it has not been established that the money if paid, as we have held it to have been paid, reached the proprietor of the firm. We see no reason therefore why the plaintiff should not have the benefit of the provisions of S 64, Contract Act. We have further been referred to the cases of *Chinnaswami Reddi* v. *Krishnaswami Reddi* (4) and *Zinda* v. *Mt. Roshnai*, *A. I. R.* 1928 *Lah.* 250. We hold then that the plaintiff is entitled to recover the earnest money paid.

I would set aside the decree of the lower Court and give the plaintiff a decree for the sum of Rs. 11,750 with costs at 6 per cent. interest from the date of suit and dismiss the rest of the claim.

Sulaiman, J.—I concur in the conclusion arrived at by my learned brother and would only like to add a few words.

Admittedly Murlidhar did no other business than in cloth and money-lending. On his death his minor son became the sole proprietor of the business. The sugar transactions were a complete departure from the ancestral trade and the old line of business. They were also transactions of a highly speculative nature. The business of the firm was being carried on on behalf of the minor by his mother Mt. Janki Kunwar who was the certificated guardian. I have no hesitation in holding that Mt. Janki Kunwar the guardian had no authority to start an entirely new business of a speculative character. The duties of a certificated guardian are governed by the provisions of S. 27, and his powers regulated by the Act. No doubt a guardian may do all acts which are reasonable and proper, for the realization, protection and benefit of the property of the minor of which he is appointed a guardian. His position is somewhat analogous to that of a trustee. Ordinary proprietors do sometimes select investments of a speculative character but it is not open to a trustee or guardian to hazard the money of the minor in the same way. He cannot be allowed to start an entirely new business of a risky character. Such a course, when not compelled by pressure of necessity (e. g. when the ancestral business is about to fail) cannot be regarded as one for the protection or benefit of the property within the meaning of the section. That the powers of a certificated guardian are limited in this way is amply made out by the authority of *Sannyasi Charan Mandal* v. *Krishna Dhone Banerji* (1). That was a case under the Dayabhaga law where no question of a karta of a joint Hindu family as conceived under the Mitakshara law arose. The person who started the new business was a certificated guardian of the minor. Their Lordships clearly laid down that though a minor may be admitted to the benefit of partnership he cannot be made personally liable for any obligation of the firm though his share in the property of the firm is liable (S 247, Contract Act).

That the transactions in dispute in the present case were of a highly speculative character depending on the rise and fall of the market price several months afterwards admits of no doubt. It has not been suggested that there was any pressure at all on the guardian to enter into such transactions. They were accordingly wholly unjustified and unauthorized.

As to the question whether the transactions were of a gambling nature, I agree that the finding of the learned Subordinate Judge must be accepted. The fact that these contracts were of a highly speculative character would be insufficient in itself to render them void as wagering contracts. Every forward contract is to some extent speculative but is not necessarily a gambling one. The recognized test is whether the parties agree that there would not be any demand for the delivery of the goods. In *Kong Ye Lone & Co.*, v. *Lawjee Nanjee* (5), (at p. 467) their Lordships of the Privy Council laid down:

(4) [1919] 42 Mad. 36=48 I. C. 856=35 M. L. J. 652.

(5) [1902] 29 Cal. 451=23 I. A. 239=5 C. W. N. 714=8 Sar. 101 (P.C.).

"that if the circumstances are such as to the warrant the legal inference that (parties) never intended any actual transfer of goods at all but only to pay and receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction but a wager on the rise or fall of the market."

The same principle has been re-affirmed by their Lordships in the recent case of *Sukhdevdoss* v. *Govindoss Chathurbhuja Doss & Co.* (3) (at p. 486 *of* 26 *A. L. J.*) where it is laid down that to produce the result of a wager there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded, but that differences only should become payable. This later case is further an authority for the proposition that the mere fact that in a particular case no delivery actually took place and differences only were paid on previous occasions would not necessarily show that the contract was a wagering one, if at the time when the contract was originally entered into there was no understanding that delivery would not take place.

In the present case there is no satisfactory evidence at all to prove any agreement or understanding between the parties that delivery would not be called for and only differences would be paid.

There remains the question of the refund of the earnest money paid by the plaintiff. The point was not put forward prominently in the Court below.

The defendant who is the proprietor of the firm is a minor and is being sued by the plaintiff. The minor is represented by his guardian for the purposes of this suit. So far as the proceedings relating to the suit are concerned he is not entitled to claim any special privilege or concession on account of his minority. In the conduct of the suit he is bound by the act of his guardian.

There cannot be the slightest doubt that the account books of the firm relating to the sugar transactions have been deliberately withheld by the defendant. On a previous occasion when examined as a witness on behalf of the defendant firm, Bhawani Shankar distinctly stated that those were account books of sugar separate from the account books of cloth and money lending. He never attempted to draw any distinction between the three sets of the account books of the firm and never suggested that the books relating to sugar transactions were not regular account books but a mere pocket book. The present suggestion that no regular account books of the sugar transactions existed is untrue. I also think it incredible that whatever books there were should be in the possession of the broker Mangal and not with the defendant. They have undoubtedly been withheld from the Court. In these circumstances we are entitled to draw every presumption against the defendant and are justified in inferring that if those books had been produced they would have shown that the firm received the amount of earnest money.

The only question that remains for disposal is whether the refund of the earnest money paid can be legally ordered. A contract made with a minor direct is undoubtedly void: *Mohri Bibee* v. *Dharmodas Ghose* (6). It would therefore be difficult to order a refund in such a case under S. 65, unless the case is covered by S. 68 also: *Motilal Mansukhram* v. *Maneklal Dayabhai* (7). But the contracts in the present case were not entered into with the minor himself but with his certificated guardian. If the guardian had no authority to enter into these contracts, the contracts were voidable. They could not be specifically enforced against the minor when the want of authority was established. Even in cases of an alienation of property belonging to the minor made by his guardian the transaction is only voidable under S. 30, Guardians and Wards Act, and is not absolutely void. By analogy the present transactions were at their very worst voidable.

Section 64, Contract Act, would therefore be directly applicable and the party rescinding a voidable contract has to restore the benefit already received: *Chinnaswami Reddi* v. *Krishnaswami Reddi* (4) and *Zinda* v. *Mt. Roshnai*, *A. I. R* 1928 *Lahore* 250.

There can therefore be no doubt that Rs. 11,750 which were paid as earnest money and have gone into the coffers of the firm on our finding must be restored.

(6) [1903] 30 Cal. 539=30 I. A. 114=7 C. W. N. 431=8 Sar. 374 (P. C.).
(7) A. I. R. 1921 Bom. 147=45 Bom. 225.

Unlike S. 65, S. 64 does not use the word "compensation" but only uses the word "benefit." I do not think that the minor can be called upon, at any rate in this case, to pay interest on the earnest money advanced but we have power under S. 34, Civil P. C., to award interest pendente lite and future.

I would accordingly allow this appeal and grant the plaintiffs decree only for Rs. 11,750 with interest at six per cent. per annum pendented lite and future till realisation.

R.M./R.K. *Appeal allowed.*

✻ A. I. R. 1929 Allahabad 896

DALAL, J.

Zafer Ali—Plaintiff—Appellant.

v.

Kanti Prakash—Defendant—Respondent.

Second Appeal No. 2331 of 1927, Decided on 14th May 1929, from a decree of Sub-Judge, Muzaffarnagar, D/- 29th October 1927.

(a) Practice—Precedents.

When there is an obvious error made in dictating the judgment it cannot be said that such is the opinion of the High Court. [P 896 C 2]

✻ (b) Succession Act (39 of 1925) S. 214 Plaintiff in redemption suit need not produce succession certificate.

A plaintiff who sues for redemption is trying to pay a debt and not to recover it and therefore, is not required to produce a succession certificate: *A. I. R.* 1927 *All.* 227, *Expl.* [P 896 C 2]

T. A. K. Sherwani—for Appellant.

K. N. Katju—for Respondent.

Judgment.—The learned Judge of the lower appellate Court was misled by a slip made in a judgment of this Court. It is a Bench judgment, *Kasumari Das* v. *Makhu* (1). The report is quite correct. In dictating the judgment it was stated by the Court that the suit was one for redemption when it was really one for sale. I sent for the record as it seemed somewhat strange that a Bench of two Judges should have decided that a suit for redemption was a suit for the recovery of a debt. Mr. Kaul, on behalf of the respondent, argued that in any way there is the opinion of this Court that a succession certificate is necessary before a decree can be passed in a suit for redemption. When there is an obvious error made in dictating the judgment it cannot be said that such is the opinion of this Court. In the mind of the learned Judge the thought of a mortgage debt was present and not redemption as would appear by his quoting the case of *Fateh Chand* v. *Mohammad Baksh* (2), and saying that a succession certificate was necessary in respect of a mortgage debt.

Under S. 214, Succession Act No. 39 of 1925, no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession, to be entitled to the effects of the deceased person or to any part thereof except on the production of a succession certificate. In the case of redemption the plaintiff is really the debtor and not the creditor and the defendant mortgagee is the creditor of a deceased person and not his debtor. Obviously therefore a plaintiff who sues for redemption is trying to pay a debt and not to recover it and is not required to produce a succession certificate.

The suit was brought for redemption of a certain property on payment of Rs. 1,300. The subordinate Courts have held that the plaintiff was entitled to redeem only 1/12th of the property and the lower appellate Court further held that 1/12th of Rs. 1300 need be paid. No objections are made to these findings. I grant a decree for redemption of 1/12th of the property in suit on deposit in Court for payment to the defendant 112. of Rs. 1,300. The deposit shall be made within two months of today's date. A redemption decree shall be prepared. I am told that the money has already been deposited. The plaintiff shall receive proportionate costs throughout.

S.N./R.K. *Suit decreed.*

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(1) A. I. R. 1927 All. 227=49 All. 1.

(2) [1894] 16 All. 259=(1894) A. W. N. 74 (F. B.).

A. I. R. 1929 Allahabad 897

YOUNG, J.

Chhattar—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 621 of 1929, Decided on 6th August 1929, from the judgment of Addl. Sess. Judge, Aligarh, D/- 8th June 1929.

Penal Code, S. 96—Accused hitting deceased being attacked by him acts in self-defence.

Where in a marpit brought about by the illegal act of the dead person himself the accused while resisting the attack of the deceased happens to hit him on the head, rather harder than perhaps he intended to have done and thus kills him, he cannot be said to be exceeding his right of self-defence and should not be convicted. [P 897 C 2]

Saila Nath Mukerji—for Appellant.

Shanker Saran—for the Crown.

Judgment.—This is the appeal of one Chhattar, who was charged under S. 302, I. P. C. before the Additional Sessions Judge of Etah. The learned Judge, on the evidence before him, convicted the accused under S. 304, I. P. C., and ordered him to undergo four years' rigorous imprisonment.

The facts in this case are perfectly clear. It appears that it was the turn of the accused to use water of a certain well in the zamindari of Nawab Sir Mohd. Muzammillulah Khan of Aligarh. The said zamindar kept a register of his tenants and, in order to avoid trouble, arranged that on certain days certain tenants should have the right of drawing water to irrigate their fields from the well. A very sensible custom had grown up that several villagers should assist the tenant whose right it was for the day to draw water from the well, and in his turn the tenant would assist them on other days. Apparently on this day (I am taking these facts from facts found by the learned Additional Sessions Judge, and I agree thoroughly with his findings) Chhattar and his brother Babu went early to the well for the purpose of drawing water to irrigate their field, it being, without any doubt whatever, their right to draw water on that day. They were there first. Thereafter Ghamandi deceased and his brother, who is also called Babu, came to the well, and shortly afterwards two other men came to the well. Ghamandi and his brother along with some relatives wanted to take the water from Chhattar and use it in their own field. Ghamandi and his brother were foremost in their endeavour to deprive Chhattar of his absolute right. Chhattar very naturally objected, with the result that Ghamandi took the initiative in attacking Chhattar with his stick or lathi. The Judge is not decisive on this point that Ghamandi was armed with a stick or lathi. In any case, there is no doubt that Chhattar, the accused, was the person who was attacked. He was also injured, which is clear from the medical evidence. In self-defence (and in this matter the Judge agrees that he acted in self-defence) Chhattar hit Ghamandi on the head with his lathi, and unfortunately killed him. He did not hit Ghamandi after he had fallen. Babu, the brother of Ghamandi, then attacked Chhattar, and in his turn received some blows from Chhattar. The Judge found, and I agree with him, that Chhattar received blows from the weapons of his opponents before, in his turn, he inflicted blows on them.

There can be no doubt on which side the fault lies in this case. Chhattar was exercising his lawful right, and he was interfered with by Ghamandi, who wished to deprive him of it. He was interfered with to the extent of being attacked, and he, very rightly and properly, resisted the attack of Ghamandi; and if in so doing he hit him on the head and unfortunately killed him, I cannot see how it can be said to be exceeding his right of self-defence. I held last week, and indeed it has been held many times by this Court, that where a man has been attacked by another man and uses a weapon such as a lathi, it is impossible to lay down with any sort of accuracy the extent to which the attacked person rightfully acts in his defence. In a marpit of this sort, brought by the illegal act of the dead person himself, the accused cannot be blamed if, through misfortune, he happens to hit the dead man rather harder than perhaps he intended to have done.

It is noticeable in this case that from the very first the accused has told the story which the Judge has now found to be correct. He also says in his confession under S. 164 that he had no inten-

tion whatever to kill the deceased. I am quite prepared to accept this contention. It seems unlikely to me that he would have the intention in a marpit of this sort suddenly springing up, when he was attacked, deliberately to kill the deceased. I am satisfied in this case that the accused did not exceed the right of private defence, and therefore I must set aside the conviction and sentence and order his immediate release.

R.M./R.K. *Conviction set aside.*

A. I. R. 1929 Allahabad 898

DALAL, J.

Narain Prasad—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 492 of 1929, Decided on 15th July 1929, from order of Sess. Judge, Mainpuri, D/- 13th May 1929.

(a) Criminal P. C., S. 476-B—No appeal lies from complaint made by appellate Court under S. 476-B.

No appeal is allowed from a complaint made by an appellate Court under S. 476-B. An appeal can only lie if the appellate Court takes action under S. 476-A. It is open to a person interested to move the appellate Court direct and if the trial Court has not passed any order in the matter, the appellate Court may make the complaint without the intervention of the trial Court. In such a case an appeal would lie to the High Court.

[P 898 C 2]

(b) Agra Tenancy Act, S. 253—No cause for interference arises where lower Court acts within jurisdiction.

Where the District Judge on appeal from the decision of the Assistant Collector files a complaint under S. 476-B, Criminal P. C., which the trial Court refuses to file, he acts within his jurisdiction and there is no irregularity in his procedure necessitating interference.

[P 898 C 2]

K. O. Carleton—for Applicant.

A. P. Dube—for the Crown.

Judgment.—Though the application in revision was not admitted specifically I have heard arguments of both parties. The Court of an Assistant Collector refused to make a complaint against the applicant Narain Prasad under S. 471, I. P. C., for forging certain receipts. The opposite party Puttu Lal went in appeal under S. 476-B to the District Judge who did make such a complaint. This is an application in revision from the order of the District Judge. It was first argued that an appeal lay to this Court as the complaint was made by the District Judge and not by the Assistant Collector. This argument is not sound. Such circumstances would arise if the District Court had taken action under S. 476-A. It is open to a person interested to move the appellate Court direct, and if the trial Court has not passed any order in the matter, the appellate Court may make the complaint without the intervention of the trial Court. In such a case an appeal would lie to this Court. No appeal, however, is allowed from a complaint made by an appellate Court under S. 476-B.

The next question is whether a revision would lie under the Criminal Procedure Code or under the Tenancy Act. If one lay under the Tenancy Act, S. 253, no cause for interference would arise as the District Judge has acted within his jurisdiction, and I can see no irregularity in his procedure.

As to jurisdiction of this Court under Ss. 436 and 439, Criminal P. C., there is a Full Bench ruling of this Court in bar of the exercise of jurisdiction under those sections : *In the matter of Bhup Kunwar* (1). The Full Bench judgment was delivered prior to 1923 when certain changes were made in the provisions relating to prosecution for offences committed in Courts. A learned Judge of this Court followed the Full Bench ruling in 1925 in *Banwari Lal* v. *Jhunka* (2), for the reason that the provisions of S. 439, Criminal P. C., were not altered in 1923. His attention, however, does not appear to have been drawn to the provisions of S. 561-A added in 1923, according to which, nothing in the Code of Criminal Procedure shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of any Court, or otherwise to secure the ends of justice. Having regard to those provisions I would have submitted this matter to a larger Bench.

I, however, do not consider such action necessary as on the facts, disagreement by way of revision with the direction of the District Judge is not possible. The District Judge has considered the matter with care, and if his reasons are not sound that matter may be decided at the

(1) [1905] 26 All. 249=(1904) A.W.N. 15.

(2) A. I. R. 1926 All. 229.

trial of Narain Prasad. There is no prima facie defect in the complaint of the District Judge, and I dismiss this application.

R.M./R.K. *Application dismissed.*

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* A. I. R. 1929 Allahabad 899 (1)

MUKERJI AND NIAMATULLAH, JJ.

Emperor

v.

Ram Prasad—Opposite Party.

Criminal Ref. No. 549 of 1929, Decided on 5th July 1929, made by Dist. Judge, Moradabad, on 10th May 1929.

*** Criminal P. C., S. 476-B—Court taking action under S. 476 not being moved by any party—Appeal lies under S. 476-B.**

Where a Court takes action under S. 476 not being moved by a party, an appeal under S. 476-B lies. The word "such" before the word "complaint" in the third line of the authorized edition of the Code refers to a complaint "under S. 476 or 476-A." The word "such" has no reference to the case of a complaint being filed at the instance of a party: *A. I. R.* 1929 *Lah.* 9, *Diss. from.* [P 899 C 2]

U. S. Bajpai—for the Crown.

G. S. Pathak—for Opposite Party.

Judgment.—This is a reference by the learned District Judge of Moradabad in a matter arising out of an appeal purporting to be under S. 476-B, Criminal P. C. The learned District Judge has not stated under what rule of law he has made the reference, but we presume that his reference is under S. 113 and O. 46, Civil P. C. If that is so, the reference is quite competent.

The facts are briefly these:—A certain person who was the appellant before the learned District Judge, viz., Ram Prasad, was ordered to be prosecuted for perjury by the learned Subordinate Judge of Moradabad. When the appeal came up for hearing, the objection was taken that no appeal lay. A ruling of a single Judge of the Lahore High Court, viz., *Satto* v. *Emperor* (1), was quoted before the Judge. The learned Judge was not satisfied that the ruling was a correct one. He did not like to take upon himself the responsibility of differing from a decision of a High Court, although the High Court was not the Allahadad High Court. He accordingly made the reference.

The question is whether where a Court takes action under S. 476, not being moved by any party, an appeal under S. 476-B, Criminal P. C., lies.

The matter is really a reading of the section itself. As we read it, the section would run like this:

"Any person on whose application any civil .....Court has refused to make a complaint under S. 476 or S. 476-A or (any person) against whom. . . . . a complaint (under S. 476 or 476-A) has been made"

In our opinion to the word "such" before the word "complaint" in the third line of the authorized edition of the Code refers to a complaint "under S. 476 or 476-A." The word "such" has no reference to the case of a complaint being filed at the instance of a party.

We have considered the case cited before the learned District Judge and with all respect, we are unable to agree with that decision.

We direct that the learned District Judge do proceed to decide the appeal as properly cognizable by him. We make no order as to costs.

R.M./R.K. *Order accordingly.*

(1) A. I. R. 1929 Lah. 9.

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* A. I. R. 1929 Allahabad 899 (2)

DALAL, J.

Ghamandi Nath—Applicant.

v.

Babu Lal—Opposite Party.

Criminal Ref. No. 198 of 1929, Decided on 8th May 1929, made by District Magistrate, Muttra, D/- 18th February 1929.

(a) Criminal P. C., S. 240— Conviction on one or more charges — Subsequent application in revision to inflict sentences with regard to others—Withdrawal of application amounts to acquittal, on same.

When a charge containing more heads than one is framed against the same person and conviction has been made on one or more of them, and the complainant applies in revision to inflict sentence on the others but subsequently withdraws the application, the withdrawal amounts to withdrawl of complaint with regard to such charge with the consent of the Court and so to acquittal. [P 900 C 2]

*** (b) Criminal P. C., S. 240— S. 240 applies to every grade of Court.**

Provisions of S. 240 apply to every grade of Court and not only to the trial Court. [P 900 C 2]

(c) Criminal P. C., S. 403 (1) and (2)— Separate charges except under S. 235 (1)— Accused cannot be tried again after acquittal or conviction.

Reading Cl. (2) in conjunction with Cl. (1) it follows that when a separate charge has been framed against person under any of the sub-sections other than sub-S. (1), S. 235, he

cannot be tried for separate charge when he has once been convicted or acquitted of one charge: 10 *C. W. N.* 518, *Rel. on.* [P 900 C 2]

S. N. Chaube—for Applicant.

Iqbal Ahmad—for Opposite Party.

Judgment. — One Ghamandi Nath made a report to the police on 21st April 1928, that on the previous night a burglary or dacoity had been committed at his house and that two men Manni Lal and Babu Lal were standing at his door armed with a spear and a sword directing the operations of the burglars or dacoits. The report was found to be false so far as Manni Lal and Babu Lal were concerned. Ghamandi Nath was thereupon tried for offences under Ss. 211 and 500, I. P. C. on the complaints of Manni Lal who is a brother of Babu Lal. The Magistrate convicted Ghamandi Nath under S. 500 and sentenced him to three moths' simple imprisonment. He adopted a very weak attitude and refrained from passing any order on the charge under S. 211, I. P. C. Manni Lal thereupon applied in revision to this Court to enhance the sentence under S. 500, I P. C. and to inflict a sentence under S 211, I. P. C. This Court agreed that the sentence of three months' simple imprisonment was ludicrously inadequate, but as Manni Lal withdrew his application the Court refrained from issuing notice to Ghamandi Nath to show cause why the sentence passed on him should not be enhanced. Babu Lal thereupon took up the running and filed in the Court of a Magistrate a complaint against Ghamandi Nath under S. 211, I. P. C. and the Magistrate accepted this complaint.

The District Magistrate in revision has submitted the record to this Court for dismissing the complaint. He has taken no legal ground but has expressed the view that further proceedings against Ghamandi Nath would amount to persecution in satisfaction of a private grudge and it was not advisible that he should be further prosecuted. This is a sound reason and I would accept the reference on this ground. It appears to me, however, that in law also the complaint to the Deputy Magistrate is not justified. It was rightly pointed out by Mr. Chaube that there was a withdrawal by the complainant with the consent of the Court here of a charge under S. 211 and so the provisions of S. 240, Criminal P. C., applied and Ghamandi Nath must be considered to have been acquitted of that charge. It was argued that there was no specific consent of this Court and that the provisions applied only to the trial Court. When this Court accepted the withdrawal by the complainant Manni Lal, it may be presumed that it gave its consent to such a withdrawal. In his application for revision Manni Lal had desired a sentence under S. 211, I. P. C. also to be imposed; so his withdrawal of that application a mounted toa withdrawal of the charge for that offence. The provisions of S 240 apply to every grade of Court, not only to the Court of trial. There is also another reason why the complaint to the Deputy Magistrate would conflict with the provisions of S. 403 (1) and (2) of the Code. Cl. (1) deals with acquittals of offences covered by Ss. 236 and 237. As to offences covered by S. 235, Cl. (2) lays down:

"A person acquitted or convicted of any offence may be afterwards tried for any distinct offencefor which a separate charge might have been made against him on the former trial under S. 235, sub-S. (1)."

Reading this in conjunction with the provisions of Cl. (1) it would follow that when a separate charge has been framed against a person under any of the sub-sections other than sub-S. (1), S. 235 he cannot be tried for the separate charge when he has once been convicted or acquitted of one charge. To the case of Ghamandi Nath sub-S. (2), S. 235, would apply because the acts alleged against him of making a false report constitute an offence of falling within two definitions of the Indian Penal Code, namely those of S. 211 and S. 500, and he could be charged with them and tried at one trial for each of such offences. When he was convicted of one of such offences, namely an offence under S. 500, he could not be tried over again for an offence under S. 211, I. P. C. This view is supported by a Bench ruling of the Calcutta High Court, *Sharbekhan Gohain* v. *Emperor* (1). There a person had been tried for offences under Ss. 201 and 202, I. P. C. and acquitted by the Sessions Court. When he was tried again for an offence under S. 176 based on the same facts, the High Court held that he could not be so prosecuted as the case did not fall under sub-S.(1), S. 235, Criminal P.C.,

(1) [1906] 10 C. W. N. 518.

but under sub-S. (2) of that section. I direct, therefore, that the proceedings against the applicant under S 211, I. P. C., be quashed add Babu Lal's complaint dismissed.

V.B./R.K. *Complaint dismissed.*

A. I. R. 1929 Allahabad 901 (1)

SEN, J.

Mohammad Yusuf and *others*—Applicants.

v.

Emperor—Non-Applicant.

Criminal Ref. No. 426 of 1929, Decided on 31st July 1929, made by Sess. Judge, Benares, on 29th May 1929.

U. P. Municipalities Act (1916), S. 314—Court can take cognizance of complaint made by person authorized by Board.

Although S. 314 provides that no Court is to take cognizance of certain offences except with the permission of the Board, yet where the prosecution has been started on the report or on complaint of some person authorized by the Board by general or special order on this behalf either with reference to all offences or certain specified offences, the complaint must be taken to have been properly instituted and the Court is bound to take cognizance of it and to act upon it.

[P 901 C 2]

M. Waliullah and *Harnandan Prasad*—for the Crown.

Judgment.—Mohammad Yusuf, Hafiz Bachchan and Aminuddin were convicted by the City Magistrate of Benares under S. 262, Municipalities Act (Act 2 of 1916) and sentenced to a fine of Rs. 2 each and in default to one day's simple imprisonment. The applicants moved the learned Sessions Judge of Benares in revision upon the ground that the sentences and findings were bad in law and ultra vires and that the prosecution of the petitioners without the permission of the Municipal Board was null and void under the law.

The learned Sessions Judge considered that the plea advanced by the petitioners was well founded and referred the case to this Court with a recommendation that the conviction and sentence be set aside.

Section 314, Municipalities Act, contains the following provision :

" Unless otherwise expressly provided, no Court shall take cognizance of any offences punishable under this Act (whereof a list is given in Sch. 8 for the purpose merely of easier reference) or any rule or bye-law, except on the complaint of, or upon information received from, the Board or some person authorized by the Board by general or special order in this behalf."

Schedule 8 of the Act, includes S. 262, under which the applicants have been convicted.

The prosecution was initiated at the instance of a Sub-Inspector of Police. The learned Magistrate in his explanation draws the attention of this Court to a resolution of the Municipal Board No. 2518 dated 8th July 1917, whereby it has empowered the police to prosecute for certain offences including the one under S. 262, Municipalities Act. The Superintendent of Police of Benares was requested to issue instructions to officers in charge of police stations accordingly. Where the prosecution has been started on the report :

" or on the complaint of some person authorized by the Board by general or special order on this behalf "

either with reference to all offences or particularly in regard only to specified offences or offences of a specified class, the complaint must be taken to have been properly instituted and the Court was bound to take cognizance of it and to act upon it. The attention of the learned Sessions Judge was not drawn to this resolution of the Municipal Board at the time when the reference was made. I reject the reference.

R.M./R.K. *Reference rejected.*

A. I. R. 1929 Allahabad 901 (2)

SEN, J.

Faqira—Accused—Applicant.

v.

Emperor—Non-Applicant.

Criminal Revn No. 377 of 1929, Decided on 30th July 1929, from an order of Sess. Judge, Saharanpur, D/- 4th May 1929.

(a) U. P. Excise Act (4 of 1910), S. 60 (a)—Conviction under S. 60 (a) cannot be sustained when contents of bottle found in accused's possession could have been changed.

Where the contents of the bottles found in the possession of the accused could have been subsequently changed and from the circumstances of the case it cannot be said that the accused was in possession of illicit liquor, a conviction under S. 60 (a) cannot be sustained.

[P 902 C 2]

(b) Criminal P. C., S. 103—Search in absence of two or more respectable men and without recording grounds of belief that house contains prohibited liquor is irregular—U. P. Excise Act, S. 53.

Where the officer making the search does not record the grounds of his belief that the house of the accused contained prohibited liquor, as required by S. 53, Excise Act, and does not conduct the search in presence of two or more respectable inhabitants of the locality, the search is irregular. Any officer authorized by law to make a search ought to exercise the very greatest caution in fulfilling the formalities required by law for making a search and providing every possible safeguard so as not to allow any handle for adverse criticizm. [P 902 C 2 ; P 903 C 1]

Nanak Chand—for Applicant.

M. Waliullah—for the Crown.

Judgment.—Faqira is a Chamar by caste and is a resident of village Olri in the District of Saharanpur. He was convicted by Mr. Rajendra Narain, Magistrate, First Class, under S. 60 (a), United Provinces Excise Act (Local Act 4 of 1910) and sentenced to three months' rigorous imprisonment. The learned Sessions Judge on appeal has affirmed the conviction but reduced the sentence to a fine of Rs. 10. Faqira challenges the legality and propriety of the conviction by the Courts below and comes up before this Court in revision.

The date of the occurrence was 24th March 1929, which by a curious coincidence happened to be the day of the Holi celebration. On that day men of the caste and the class to which Faqira belongs notoriously indulge in strong drinks.

Mr. Abdul Rauf Khan, Sub-Inspector of Bargaon Police Station having received an information that Faqira was in possession of illicit liquor raided his house. Two bottles containing some liquid were discovered under a pulla in the courtyard. There was a struggle between a police constable and Faqira over these bottles and it appears that these two bottles were smashed in the course of the struggle. Two other bottles alleged to have contained illicit liquor were found inside the house in a room. The contents of these two bottles were not subjected to any chemical test. The Excise Officer who examined these bottles appears to have applied what he calls "the small test," and according to him one of the bottles contained 36.2 U. P. and the other 27.1 U. P. liquor. According to the Excise Inspector, it was possible for 35 U. P. liquor to reach the strength of 26.2 by exposure. There are certain facts relating to these bottles which apear to be shrouded up in complete mystery and no attempt has been made on behalf of the prosecution to unravel the same. The learned Sessions Judge noticed it and I cannot fail to take notice of it that the bottles bore on the mouth the seal of one Munawwar Ali who was not a search witness and who lived at a distance of nearly two miles from Olri. The bottles were not securely stoppered. The learned Sessions Judge finds and it is a finding which is completely destructive of the case for the prosecution that

"it is possible for the contents of the bottles to have been subsequently changed."

How could it be said under the circumstances that Faqira was in possession of illicit liquor? How can the aforesaid finding be reconciled with the remark of the learned Sessions Judge that

"in spite of the irregularities committed it can hardly be disputed that a small quantity of illicit liquor was found in the house owned by the appellant."

As a matter of fact the matter is disputed and is very vigorously disputed and upon the findings it is impossible to sustain the conviction of Faqira under S. 60 (a), Excise Act.

It has been argued that the search made by the police was irregular. The Sub-Inspector in view of the Government Notification dated 13th July 1910, was a Police Officer invested with certain powers under the authority exercisable by the Local Government by virtue of S. 10, Excise Act, and was "an Excise Officer" within the meaning of S. 3, sub-Cl. (2) of the Act. It is admitted that the Sub-Inspector had not armed himself with a search warrant. It is more than doubtful if the Sub-Inspector was under the provisions of S. 53 of the Act competent to institute a search. The powers conferred by S. 53 are limited to the Collector or any other Excise Officer not below such rank as the Local Government may prescribe. Assuming that the Sub-Inspector was qualified to search the house, he does not appear to have recorded the grounds of his belief that the house of Faqira contained prohibited liquor.

It is to be regretted that the search was not conducted in the presence of two respectable persons of the vicinity. The only witnesses to the search were the village mukhia and the chaukidar of the village. Section 103, Criminal P. C., provides that before making a search

under Chap. 7 of the Code, the officer or other persons about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.

Any officer authorized by law to make a search ought to exercise the very greatest caution in fulfilling the formalities required by law for making a search and providing every possible safeguard so as not to allow any handle for adverse criticizm. It is to be regretted that the proper safeguards were not provided in the present case.

The result is that I allow the application, set aside the orders of the Courts below and acquit Faqira of the offence charged. The fine if paid will be refunded.

R.M./R.K. *Application allowed.*

A. I. R. 1929 Allahabad 903

SEN, J.

Faqira and *another*—Accused — Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 376 of 1929, from order of Sess. Judge, Saharanpur, D/- 4th May 1929.

Criminal P. C, S. 353 — Obstruction to police officers entering house without search warrant—No harm beyond push—No offence is committed.

Where a Sub-Inspector and a constable acting under him enter the house of the accused without being in possession of a search warrant it is more than doubtful whether it could be said that they were engaged in the execution of their duty as public servants. They are technically guilty of a house-trespass and the accused has a right to resent the invasion of his house. When no harm beyond a push appears to have been sustained by the constable, no offence can be said to be committed under S. 353 : 13 *A. L. J.* 691, *Rel. on.* [P 903 C 2]

Nanak Chand—for Applicants.

M. Waliullah—for the Crown.

Judgment.—The case is a sequel to *Criminal Revision No.* 377 *of* 1929, [*Faqira* v. *Emperor* (1)] which has already been disposed of. On 24th March 1929, Sub-Inspector Mr. Abdul Rauf Khan raided the house of Faqira Chamar upon certain information received that the latter was in possession of illicit liquor. The Sub-Inspector was not armed with the necessary search warrant. The learned Sessions Judge has found that the procedure adopted by the Sub-Inspector was irregular. It was irregular because the Sub-Inspector, if he be considered to be an officer coming within the purview of S. 53, Excise Act, did not take the trouble to record his reasons for the belief that the house of Faqira Chamar contained illicit liquor.

It is alleged that the Sub-Inspector found two bottles of illicit liquor inside the house, that Faqira ran up and tried to break the two bottles, that Fatehyab Khan constable snatched one of the bottles from Faqira's hands, but that Faqira and Mangan pushed the constable down and that Mangan aimed a lathi blow which fell on the bottle in the hands of the constable.

On these facts, the learned Magistrate convicted Faqira and Mangan under S. 352, I. P. C. and sentenced them to two months' rigorous imprisonment.

The learned Sessions Judge of Saharanpur has confirmed the conviction and sentence on appeal.

In the absence of a proper search warrant, it is more than doubtful whether it could be said that the Sub-Inspector and the constable acting under him were engaged in the execution of their duty as public servants. Faqira, the owner of the house, had a right to resent the invasion of his house by the police officers. Technically the police officers were guilty of house trespass. No harm appears to have been sustained by Fatehyab Khan constable beyond the push which he received from Mangan. It has been strongly argued that in view of the circumstances of the case, no offence is brought home to the applicants under S. 353, I. P. C. This contention is not without force and is supported in principle by a decision of this Court in *re, Madho Sonar* v. *Emperor* (2). I allow the application for revision, set aside the orders of the Courts below and direct the release of Faqira and Mangan. They are already on bail and need not surrender to their bail.

R.M./R.K. *Revision allowed.*

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(1) A. I. R. 1929 All. 901 (2)=1929 Cr. C. 493 (2).

(2) [1915] 13 A. L. J. 691=30 I. C. 141=16 Cr. L. J. 589.

A. I. R. 1929 Allahabad 904

SEN, J.

Ram Sundar—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 384 of 1929, Decided on 26th July 1929, made by Sess. Judge, Mirzapur, on 10th May 1929.

Criminal P. C., S. 256—Whether accused prejudiced by failure to follow provisions of S. 256 doubtful—Conviction was set aside.

Where it cannot be said with certainty that the accused, who has not been asked by the Magistrate as to whether he wishes to cross-examine the prosecution witnesses, has not been prejudiced by reason of non-compliance of the provisions of S. 256 and the case is not fit one for retrial, the conviction should be set aside: (1902) *A.W.N.* 5 and *A.I.R.* 1927 *All.* 217, *Rel. on.* [P 904 C 2]

M. Waliullah—for the Crown.

Judgment.—Ram Sundar was convicted under Ss. 379 and 426,. I. P. C., by a Special Magistrate of Mirzapur and sentenced to two months' rigorous imprisonment and to a fine of Rs. 4 under S. 426 I. P. C.

The charge against the accused was that he with certain confederates had stolen a male goat belonging to Sukhdeo and had killed it.

The charge was framed against the accused on 21st February 1929. On that date the Magistrate did not ask the accused if he wished to cross-examine any of the witnesses for the prosecution who had already been examined.

It was argued before the learned District Magistrate on appeal that the provisions of S. 256, Criminal P. C., were mandatory, that the said provisions had not been complied with and that this was a defect which vitiated the trial.

The learned District Magistrate did not accede to this contention on the ground that no authorities were cited before him. There are two reported decisions of this Court which deal with the provisions of S. 256 and there is no real conflict between the two. In *Queen Empress* v. *Henry C. Kaps* (1), it was held by Blair, J. that where a Magistrate who tried the case against the accused under S. 353, I. P. C., after framing the charge, omitted to ask the accused whether he wished to cross-examine any of the prosecution witnesses whose evidence had been taken, and in consequence of that omission an application had been made for the recalling of the witnesses for cross-examination and that application was rejected on the ground that it was made too late, it was impossible to say that the accused by being debarred from cross-examining the witnesses called against him did not suffer a substantial injury.

The right of cross-examination is a very important right. It will be extremely difficult to say that where the witnesses for the prosecution already examined are not offered for cross-examination after the framing of the charge the accused has not thereby suffered any substantial injury in the course of the trial. No hard and fast rule can be laid down in this respect because the answer to the question as to whether the accused has been prejudiced will be different according to the varying posture of each case.

In the case referred to above, the test applied by Blair, J. was as to whether substantial injustice has been done to the case.

In *Emperor* v. *Chhajju* (2), Kendall, J. held that the provisions of S. 256, Cr. P. C. are not provisions relating to the mode of trial and failure to follow those provisions strictly amount to no more than an irregularity in the procedure and would not be a ground for setting aside a conviction, unless the irregularity had caused the failure of justice.

It cannot be said with certainty that the accused has not been prejudiced by reason of non-compliance of the provisions of S. 256, Criminal P. C.

This is not a fit case in which a retrial ought to be ordered. The learned Sessions Judge recommends that no retrial should be directed in the present case inasmuch as the accused had already undergone over two weeks' imprisonment and incurred some expenses in this case. I accept the reference, set aside the order of Special Magistrate and of the learned District Magistrate on appeal and direct that Ram Sundar be set at liberty.

R.M./R.K. *Order set aside.*

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(1) [1902] A. W. N. 5.

(2) A. I.R. 1927 All. 217=49 All. 316.

A. I. R. 1929 Allahabad 905 (1)

DALAL, J.

Gauri Shankar and *another*—Accused —Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 395 of 1929, Decided on 24th July 1929, from order of Sess. Judge, Farrukhabad, D/- 18th April 1929.

Criminal P. C., S. 195—Court making complaints should devote some thought to the matter, frame proper charge and name witnesses supporting the case.

It is very desirable that civil or criminal Courts, when they make a complaint, should devote some thought to the matter, frame a proper charge and state in detail the names of witnesses who are likely to prove the charge. For want of such information a complaint very often results in acquittal reflecting discredit on Courts of law. [P 905 C 1]

A. P. Dube—for Applicants.

M. Waliullah—for the Crown.

Judgment.—The complaint is made by the learned Judge in a very haphazard manner. The actual statements in vernacular of the applicants which are supposed to be contradictory, are not quoted. The possibility is not considered that a man may be a debtor or a tenant of a zemindar in 1924 and may cease to be such in 1928. It is much to be desired that civil or criminal Courts, when they make a complaint, would devote some thought to the matter, frame a proper charge and state in detail the names of the witnesses who were likely to prove the charge. For want of such information the complaint more often than not results in an acquittal, reflecting discredit on Courts of law. This is just such a case and it is not desirable that such a complaint should be permitted. I set aside the order of the Sessions Judge, dated 18th April 1929, and withdraw the complaint made by him.

R.M./R.K. *Order set aside.*

A. I. R. 1929 Allahabad 905 (2)

BOYS AND PULLAN, JJ.

Surjan Kunwari—Appellant.

v.

Shantanand Gir and *another*—Respondents.

Execution First Appeal No. 69 of 1928, Decided on 28th May 1929 against decree of Sub-Judge, Allahabad, D/- 4th February 1928.

Civil P. C. S. 145 — Security, given by person in possession of property and profits, is liable for all claims of the decree-holder to the extent of that security.

S obtained a decree against *B* who appealed and applied for stay of execution. Stay was granted on the furnishing of security bonds to the amount of Rs. 10,000 and *R* (not a party to the suit) furnished security in the form of two fixed deposit receipts of Rs. 10,000 each. *S* applied for attachment of the receipts and asked for payment of eight separate items out of the proceeds, six of which were included in the decree and accepted by the Sub-Judge, *R*, however, urged that the Sub-Judge was wrong in holding that the fixed deposit receipts were liable to meet the six items. *R* contended that the security related to certain property in her possession under a lease and to the profits accruing subsequent to a particular date from the property and to the other two items only. She had delivered up possession of property and contended that as the decree did not grant future mesne profits, her security was not liable for sale at the instance of the decree-holder.

Held: that the Sub-Judge was right in rejecting this objection. Taking isolated sentences here and there, it was possible to find some support for the contentions of either party, but after very full consideration of the whole history of the matter there could be no possible doubt but that, in furnishing the security and thus remaining in possession of the property and profits for a considerable further period *R* was well aware that he was giving security and did give such security for all claims that the decree-holder might have' to the extent of that security, for any amounts payable to him under the decree. [P 906 C 1]

U. S. Bajpai and *Janaki Prasad*—for Appellant.

S. K. Dar, *B. L. Dave* and *A. P. Pandey*—for Rospondents.

Judgment.—The earlier history of this case is complicated in its facts, but the matter that we have to decide is really comparatively simple. The appeal arises out of an application for execution. Mahant Shantanand obtained a decree against Mahant Basudevanand. Basudevanand appealed and when he applied for stay of execution, stay was granted upon the furnishing of security bonds to the amount of Rs. 10,000 and security furnished by Rani Surjan Kunwari (who was not a party to the suit) in the shape of two fixed deposit receipts for Rs. 10,000 each. Mahant Shantanand has now applied for attachment of these two fixed deposit receipts and asked that out of the proceeds he should be paid some eight separate items. Of these items six arise out of the decree itself, and the Subordinate Judge has accepted them. A seventh item was for future mesne profits with

the interest arising therefrom. The Subordinate Judge has not allowed these two items on the ground that no future mesne profits were decreed. With these last two items we are not directly concerned. The present application is one by Rani Surjan Kunwari who urges that the learned Subordinate Judge was wrong in holding that the fixed deposit receipts deposited by her were liable to meet the six items to which we have referred. Her contention is that the security deposited by her related to certain property of which she was in possession under a lease, and to the profits accruing subsequent to a particular date from that property, and to those two items only. She has delivered up possession of the property and contends that as by the decree nothing was given to the decree-holder in the nature of future mesne profits subsequent to the date of suit, the security deposited by her was not liable to sale at the instance of the decree-holder.

The Subordinate Judge has rejected this objection and we think rightly. We have had the various orders, applications and affidavits relating to this question of security put before us in great detail and at great length. Taking isolated sentences here and there it is possible, as the learned Subordinate Judge says, to find some support for the contentions of either party, but after very full consideration of the whole history of the matter we are satisfied that there can be no possible doubt but that, in furnishing the security and thus remaining in possession of the property and profits for a considerable further period herself, the Rani was well aware that she was giving security and did give such security for all claims that the decree-holder might have, to the extent of that security, for any amounts payable to him under the decree.

Of the six amounts to which we have referred, one of them was a sum of Rs. 1270-8-0 due to the Secretary of State in the matter of court-fees the suit having been filed in forma pauperis. The Secretary of State applied through his counsel in execution against the judgment-debtor for the payment of Rs. 1348, the sum of Rs. 1270-8-0 which we have already mentioned and presumably a further amount for further costs. The learned Subordinate Judge gave notice to both parties. The decree-holder stated before the Subordinate Judge: vide the order of the latter dated 30th April, 1929, that: "it was a mistake on his part to have included in his own dues the money which was really payable by the judgment-debtor to the Secretary of State for India in Council."

We do not think that the admission by the decree-holder was a correct statement of the situation. The money was not primarily payable by the judgment-debtor. It is primarily payable by the decree-holder; but the decree-holder is entitled to recover it from the judgment-debtor. He was, therefore, right in asking for this sum provided that he was able to state either that he had already paid the sum to the Secretary of State, or was prepared to assure the Court that that money would be paid to the Secretary of State. We think, therefore, that the procedure for the Subordinate Judge in this case was to allow the item but not to pay it over to the decree-holder who had not given him any assurance that the Secretary of State had been paid. Having realized the amount the Subordinate Judge should pay it over direct to the Secretary of State.

It will be noted that the amount stated in the application of the decree-holder for execution is Rs. 1270-8-0 and in the present proceeding no larger amount than that can be retained by the Subordinate Judge and paid over to the Secretary of State. If the Secretary of State desire to press his claim for the balance of Rs. 77-8-0 he will be entitled in the ordinary way to obtain it from the decree-holder, and the decree-holder will be entitled to recoup himself by any subsequent proceeding against the judgment-debtor.

For the reasons that we have given above we are satisfied that the order of the lower Court, from which this appeal has been filed, was right, and we dismiss the appeal with costs.

K.N./R.K. *Appeal dismissed.*

A. I R. 1929 Allahabad 906

SULAIMAN AND NIMATULLAH, JJ.

Ram Chander—Defendant—Applicant.

v.

Tej Singh and *others*—Plaintiffs—Opposite Parties.

Civil Revn. No. 133 of 1928, Decided on 13th June 1929, against order of Munsif, Koil, D/- 26th July 1927.

Civil P. C., S. 151—Inherent jurisdiction —Application for setting aside ex parte decree if dismissed for default can be restored upon good cause shown.

Where an application to set aside an ex-parte decree is dismissed for a default, a fresh application is not the only remedy left open. An application for the restoration of such application can be made. The question for consideration is whether there was good cause for his non-appearance when the application was dismissed. Although O. 9 does not apply to such an application for restoration, the case falls under inherent jurisdiction of the Court as laid down in S. 151 : *A.I.R.* 1925 *All.* 773; *Rel. on.* [P 907 C 1]

Panna Lal—for Applicant.

N. P. Asthana—for Opposite Parties.

Judgment.—This is an application in revision from an order refusing to restore an application which was itself an application for setting aside an ex parte decree and had been dismissed for default. The learned Judge thought that no application for the restoration of such an application can lie, and the only remedy open to the applicant is to make a fresh application. Apparently his view seems to be that, if an application for setting aside an ex parte decree is dismissed for default, a fresh application for setting aside the ex parte decree should be filed, and no application to restore the application dismissed for default is competent. If this view were correct, the result would be that, if the application for setting aside an ex parte decree happens to be dismissed after the expiry of 30 days, the applicant would be left without any remedy, even though there may be a just cause for his non-appearance. For, it is quite clear that S. 5, Lim. Act, would not apply to such an application, as it has not been expressly made applicable to it. When an applicant applies that his application for setting aside the ex parte decree be restored, the question for consideration is whether there was good cause for his non-appearance at the time when the application was dismissed. That is a question entirely separate and independent from the question whether there was good cause for his non-appearance on the date when the ex parte decree was passed. These two are entirely different dates, and involve different questions for consideration.

In our opinion, although O. 9 does not apply to such an application for restoration, the case falls under the inherent jurisdiction of the Court, as laid down in S. 151, Civil P. C. This was the view expressed in *Ganesh Prasad* v. *Bhagolo Ram* (1), which is directly in point. We, therefore, allow this revision and setting aside the order send the application, dated 23rd July 1927, to the Court below for disposal according to law.

R.M./R.K. *Revision allowed.*

(1) A. I. R. 1925 All. 773=47 All. 878.

A. I. R. 1929 Allahabad 907

MUKHERJI AND YOUNG, JJ.

Kedar Nath—Plaintiff—Applicant.

v.

Ganga Ratan and *another*—Defendants —Opposite Parties.

Civil Revn. No. 52 of 1928, Decided on 7th May 1929, against order of Small Cause Court Judge, Cawnpore, D/- 23rd December 1927.

Civil P. C., O. 7, R. 10—Suit of small cause nature—Defendant pleading partnership—Small Cause Judge finding that there was partnership, dismissing suit — Plaint need not have been returned.

Where a suit as originally brought was of a small cause nature, but the defendant raised the plea of partnership between him and the plaintiff, and the Small Cause Judge, finding that there was partnership dismissed the suit, the suit was rightly dismissed and the Judge need not have returned plaint for presentation to proper Court. [P 907 C 2]

V. C. Vaish—for Applicant.

U. S. Bajpai—for Opposite Parties.

Judgment.—The plaintiff who is the applicant before us brought a suit in the Court of Small Causes at Cawnpore for recovery of a certain amount of money on the allegation that he was a commission agent and he had purchased certain bales of yarn at the defendant's instance and had sold the same at their instance. He claimed the difference in the prices and his commission. The defence was that the parties dealt with bales of yarn as partners. The learned Judge, Small Cause Court, found as fact that the bales of yarn had been dealt with by the parties as partners. Having found this, he dismissed the suit.

In this Court it is contended that the learned Judge, Small Cause Court, ought to have ordered the plaint to be returned for presentation to the proper Court. In our opinion, this contention is not sound. The suit as brought was cognizable by the Judge, Small Cause Court. It would be only on an amended plaint that a case for partnership would be cognizable by any Court. The suit has failed on the

merits and not because the plaint was not cognizable by the Judge, Small Cause Court. We dismiss this application with costs.

S.N./R.K. *Application dismissed.*

A. I. R 1929 Allahabad 908

BENNET AND IQBAL AHMAD, JJ.

Ramadhar and *another*—Plaintiffs—Appellants.

v.

Raj Narain and *others*—Defendants—Respondents.

Second Appeal No. 1059 of 1926, Decided on 16th July 1929, from a decree of Dist. Judge, Farrukhabad, D/- 13th March 1926.

(a) Interest—Cause of action held not accruing on default of payment of interest as there was no clear provision to that effect.

The terms of a mortgage deed were as follows: (1) The principal and interest at Rs. 3-2-0 p. m. were to be repaid in a period of three years; (2) interest was to be paid every six months; (3) any six-monthly interest unpaid was to be added to the principal and interest at the above rate was to be paid on it; (4) in case of breach of covenant the mortgagee could realise, all the principal at once with interest and compound interest through the Court. The mortgagee put the mortgage in suit within period of limitation from the date when the three years expired but after period of limitation calculated from the date of default to pay interest after expiry of six months.

Held: that in absence of clear provision to the effect that the mortgagee could put the mortgage in suit on default of payment of interest, the cause of action did not accrue of default of payment of interest and suit brought within twelve years from default of payment of principal was in time: *A. I. R.* 1923 *All.* 1 (*F.B.*) and *A. I. R.* 1922 *All.* 524, *Dist.* [P 909 C 1]

(b) Deed—Construction—Language similar but not identical—Document should not be interpreted by language of another.

It is well settled that it is not permissible to interpret one document by the language of another specially when the languages though similar are not identical. [P 909 C 2]

S. B. L. Gour for *U. S. Bajpai*—for Appellants.

K. N. Katju—for Respondents.

Iqbal Ahmad, J.—This is a plaintiff's appeal and arises out of a suit for sale on a mortgage dated 22nd October 1908.

The suit was resisted, inter alia, on the ground, that it was time barred. Both the Courts below gave effect to this contention and dismissed the suit.

According to the terms of the mortgage-deed the stipulated time for payment of the principal and interest was three years and interest was payable half yearly and in case of default it was to be added to the principal and interest, at the agreed rate, was to be charged on that amount. The Courts below held that, in view of the terms of the bond, the cause of action for recovery of the mortgage debt accrued on default of the mortgagor to pay interest on the expiry of six months from the date of the mortgage-deed and as the plaintiffs did not put the mortgage into suit within a period of 12 years from that date, the suit was time barred. In so construing the mortgage deed in suit the Courts below placed reliance on an unreported decision of this Court in *Second Appeal No.* 1178 *of* 1921, decided on 9th June 1922.

I am unable to agree with the Courts below. The relevant words in the mortgage-deed in suit, on the interpretation of which the decision of this case must turn, are these:

"*iqrar yeh hai ke rupya mazkura bala mai sud ba hisab tin rupya do anna mahwari ke arsa tin sal men ada wa bebak karunga, xur sud uska har shashmahi ada karunga, jis shashmahi per zar sud ada na karun to raqam sun shamil asal ke hokar usper bhi sud ba sharah mazkura bala ada karunga, dar surat wada khilafi ke murtahin ko ikhtiar hoga ke kul rupya apna yakmusht mai sud wa balai sud bazarie adalat mujh se was saha marhuna wa niz zat wa digar jaiddd meri se wasul karlewe.*"

The Courts below were of opinion that the words "wada khilafi" in the passage quoted above, have reference, not only to the default of mortgagor to pay the mortgage money on the expiry of three years but also, to his default to pay interest on the expiry of six months from the date of the mortgagee-deed and, therefore, time began to run against the mortgagee on the failure of the mortgagor to pay interest on the expiry of six months from the date of the mortgage. The interpretation put upon the passage quoted above, by the Courts below does not commend itself to me.

The mortgagor agreed to pay interest every six months and. in case of failure to pay interest for six months, he agreed to pay compound interest. So far as the payment of interest was concerned, the mortgagor agreed that, in case of his default to pay interest on the expiry of six months, the remedy of the mortgagee would be to add the same to the princi-

pal and thus charge compound interest. The stipulation as to payment of interest ends there and proceeds no further. In case of breach of covenant (*dar surat wada khilafi*) the mortgagee is authorized to recover, by suit, not only simple interest but compound interest as well. It is also manifest that if default in payment of interest on the expiry of six months entitle the mortgagee to sue at once and he did so sue, he would not be entitled to get compound interest. The words "*dar surat wada khilafi*" therefore, can have reference only to the default in payment at the end of the stipulated period of three years. The "ekrar" to pay in three years is the "*wada*" and the "*wada khilafi*" is the default in the performance of that "ekrar." No doubt the mortgagor also covenanted to pay interest every six months, but in the mortgage-deed there is no covenant to the effect that in default of payment of interest the mortgagee will be entitled either to add the same to the principal and charge interest on the consolidated amount or to put the mortgage in suit. If it was intended that in default of payment of interest the mortgagee would be entitled to sue, without waiting for the stipulated period of three years, I would expect clear language to that effect in the deed. But the deed is conspicuous by an absence of any such language. In every case in which there is a stipulation to pay compound interest, there must be a provision to pay interest at stated intervals, otherwise the payment of compound interest with prescribed rests cannot be provided for. In such cases the promise is to pay simple interest and to pay compound interest on default of payment of simple interest. The promise is one and indivisible and, the mere non-payment of simple interest does not constitute a breach of the promise.

It is worthy of note that in the mortgage-deeds that formed the subject matter of consideration, in the Full Bench decisions of *Gaya Din* v. *Jhumman Lal* (1) and *Shib Dayal* v. *Meharban* (2), in which it was held that, on default of payment of interest, time began to run against the mortgagee, there were clear provisions in each deed that, on default being made by mortgagor to pay interest the mortgagee would be entitled either to add the same to the principal and charge compound interest, or without waiting for the stipulated period to put the mortgage-deed into suit. There was a similar provision in the mortgage-deed that formed the subject matter of decision in *Ram Das* v. *Mohammad Said Khan* (3). I am not aware of any case decided by this Court, except the case to which reference has been made by the Courts below, in which, in the absence of a clear provision in the mortgage-deed, empowering the mortgagee in the event of default in payment of interest, to sue for the mortgage debt, without waiting for the period provided by the deed for payment of that debt, it was held that cause of action for recovery of the mortgage debt accrued to the mortgagee on default of payment of interest.

In *Second Appeal No.* 1178 *of* 1921, the mortgage bond contained the following stipulations :

"*Ba iqrar adai sud fi sadi ke rupya char anna mahwari qarz leya, iqrar jeb hai ke mubligan mazkur wada chah sal men ada kardenge magar sud sal ba sal ada karte rahenge, dar surat adam adai zar sud salana ke sud naga shuda shamil zar asal hoga, aur usper bhi sud bashareh sadar ada karenge, dar surat wada khilafi daen ko ikhtiar hoga ke sab rupya apna mai sud wa balai sud fistrah mumkin ho ham se wa niz jaidad mustagharqa tahat wa digar jaidad manqula wa ghair manqula hamari se yakmusht wasul karlewe, hamko our warisan hamare ko kuch uzr kisi qisam ka na hoga*"

and two learned Judges of this Court held that the words "*dar surat wada khilafi*" governed both the promise to pay interest at the end of each year and the promise to pay the mortgage debt in six years and, therefore, they came to the conclusion that the case was governed by the Full Bench decision of *Gaya Din* v. *Jhumman Lal* (1). No reasons for putting this interpretation are given in the judgment, and, with all respect, I am unable to agree with that decision. Further it is well settled that it is not permissible to interpret one document by the language of another, specially where the languages, though similar, are not identical.

As the suit was decided by the lower appellate Court on a preliminary point and, I am not in agreement with the decision of that Court, I would allow this appeal, set aside the decree of the

(1) [1915] 37 All. 400=23 I. C. 910=13 A. L. J. 510.

(2) A. I. R. 1923 All. 1=45 All. 27 (F.B.).

(3) A. I. R. 1922 All. 524.

lower appellate Court and remand the case to that Court with directions to re-admit the appeal to its original number and dispose it of according to law.

Costs here and hitherto should be costs in the cause and must abide the result.

Bennet, J.—I have read the judgment of my learned brother and I regret that I cannot agree that the interpretation of the bond in suit is free from doubt. The portion quoted in vernacular lays down the following four provisions :

(1) It is agreed that I shall repay principal and interest at Rs. 3-2-0 p. m. in the period of three years.

(2) And that I shall pay the interest every six months.

(3) Any six-monthly interest unpaid will be added to the principal and I shall pay interest at the above rate on it.

(4) In case of breach of covenant the mortgagee may realise from me all the principal at once with interest and compound interest through the Court, etc.

It appears to me that the provision (4) for breach of covenant may either be read as applying to both the covenants (1) and (2), or as applying to (1) only. It may be said in favour of applying it to both that it comes after both. It may be said in favour of applying it to (1) only that there is already a provision (3) for breach of (2). It would have been quite easy to add a few words to (4) to show whether it applied to (1) and (2) or to (1) only. In the absence of those few words I consider that the clause (4) is ambiguous.

In favour of applying (4) to (2) it was also argued that as (1) provided for repayment of principal and interest in the period of three years it was open to the mortgagee to sue on a breach of that covenant without any special provision for suing : but that if the mortgagee was to have a right to sue on the failure to pay any six-monthly interest, then a special provision was necessary for that purpose.

The view that I take that the provision is ambiguous is further supported by the fact that two learned Judges of this Court in *Second Appeal No.* 1178 *of* 1921 where a deed with practically similar provisions was produced, held that (4) applied to both (1) and (2), and that there could be no doubt whatever on the subject. This is also the view of the two lower Courts in the present case.

My learned brother, however, takes the opposite view, which was the view taken by the lower appellate Court in the *Second Appeal No.* 1178 *of* 1921.

I hold that the provisions in the mortgage deed on the point are ambiguous. Under S. 93, Evidence Act, evidence may not be produced to show what was the meaning of the parties. The clause therefore remains ineffectual, so far as its application to the interest is concerned. The defendant bases his plea of limitation on this clause, alleging that owing to a breach of the covenant for the payment of interest the cause of action arose more than twelve years before the date of suit. Under S. 103, Evidence Act, the burden of proof that this was a term of the contract lay on the defendant. The defendant has failed to discharge that burden of proof. His plea of limitation therefore fails. The lower appellate Court has dismissed the appeal of the plaintiff on the ground of limitation only. Accordingly the decree of the lower appellate Court should be set aside and the appeal remanded for disposal.

R.M./R.K. *Case remanded.*

A. I. R. 1929 Allahabad 910

SULAIMAN AND NIAMATULLAH, JJ.

Abhey Ram and *another*—Plaintiffs—Appellants.

v.

Jhanda and *others*—Defendants—Respondents.

Second Appeal No. 719 of 1926, Decided on 10th June 1929, from a decree of Addl. Judge, Meerut, D/- 13th January 1926.

(a) Civil P. C., S. 11—Suit dismissed on ground that a person had no right to continue suit cannot act as res judicata against his sons.

A suit which is dismissed on the ground that plaintiff has no right to continue the suit cannot operate as res judicata in favour of the sons of the plaintiff. [P 911 C 2]

(b) Civil P. C., S. 11—Finding is not conclusive if decree is not based on it but is made in spite of it.

A finding cannot be conclusive against a party if the decree is not based upon it but is made in spite of it. Such a finding against the plaintiff cannot found a plea of res judicata when they succeed on other pleas and have no occasion to go further as to the find-

inga gainst them. *A. I. R.* 1922 *P. C.* 241 and 11 *Cal.* 301, *Ref.* [P 912 C 1]

(c) Adverse possession — Mere fact that other people are cosharers cannot prevent acquisition of title by adverse possession.

The mere fact that other people are cosharers would not prevent an acquisition of title by adverse possession. In any case if in the joint land actual ouster to the knowledge of the true owner is established, adverse possession can be proved. [P 912 C 1]

K. N. Katju—for Appellants.

P. L. Banerji—for Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit for declaration that they are in proprietary and adverse possession of the property in suit. The last male owner was Jas Karan on whose death Mt. Kuri his widow admittedly succeeded to the estate. It was the plaintiffs' case that Mt. Kuri remarried and that there was a custom under which she forfeited all rights in this estate. Her deceased husband's uncle Tirkha institutsd a suit against her for possession but during the pendency of the suit he died. That suit was continued by Kanhaiya the father of the present plaintiff who was not the nearest reversioner of Tirkha, but Net Ram and Nawal the grandfathers of the present defendants were the nearest reversionary heirs. These latter were impleaded as pro-forma defendants. The suit was dismissed by the first Court and Kanhaiya alone appealed to the District Judge and got a decree reversing the decree of the first Court. That judgment was set aside and the suit dismissed by the High Court on the ground that Kanhaiya was not the nearest heir who continued the suit in place of Tirkha deceased. No decree was passed in favour of Net Ram and Nawal.

It is the plaintiff's case that after Kanhaiya had succeeded in obtaining a decree from the District Judge's Court he obtained possession of the property in the execution department and has continued in possession ever since. The name of Kanhaiya, however, was not entered in the revenue papers and that of Mt. Kuri continued as before. She died in 1920. After her death the present defendants succeeded in getting their names entered in the revenue papers and thereafter brought a suit for ejectment against the present plaintiffs. The latter raised the question of proprietary title but the revenue Court decided that the present defendants were the cosharers and that they were competent to sue. On appeal to the District Judge it was held that the defendants were the cosharers but that the suit was not maintainable inasmuch as the other cosharers had not joined in it and the plaintiffs to the suit were not lambardars.

In the present suit questions of fact as well as the plea of res judicata were raised and several issues were struck by the first Court which found all of them against the plaintiffs and dismissed the suit. The learned District Judge, however, has not gone into the questions of fact and has held that the effect of the two previous litigations is to create a bar of res judicata against the present plaintiffs. We are unable to agree with him in this view.

As regards the civil suit it is quite obvious that Tirkha died before the trial Court decided the suit and according to the view taken by the High Court Kanhaiya had no right to continue the suit and the suit was actually dismissed. It would therefore follow that that suit could not operate as res judicata in favour of Kanhaiya's sons. As regards the revenue suit the learned District Judge in spite of having recorded the finding that the present defendants were the cosharers dismissed the suit on the ground that they were not competent to sue. It is therefore quite clear that on his own finding it was not necessary to decide that they were the cosharers. The suit failed on the ground that they had no right to sue. The learned advocate for the respondents relies on the case of *Jagdeo Misir* v. *Mahabir Tewari* (1) which follows an earlier Privy Council case viz: *Midnapur Zemindari Co. Ltd.* v. *Naresh Narain Roy* (2). The Midnapur zemindari case does not help the respondents. Their Lordships approved of the opinion expressed by the learned Judges of the Calcutta High Court to the effect that where a Court decides that a certain question is necessary and records a finding on it, it is not proper to re-consider whether that issue was really necessary or not. The finding arrived at would be binding on the parties. The same view was taken in *Jagdeo Misir's* case. That is not the case here. The District Judge dismissed the suit in

(1) A. I. R. 1927 All. 803.
(2) A. I. R. 1924 P. C. 144=51 Cal. 631=51 I. A. 293. (P.C.).

spite of the finding in favour of the defendants that they were cosharers, As pointed out by their Lordships in the case of *Midnapur Zemindari Co. Ltd.* v. *Naresh Narain Roy* (2) at 467 (*of* 48 *Cal.*) the finding on that question against the plaintiff could not found a plea of res judicata for they had succeeded on the other plea and had no occasion to go further as to the finding against them. A similar view was expressed by their Lordships in the case of *Run Bahadur* v. *Lucho Kuar* (4) at p. 306 where it was remarked that a finding could notbe conclusive against the party if the decree was not based upon it but was made in spite of it. We therefore think that the view taken by the District Judge on the question of res judicata cannot be upheld.

A further opinion has been expressed by him that any question of adverse possession can never arise in this case because the khata is a joint khata in which there are other cosharers. It is not suggested on behalf of the defendants that the parties are cosharers in this khata independently of the interest which is claimed in this suit. The mere fact that other people are cosharers would not prevent an acquisition of title by adverse possession. In any case if in the joint land an actual ouster to the knowledge of the true owner is established, adverse possession could be proved.

We therefore think that before disposing of this appeal finally we ought to have clear findings on the following three issues:

(1) Did Mt. Kuri remarry after the death of her husband Jas Karana ?

(2) If she did remarry, is there any custom of forfeiture of the husband's estate prevalent in the brotherhood of Jas Karan ?

(3) If she remarried and there is such custom, whether the plaintiffs have remained in adverse possession of this property for more than 12 years before the suit ?

No fresh evidence is allowed. The findings should be returned within three months. The usual ten days will be allowed for objections on return of the findings.

R.M./R.K. *Findings ordered.*

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(3) A. I. R. 1922 P. C. 241=48 Cal. 460=48 I. A. 49 (P.C.).

(4) [1885] 11 Cal. 301=12 I. A. 23=4 Sar. 602 (P.C.).

A. I. R. 1929 Allahabad 912

SULAIMAN AND PULLAN, JJ.

Sheo Ram—Defendant—Appellant.

v.

Sone Lal and *another*—Plaintiff—Respondents.

First Appeal No. 79 of 1928, Decided on 24th July 1929, from order of 2nd Addl. Sub-Judge, Farrukhabad, D/- 29th February 1928.

(a) U. P. Municipal Act, S. 318—It is not necessary that "aggrieved person" should be party to order appealed against—It is sufficient if order affects him prejudicially.

Having regard to the provisions of the other sections mentioned in S. 318 it cannot be said that the aggrieved person must of necessity have been a party to the order appealed against. The expression used is "any person aggrieved" and not "any party aggrieved" as occurs in S. 97, Civil P. C. It is quite sufficient that the order must affect the person prejudically and he must be aggrieved by it. He is entitled to prefer an appeal if an order passed behind his back affects him adversely. [P 913 C 1]

(b) U. P. Municipal Act, S. 321 (1)—Order under S. 318 is final and cannot be questioned in a civil Court.

Where the Magistrate considers that a certain person is aggrieved and that the order of the Municipal Board affects him adversely, his order or direction under S. 318 is final and cannot be questioned by a civil Court. This is expressly provided in S. 321 (1). [P 913 C 2]

(c) U. P. Municipal Act, Ss. 112 (3) and 318—Order granting or refusing sanction by Municipal Board is passed under S. 318 and not under S. 112 (3).

An order granting or refusing sanction by the Municipal Board is passed under the authority given to it by S. 118, and S. 318 is applicable to such a case. Such an order cannot come under S. 112 (3). S. 112 (3) deals with the delegation of powers by the Board and authorizes the committee to deal with such applications those orders being subject to the right of appeal or revision by the Board itself. [P 913 C 2]

K. D. Malaviya—for Appellant.

U. S. Bajpai—for Respondents.

Judgment.—This is an appeal from an order of remand arising out of a suit brought by the plaintiff for a permanent injunction against the defendant-appellant restraining him from interfering with the plaintiff's rights in a certain chabutra constructed by him. The plaintiff applied to the Municipal Board for sanction to construct his chabutra. His application was referred to the Public Works Committee to which power to deal with such applications had been given under S. 112, Municipalities Act. The Committee refused permission, but the

order was revised by the Municipal Board which granted the sanction. The plaintiff proceeded to start the construction and then the defendant-appellant Sheo Ram, who apparently had not been aware of the application for sanction and who certainly had not filed any objection protesting against the grant of the sanction, preferred an appeal to the District Magistrate under S. 318 on the ground that the construction would narrow the street and would interfere with the right of way of the public of which he was a member. The Magistrate allowed the appeal and cancelled the sanction. On this the present plaintiff instituted the present suit for injunction. The learned Munsif held that the civil Court could not go behind the order of the District Magistrate passed in appeal and that the suit was not maintainable. He accordingly dismissed the suit without going into the merits. On appeal the lower appellate Court has come to a contrary conclusion and has remanded the case for disposal of the other issues.

The main point which arises for consideration in this appeal is whether the defendant-appellant was an "aggrieved person" within the meaning of S. 318, Municipalities Act, so as to be entitled to prefer an appeal to the District Magistrate. On behalf of the respondent it is urged that only that person can appeal who was a party to the proceedings and who had been aggrieved by the order passsed against him. Having regard to the provisions of other sections mentioned in S. 318 we do not think that it can be said that the aggrieved person must of necessity have been a party to the order appealed against. It seems to be quite sufficient that the order must affect him prejudicially and he must be aggrieved by it. It is to be noted that the expression used is "any person aggrieved" and not "any party aggrieved" as occurs in S. 97, Civil P. C. If a person is really affected adversely by the order which was passed behind his back we think that he would be entitled to prefer an appeal. In cases of sanction the application is generally made ex parte and no notice is issued by the Board calling upon people to object. It therefore seems to us that the legislature could not have intended to deprive the persons, who are adversely affected by the grant of sanction of a right to have their grievances redressed by the District Magistrate on appeal. If this were not so then all orders granting sanction by the Municipal Board would not be open to revision by the District Magistrate at all, because the Municipal Board itself has granted the sanction and the order is passed in favour of the party who alone was a party to the proceeding.

We are of opinion that the view taken by the appellate Court that the appellant was not an aggrieved person and he was not entitled to prefer an appeal is not correct.

We do not think that it is necessary to decide whether the rights of the defendant were actually affected by the sanction or whether his rights were not in any way infringed. The District Magistrate considers that he was an aggrieved person and that the order affected him adversely and we think that his order or direction made under S. 318, is final and cannot be questioned by a civil Court. This is expressly provided in S. 321 (1). We are accordingly of opinion that the view taken by the first Court is right.

The lower appellate Court has taken another ground which in our opinion is untenable. It has considered that the order passed by the Municipal Board was an order under S. 112 (3) and not under S. 118 at all. It has accordingly thought S. 318 has no application whatsoever. We are unanle to accept this view. S. 112 deals with the delegation of powers by the Board and authorizes the Committee to deal with such applications, those orders being subject to the right of appeal to or revision by the Board itself. But the order granting or refusing sanction by the Municipal Board is passed under the authority given to it by S. 118. There can therefore be no doubt that S. 318 was applicable.

We accordingly allow this appeal and reversing the order of the Court below ressore that of the Court of the first instance with coets in all Courts.

R.M./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 914 (1)

MEARS, C. J., AND SEN, J.

Lal Bahadur—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 219 of 1929, Decided on 16th July 1929, from an order of Sess-Judge, Bareilly, D/- 13th December 1928.

Criminal P. C., S. 514—Bond obtained by Court without jurisdiction is nullity and no action can be taken under S. 514 against accused.

Where a Magistrate without jurisdiction obtains a bail bond from an accused person for his appearance before another Court outside his jurisdiction and it transpires that the Magistrate was not competent either to admit the accused to bail or to secure a bail bond from him, the bail bond or personal recognizance of the accused is a nullity. No proceedings against the accused under S. 514 can therefore be taken in respect of such bond. [P 914 C 2]

M. Waliullah—for the Crown.

Judgment.—This is an application for revision of Lal Bahadur Johri from an order passed by the District Magistrate of Budaun under S. 514, Criminal P. C. This order was confirmed on appeal. It appears that on 14th April 1927, Lal Bahadur Johri against whom a warrant of arrest had been issued by the District Magistrate of Budaun appeared before a Magistrate of the First Class at Rai Bareilly and applied for bail. His application was granted by the Magistrate presumably under S. 85, Criminal P. C. upon Lal Bahadur Johri executing a personal recognizance for a sum of Rs. 3,000 for his attendance in the Court of the District Judge of Budaun within a certain time. In pursuance of the said order, Lal Bahadur Johri did not appear in the Court of the District Magistrate of Budaun and the result of it was that the bail bond which had been executed by Lal Bahadur Johri at Rai Bareilly on 14th April 1927, was declared to be forfeited to the Government. The learned District Magistrate took further proceedings under S. 514, Criminal P. C. and certain moveable properties belonging to Lal Bahadur Johri were attached and sold. Lal Bahadur Johri is aggrieved by this order and challenges the legality and propriety of the proceedings taken in the Court of the District Magistrate with regard to the sale of his moveables, consequent upon the forfeiture of his recognizance.

Upon a consideration of all the facts of the case we have come to the conclusion that the bail bond was executed by Lal Bahadur Johri in a Court which had no jurisdiction in law to obtain a personal recognizance from Lal Bahadur Johri and the bail bond in question was of no legal effect. The District Magistrate was therefore not competent under S. 514, Criminal P. C. to sell any portion of the moveable property of Lal Bahadur Johri by reason of the latter not carrying out the order of the Magistrate of Rai Bareilly dated 14th April 1927. No warrant of arrest had been executed against Lal Bahadur Johri in the district of Rai Bareilly. As a matter of fact, no warrant of arrest had hitherto been executed against Lal Bahadur Johri under S. 85, Criminal P. C. The Magistrate of Rai Bareilly was not competent either to admit Lal Bahadur Johri to bail or to exact from him a bail bond. Where a Magistrate without jurisdiction obtains a bail bond from an accused person for his appearance before another Court outside his jurisdiction and it transpires that the Magistrate was not competent either to admit the accused to bail or to secure a bail bond from him, the bail bond or personal recognizance of the accused is a nullity. In the above view, we allow the application, set aside the order of the District Magistrate forfeiting the bail bond and directing that the moveable property of Lal Bahadur Johri be sold for non-compliance of the order of the Magistrate of Rai Bareilly. The order of the District Magistrate of Rai Bareilly was clearly contrary to law.

R.M./R.K. *Order set aside.*

A. I. R. 1929 Allahabad 914 (2)

SEN, J.

Parbhu—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 348 of 1929, Decided on 29th July 1929, from order of Sess. Judge, Allahabad, D/- 16th April 1929.

Criminal P. C., S. 257 (2)—Provisions are mandatory and no discretion is left to

Magistrate—Appellate Court can ask trial Court to comply where it has not been done with microscopic exactness.

The provisions laid down by S. 257 (2) are mandatory and imperative. When an accused person has entered upon his defence he ought to be allowed every reasonable facility in establishing his defence and the Magistrate is bound to issue any process for enforcing the attendance of a witness required by the accused person, unless the Magistrate is convinced that the accused wants that witness not in the interest of justice but for purpose of vexation and delay or for defeating the ends of justice. Where the Magistrate does not record in writing the grounds on which the application should be refused, the trial is vitiated. The omission to comply with the provisions is an illegality and not a mere irregularity and the defect cannot be cured by S. 537. [P 915 C 2, P 916 C 1]

But it is competent for the appellate Court to direct the trial Court to comply with the provisions of law as contained is S. 257, where the same has not been done with microscopic exactness; and where the lacuna contained in the procedure of the trial Court is removed the applicant ought not to have any cause of grievance. [P 916 C 2]

K. O. Carleton—for Applicant.

M. Waliullah—for the Crown.

Judgment.—Parbhoo has been convicted by a Magistrate of the First Class, under his judgment, dated 16th February 1929, for an offence under S. 325, I. P. C., and sentenced to one year's rigorous imprisonment and a fine of Rs. 30 or one month's further rigorous imprisonment in default of the payment of fine. He had two confederates in Imam Uddin and Siraj Uddin who were convicted under S. 323, I. P. C., and sentenced to one month's rigorous imprisonment each. The case of these two is not before me.

Mahadeo, the complainant, is a servant of the zemindar of Rangpura. He found some cattle and goats belonging to the employees of the Phaphamau railway station grazing in the field of his master. He was driving off the cattle to the pound-house and when he got near the level crossing, Parbhoo Kahar the applicant, who is the Hindu water carrier at the Phaphamau railway station attacked Mahadeo, gave him a good thrashing, took one of the fingers in his mouth and bit the top joint completely off. His two associates took a minor part in this affair.

The defence put forward by Parbhoo was that

"the complainant was standing in the Phaphamau station with his hand on the window of a railway carriage when somebody shut down either the widow or the shutter with such violence that it cut off the complainant's finger, and that thereupon the complainant went off to the police station and concocted the story of the cattle trespass and rescue."

In support of his defence, Parbhoo examined a number of witnesses. The trial Court believed the story of the complainant's witnesses, discarded the story as told by Parbhoo and held that the case for the prosecution was proved up to the hilt in all essential particulars.

Parbhoo sought to examine in this case one Ram Narain Misra, the relieving station master of the Phaphamau railway station. At the time when he was requisitioned by the Court, the Magh Mela was in progress, and the railway authorities could not spare the services of Ram Narain Misra even for a day. The learned Magistrate did not adjourn the hearing of the case to such time when the evidence of Ram Narain Misra might be available; but ordered that the deposition of Ram Narain Misra might be wholly dispensed with. The learned Magistrate refers to S. 256, Criminal P. C., in support of this procedure. S. 256, Criminal P. C., has absolutely no bearing. S. 257 (1), Criminal P. C., contains the following provision:

"If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness . . . . . , the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purposes of vexation or delay or for defeating the ends of justice; such ground shall be recorded by him in writing."

The aforesaid provision is mandatory and imperative. Where an accused person has entered upon his defence, he ought to be allowed every reasonable facility in establishing his defence and the Magistrate is bound to issue any process for enforcing the attendance of a witness required by the accused person, unless the Magistrate is convinced that the accused wants that witness not in the interest of justice but for the purpose of vexation and delay or for defeating the ends of justice. In the absence of any finding by the Magistrate that the accused in requiring the presence of Mr. Ram Narain Misra was actuated by ulterior motives and that his object was vexation or delay or for defeating the ends of justice, the Magistrate was not

justified in not staying his hands and waiting for such time when the evidence of Ram Narain Misra would be procurable. In the present case, the Magistrate does not state that the accused person had asked for the examination of Ram Narain Misra for the purpose of vexation or delay or for defeating the ends of justice. The Magistrate has nct recorded in writing any such grounds. The proceeding therefore adopted by the learned Magistrate militates against the imperative and mandatory provision of S. 257 (1), Criminal P. C. Here this section is imperative and the Magistrate had no discretion to refuse to issue process to compel the attendance of any witness unless he considered that the application should be refused on the ground that it was made for the purpose of vexation or delay or for defeating the ends of justice : *Emperor* v. *Purshotam* (1). In *Narayana Mudaly* v. *Emperor* (2), it was held that the refusal of a Magistrate to issue process to a witness named by the accused when such refusal in regard to any particular witness is not based on any grounds mentioned in S. 257, Criminal P. C., was an illegality which could not be cured by S. 537 of the Code.

Parbhoo appealed to the learned Sessions Judge of Allahabad who upheld the conviction and sentence.

It is contended by Parbhoo in revision that the trial is vitiated by reason of the omission of the Magistrate to give full effect to the provision of S. 257 (1), Criminal P. C. The omission on the part of the Magistrate was unquestionably an illegality and not a mere irregularity and the defect could not be cured by invoking the aid of S. 537, Criminal P. C.

On an application for revision being made, a learned Judge of this Court forthwith directed the trial Court to summon Ram Narain Misra to record his statement and to certify the said statement to this Court. This thing has been done. The statement of Ram Narain Misra has been examined and the learned counsel for the applicant admits that his statement is not helpful to the applicant in any form or shape.

It is competent to this Court to direct the trial Court to comply with the provision of law as contained in S. 257, Criminal P. C., where the same has not been done with microscopic exactness. The accused person is entitled in law to insist upon the forms of law being observed, more especially when the said forms have been prescribed by statute deliberately with the object of helping the accused in establishing his defence with reasonable facility. In the present case the lacuna contained in the procedure of the trial Court has been removed by the order of this Court and the applicant ought not to have any cause for grievance.

It will be useless in a case like the present to overset the orders of the Courts below and to direct a retrial. The Courts below had the entire material evidence before them to enable them to come to the right conclusion. The judgment of the Courts below therefore ought not to be disturbed.

An appeal has been made to me for the reduction of the sentence. The conduct of the accused is marked by brutal savagery and abandoned ruffianism. The cattle of the accused trespassed upon the field of Mahadeo's master. The accused persons were unquestionably the wrongdoers. Mahadeo was within his rights in taking the cattle to the pound. The rescue of the cattle by Parbhoo and his associates was unjustified and the attack of Parbhoo upon Mahadeo was aggressively brutal. I dismiss this application.

R.M./R.K. *Application dismissed.*

(1) [1902] 26 Bom. 418=4 Bom. L. R. 38.
(2) [1908] 31 Mad. 131.

A. I. R. 1929 Allahabad 916

SEN, J.

Imrat and *others*— Accused — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 606 of 1929, Decided on 15th August 1929, from order of Addl. Sess. Judge, Moradabad, D/- 16th May 1929.

Criminal Trial—Evidence—Appreciation of —First information report cannot be used as primary evidence of fact in dispute.

A first information report cannot be used as primary evidence of any fact in dispute but may be treated as corroborative evidence of facts which have to be established in the case. [P 917 C 1]

S. C. Goyel—for Appellants.
Sankar Saran—for the Crown.

Judgment.—Surat, Jhabbu, Mukanda and Ghasi have been convicted by the learned Sessions Judge of Bijnor under S. 366-A, I. P. C., or in the alternative under S. 368 of the aforesaid Code and sentenced to two and half years' rigorous imprisonment each. Sarupa has been convicted under S. 366, I. P. C., and sentenced to three years' rigorous imprisonment.

Of the persons convicted, two are chauhans by caste and the three are gadarias. The charge levelled against them is that they abducted one Mt. Herdei, a minor girl, under the age of 16 years from her father's house in mauza Noorullahpur and after a progress through several villages namely Shamspur, Sadaphal, Kaural they arrived in mauza Khardauni in the district of Meerut and gave the girl in marriage to one Durga.

Mt. Herdei is a married girl. She is about 14 years old and her gauna ceremony has not been performed. The accused persons represented and induced the girl to represent that she was a chauhan girl. The prime mover in the drama was the accused Sarupa.

Upon the evidence produced in the case, there can be no manner of doubt as regards the guilt of the accused. Their conviction therefore must stand.

The learned Sessions Judge of Bijnor has delivered a very lengthy judgment and one of the principal causes of prolixity is repetition of facts and importation of irrelevant matter into the judgment.

A first information report cannot be used as primary evidence of any fact in dispute but may be treated as corroborative evidence of facts which have to be established in the case.

There was no warrant for the learned Sessions Judge for holding upon the strength of certain statements contained in the first report that there was illicit connexion between Mt. Herdei and Sarupa.

I am, however, in general accord with the appraisement of evidence made by the learned Sessions Judge as also with the conclusions arrived at by him.

Cases under S. 366, I. P. C., and cognate sections of the Penal Code are coming up before the Courts of law in large number. It may be fairly presumed that there is a large number of cases which does not attract the notice of the authorities ; and crime is allowed to go free footed without any let or hindrance. A great number of these offences are committed in the western districts of the United Provinces and it is no coincidence that the girls kidnapped or abducted are sent away to the Punjab. This opens out a page not of legal ethics but of social statics. The census figures show that there is a considerable disparity in the proportion of males to females among certain classes and castes in the Punjab. I am not called on to make any pronouncement upon the means which may or ought to be devised to eradicate this evil. The thing that I am certain about is that where the offenders have been tracked, the sentence passed upon them ought to be severe.

The sentence passed in the present case does not err on the side of severity. I maintain the conviction and dismiss the appeal.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 917

SEN, J.

Phul Chand Dube — Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 460 of 1929, Decided on 30th July 1929, from order of Addl. Sess. Judge, Ghazipur, D/- 23rd March 1929.

(a) Penal Code, S. 411—Missing bullock found in possession of accused is not "stolen property" and accused cannot be convicted under S. 411.

In order to bring home the guilt under S. 411 it is essential that some stolen property should have been found in the possession of the accused and there should have been evidence that the accused retained possession of the property either knowingly or having reason to believe that the same was stolen property. [P 918 C 1]

A's bullock was missing. After several months it was found in the possession of *B*. *B* was prosecuted and convicted under S. 411. *B* appealed.

Held : that a missing bullock could not be stolen within the meaning of S. 410 as no offence was committed with reference to it by theft or by extortion or by robbery etc. This being so the conviction under S. 411 could not be sustained: 36 *P. W. R.* 1911 *Cr. Rel. on.* [P 918 C 2]

(b) Penal Code, S. 403 — Trying to dispose of another's missing bullock amounts to offence under S. 403.

A's bullock which was missing was found in the possession of *B*. *B* had tried to sell it

to *C* who later on refused to purchase it thinking that it was acquired by *B* by theft.

Held; that offence under S. 403 was committed by *B*. *B* knew that the bullock did not belong to him. He did not make any inquiry as to real owner but set up a title to the bullock himself and tried to dispose of it with a view to make a wrongful gain to himself and a wrongful loss to the original owner. His act therefore amounted to dishonest misappropriation or conversion to his own use within the meaning of S. 403: 36 *P. W. R.* 1911, *Cr. Rel. on.* [P 918 C 2]

S. N. Verma—for Applicant.

Judgment.—Phul Chand Dube has been convicted by a Magistrate of the first class under S. 411, I. P. C. and sentenced to one year's rigorous imprisonment. He appealed and the conviction and sentence were confirmed by the Additional Sessions Judge of Ghazipur. Phul Chand Dube comes up before this Court with an application for revision and challenges the propriety of the conviction and sentence.

The facts of the case lie within a very narrow compass and may be briefly outlined here. One Sahodar Patakh of the district of Chapra owned a bullock. His bullock was missing. This bullock, after several months, was traced in the possession of Phul Chand Dube, the applicant. The bullock was taken possession of by the police and Phul Chand Dube was prosecuted under S. 411. I. P. C., with the result which has been indicated above.

The learned Magistrate and the learned Additional Sessions Judge do not appear to have approched the case from the proper angle and I am not surprised that they have failed to view the matter in its true perspective. In order to bring home the guilt under S. 411, I. P. C., it is essential that some stolen property should have been found in the possession of the accused and there should have been evidence that the accused retained possession of the property either knowingly or having reason to believe that the same was stolen property.

Stolen property has been defined in S. 410, I. P. C. Unless the right of ownership in the property was lost to the owner by the commission of any one of the offences enumerated in S. 410, I. P. C., the property could not be said to be stolen property. In the present case the bullock was missing. No offence was committed with reference to the bullock by theft or by extortion or by robbery or by criminal misappropriation or by criminal breach of trust. The bullock in the possession of Phul Chand Dube was therefore not "stolen property" within the meaning of S. 410, I. P. C. This being so the conviction under S. 411, I. P. C. cannot be sustained. I allow the application for revision and reverse the conviction and sentence under S. 411, I. P. C.

The bullock in dispute was not a derelict. The original owner had not abandoned his right to the bullock. Phul Chand Dube, who had taken possession of the bullock had no proprietary interest in the same. He claimed to be owner but the findings of the Courts below are that he had failed to establish his ownership. Phul Chand Dube after having taken possession of the bullock, attempted to dispose of the bullock by way of sale to one Bancham Singh. The bargain was struck; the price was settled; Pancham Singh was not in possession of ready money and therefore he executed a sarkhat in favour of Phul Chand Dube. It was subsequently brought home to Pancham Singh that it was not safe to purchase this property because it might have been acquired by Phulchand Dube by theft. Pancham Singh thereupon returned the bullock to Phulchand Dube and the bullock was recovered by the police from the possession of the latter. Upon these facts there can be no doubt that an offence was committed under S. 403, I. P. C.

Phulchand Dube knew that the bullock did not belong to him. He made no enquiry as to real owner. He set up a title to the bullock himself and tried to dispose of it with a view to make a wrongful gain to himself and a wrongful loss to the original owner. His act therefore amounted to a dishonest misappropriation or conversion to his own use within the meaning of S. 403, I. P. C. Expln. 2 to the aforesaid section provides:

"It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it: it is sufficient if, at the time of appropriating it he does not believe it to be his own property or in good faith believes that the original owner cannot be found."

It has been held by the Punjab Chief Court in *In re Chandaria* v. *Emperor* (1) that where a person retains in his custody animals which have strayed away from a grazing ground and there is no evidence to show that it is stolen, he is guilty of an offence under S. 403 and not under S. 411, I. P. C. There is nothing to show that Phulchand Dube is a habitual offender. He is an old man between 50 and 55 years. I sentence him to six month's rigorous imprisonment. I direct that the sentence should count from the 19th October 1928, the date of his original conviction by the Magistrate. He ought to be allowed a credit for the term that he has already served under S. 411, I. P. C. If he has served out six months or more, he should be forthwith released.

R.M./R.K. *Order accordingly.*

(1) [1981] 36 P. W. R. 1911 Cr.=11 I. C. 623=235 P. L. R. 1911.

** A. I. R. 1929 Allahabad 919

MUKERJI AND NIAMATULLAH, JJ.

Ganga Sagar—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 326 of 1929, Decided on 25th July 1929, from an order of Sess. Judge, Bulandshahr, D/- 5th March 1929.

**** (a) Income-tax Act, S. 22 (3)—Letter with statement of income in Hindi—Request by letter to Income-tax Officer to fill in income-tax form—Letter of request with income statement is sufficient return.**

A merchant sent a letter to the Income-tax Officer stating that he had made a mistake in the figures supplied by him on 25th July. This letter was received in the office of the Income-tax Officer on 7th November. Attached to this letter was a statement of the income in Hindi. Along with this letter and the enclosure, the merchant sent one of the printed forms in Hindi in which an assessee is required to make a statement of his income, and in his letter suggested that the Income-tax Officer might enter the figure contained in the enclosure into the blank form and substitute the fresh return in place of the return made on 25th July.

Held : that the letter and its enclosure and the blank form sent by the merchant did substantially amount to the making of a return. [P 921 C 2]

(b) Income-tax Act, S. 52—Commencement of offence.

An offence under S. 52 is committed on the day a return, made under S. 22, is verified by a party. [P 922 C 1]

*** (c) Income-tax Act (1922), S. 22 (3)—Revised return made before assessment is return in due time—Offence committed with return under Cl. (2) need not be condoned even if revised return is true.**

There is nothing in Cl. (3) which says that any offence committed with respect to a return made under Cl. (2) must be condoned if the revised return be true. All that Cl. (3) provides is that this return would be treated as a return made in due time, provided it is made before an assessment has been made. [P 922 C 1]

**** (d) Income-tax Act, S. 1—Assessee can use all legal devices to avoid tax.**

A man who is liable to pay a tax is entitled to take shelter under all devices which he may adopt within the law to avoid payment of the tax. Indeed the whole scheme of the Income-tax Act contemplates that people liable to be assessed with income-tax were likely to shirk making true disclosures and if they did go wrong, they were to be treated with more or less leniency. [P 923 C 1]

(e) Penal Code, S. 53 : (per *Mukerji J.*)—**Maximum punishment should be awarded only in extreme cases—Ability of accused to pay fine easily—Maximum fine should not be awarded if Offence is not serious—Criminal Trial—Sentence.**

The maximum sentence whether of fine or of imprisonment, provided for by law, represents the sentence to be inflicted in extreme cases. Because a man may easily pay a fine is no ground for ordering him to pay the maximum fine fixed by law, if the nature of the offence committed by him is not of the most serious character, having regard to the description of the offence itself. [P 924 C 1]

(f) Income-tax Act, S. 34—Taxes on escaped income.

There is no provision in law for the recovery of taxes on "escaped income" for more than one year. [P 925 C 1]

(g) Income-tax Act, S. 24—Purchase of shares—Price exceeding face value paid—Excess is no loss.

No part of the money invested in the purchase of shares of the face value below the price paid can be put down as a loss. [P 926 C 1]

(h) Income-tax Act, S. 52—Verification of untrue statement is essence of offence—Penal Code, S. 177.

The essence of offence under S. 52, and Penal Code, S. 177 lies in the verification of an untrue statement, and provided the statement was deliberately false or not believed to be true, subsequent rectification cannot make it any the less an offence, though it may be considered as an extenuating circumstance in awarding sentence. [P 927 C 2]

T. B. Sapru, Nehal Chand and *P. N. Sapru*—for Applicant.

U. S. Bajpai—for the Crown.

Mukerji, J.—This is an application to revise the order of the District Magistrate convicting the applicant under S. 177, Penal Code read with S. 52, Income-tax Act, and sentencing him to

pay a fine of Rs. 1,000 and the order of the Sessions Judge, in appeal, confirming the said conviction and sentence. On behalf of the Crown a revision has been filed, being revision No. 311 of 1929, praying that the sentence passed on Rai Bahadur Seth Ganga Sagar may be enhanced on the ground that it is inadequate. As the result of the revision filed on behalf of the Crown, the question whether the applicant's conviction is good on facts, has been reopened. We have heard the learned counsel for the parties at length. The facts which led to the conviction of Mr. Ganga Sagar, briefly are these:

Mr. Ganga Sagar is a wealthy trader of Khurja in the district of Bulandshahr. He holds a large amount of shares in different companies including many jute mills in Bengal which pay very handsome dividends. He was to be assessed with income-tax and the Income-tax Officer, Mr. Samiullah, served him with a notice for making a return of the income earned by him in the year 1926-1927, so that on the basis of that income the tax payable by him for the year 1927-1928 might be assessed. The notice was issued on 2nd April 1927, and by it the return was to be filed on 15th May 1927. The applicant, Mr. Ganga Sagar, took time for preparing the return and, ultimately, on 20th July 1927, appeared personally with his books before Mr. Samiullah. It is important to note that 25th July 1927 had not been fixed for the appearance of Mr. Ganga Sagar nor had the date been fixed for him to produce his account-books. His only duty was to file a statement of his income. Mr. Samiullah was requested by Mr. Ganga Sagar to examine his (latter's) account-books and to satisfy himself as to the income of the proposed assessee. Mr. Samiullah ought to have plainly told the applicant that it was no part of his (Mr. Samiullah's) duty to examine the account-books for the benefit of Mr. Ganga Sagar and it was for Mr. Ganga Sagar to find out, from his own books, what his income, on the several heads, was and to make a return. Mr. Samiullah, however, was persuaded to accede to Mr. Ganga Sagar's request and he noted down on two pieces of paper what was the income of Mr. Ganga Sagar, according to his books. After the several items of income had been added up, Mr. Ganga Sagar entered those figures in the form provided for making a return by an assessee, and he signed it. This return is Ex. P and the note made by Mr. Samiullah is Ex. O. Mr. Samiullah, after the return had been made, recollected that he had some information conveyed to him by the Income-tax Officer of "companies district" that Mr. Ganga Sagar had received a dividend of Rs. 6,000 on account of his shares in Sura Jute Mills, Ltd., that Mr. Samiullah asked Mr. Ganga Sagar how it was that this dividend did not find place in his books. Mr. Ganga Sagar replied, according to Mr. Samiullah, that the date of payment as recorded in the letter of the Income-tax Officer of companies districts, (Ex. N), was merely the date of the declaration of the dividend. The suggestion conveyed by this reply was that the actual dividend had not yet been received by Mr. Ganga Sagar. This set Mr. Samiullah athinking and he made certain further enquiries as to Mr. Ganga Sagar's income from dividends. The enquiries took the shape of a letter addressed to the Calcutta Income-tax Office. Mr. Samiullah also got certain information from the companies intimating what dividends had been paid to Mr. Ganga Sagar.

The letter Ex. V and the enclosures Ex. VI to Ex. V-5 show that Mr. Ganga Sagar had received dividends to the amount of about Rs. 70,000 over and above the dividends that had been declared in the return made on 25th July 1927. Before receiving Ex. V. Mr. Samiullah had already issued notice to Mr. Ganga Sagar to produce his account books for the Sambat year 1981 to 1982. I may mention here that the Hindu year for which Mr. Ganga Sagar was expected to make a return was 1982 to 1983, Dewali to Dewali, corresponding to 17th October 1925 to 5th October 1926. On receipt of Ex. V and its enclosures, he issued another notice, on 19th October 1927, calling on Mr. Ganga Sagar to make a return of his income for the previous year, on the ground that a portion of the income of that year had "escaped" assessment. Evidently the Income-tax Officer thought that Mr. Ganga Sagar had a much larger income than for which he had made a return and that he had not fully disclosed his income either for the year 1982 to 1983 or for the previous year. Mr. Ganga Sagar admits in his

statement before the Court that he received the notice by the end of October 1927. Then he consulted some friends and, as the result of what he was told, he sent a letter from Calcutta to the Income-tax Officer (Mr. Samiullah) at Bulandshahr stating that he had made a mistake in the figures supplied by him on 25th July 1927. This letter is Ex. W and was received in the office of the Income-tax Officer on 7th November 1927. Attached to this letter was a statement of the income in Hindi. This has been marked as Ex. W-1. Along with this letter and the enclosure, Mr. Ganga Sagar sent one of the printed forms in Hindi, in which an assessee is required to make a statement of his income. He said on the letter Ex. W in Hindi (while the letter itself is in English) that he did not know how to fill up the form. The suggestion was that the Income-tax Officer might enter the figures contained in Ex. W-1 into the blank form W-2 and substitute the fresh return in place of the return made on 25th July 1927. The letter Ex. W runs as follows:

"I find that during your inspection of my bahikhata on 25th July 1927, you omitted to look into certain entries. As you yourself had looked into it I believe that you should have examined the whole of it. Just then in your presence in a hurry I prepared the statement and gave it over to you. Since then I had been busy in other works. Now on Dewali when I went into the accounts to carry over into the bahikhata I found that mistakes had crept in the examination of accounts. The statement that I prepared in a hurry in your presence and gave to you was not quite accurate. I herewith send another correct statement. The former is not correct. This is correct according to accounts. Please cancel the former statement and put this revised one on file."

It is common ground that Ex. W-1 submitted with this letter Ex. W, contains, substantially, a correct statement of the applicant's income.

The applicant was assessed on an income of Rs. 4,73,045 with a tax of Rs. 2,761 and odd and super-tax of rupees 75,951 and odd. He was also assessed on account of the previous year (1926-1927) on the ground that a considerable portion of his income had escaped assessment. The basis of this assessment, made under S. 34 (escaped items) was Rs. 5,00,000 and odd.

Negotiations were then started with Mr. Ganga Sagar calling on him to pay a sum of Rs. 7,00,000 on pain of being prosecuted for having made a false return on 25th July 1927. Mr. Ganga Sagar did not agree to pay this large sum and the income-tax authorities came down to the sum of Rs. 3,00,000. Even this sum Mr. Ganga Sagar refused to pay and then his prosecution was ordered, not only under S. 52, Income-tax Act, read with S. 177, I. P. C., but also under S. 193 (perjury) and S. 465 (forgery) of the same Code.

As the result of a trial before the District Magistrate of Bulandshahr Mr. Ganga Sagar was acquitted of the offences under Ss. 193 and 465, I. P. C., and was convicted of the offence under S. 177 (read with S. 52, Income-tax Act), I. P. C., and was sentenced as already stated.

As I have already stated, the whole evidence has been thoroughly thrashed out and all possible arguments have been put forward on either side before us. Having considered the evidence I am fully satisfied that Mr. Ganga Sagar when he filed his return on 25th July 1927 either knew or believed that it was false or at least did not believe that it was true. If that is so, he has been rightly convicted. I shall examine the evidence very briefly, (an extensive survey of the evidence is not called for). But before I do so it is necessary to examine the contention of Sir Tej Bahadur Sapru on behalf of Mr. Ganga Sagar that, under the law, Mr. Ganga Sagar was not at all liable to be prosecuted, inasmuch as he filed a fresh return which was received in the Income-tax Officer's Office on 7th November 1927 and which was substantially correct. For the Crown it was urged that this supposed return was no return at all, for, the form provided for preparing a return was not filled in nor signed. I am not prepared to attach much importance to this pure technicality. I take it that the letter Ex. W and its enclosure Ex. W-1 and the blank form sent by the applicant did substantially amount to the making up of a return; because Mr. Ganga Sagar filed a correct return on 7th November 1927 (this is the date of the receipt), is he not liable to be prosecuted under S.52, Income-tax Act. S. 52 reads as follows, so far as it is relevant at the present moment:

"If a person makes a statement in a verification mentioned in . . . . S. 22 . . . . which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be deemed to have committed the offence described under S. 177, I.P.C."

On a plain reading of this provision of law an offence is committed on the day a return made under S. 22 is verified by a party. It follows that on 25th July 1927, Mr. Ganga Sagar did commit an offence under S. 177, I. P. C., if he made a statement which was false and which he either knew or believed to be false or did not believe to be true. This return was made by Mr. Ganga Sagar under S. 22, Cl. (2), Income-tax Act. In the same section, Cl.(3) says that where a person has not furnished a return or, having furnished a return "discovers any omission or wrong statement therein" he may furnish a return or a revised return as the case may be, at any time before the assessment is made and any return so made shall be deemed to be a return made in due time under this section. Sir Tej Bahadur argued that when Mr. Ganga Sagar furnished a revised return which was received on 7th November 1927 the earlier return, Ex. V, was "washed out" and it could not be used even for the purpose of prosecution.

There is nothing in Cl. (3), S. 22 which says that any offence committed with respect to a return made under Cl. (2), S. 22, must be condoned if the revised return be true. All that Cl. (3) provides is that this return would be treated as a return made in due time, provided it is made before an assessment has been made. In my opinion Cl. (3) does not go in any way beyond this. The result is that if, on facts, Mr. Ganga Sagar be found guilty with respect to the return Ex. V he must be convicted. It may be that the fact that Mr. Ganga Sagar made a revised and correct return may go in mitigation of the offence but the offence once committed is there and a conviction is bound to follow unless it is compounded under S. 53, Cl. (2), Income-tax Act.

Now as to facts. Mr. Ganga Sagar knew that his income from the dividends received from various companies was Rs. 3, 47,000. In the return, that he made in the presence of Mr. Samiullah (Ex.P), he put down the income at Rs. 62,000 and odd. His explanation is twofold. First he says that he put down his books before Mr.Samiullah. Mr Samiullah examined the accounts, noted the income and then Mr. Ganga Sagar put down the figures found by Mr. Samiullah in Ex.P. This is no doubt true, but it is equally true that Mr. Samiullah was not fully cognizant of all the entries in the applicant's book, and the applicant knew that this was the case. What the applicant has done as regards the entry of the dividends in his book is this. At p. 37 of his account book he has entered under the heading "income from shares" certain amounts received from certain companies totalling to Rs. 62,000 and odd. At p. 39 he put down certain figures with reference to pages of "naqal bahi." The heading of this page is "account of profit and loss relating to shares." If this p. 39 be read with the naqal bahi, the entries would show that large sums of money, amounting to nearly three lakhs of rupees, were received by Mr. Ganga Sagar from companies other than those mentioned at p. 37, and the amounts so received were entered in the book by him, in a particular manner. He purchased certain new shares at a premium. What Mr.Ganga Sagar did was to debit himself with the amounts he paid over and above the face values of the shares, on the ground that the price paid by him over and above the face values represented his loss in the transactions of the purchase of the new shares.

It is clear from what took place on 25th July 1927 before Mr. Samiullah that Mr. Ganga Sagar did not disclose to Mr. Samiullah the fact that he had received other dividends also (dividends other than those shown at p. 37) and that he had recorded in his books, those dividends in a particular manner. When Mr. Samiullah asked where the entry as to the dividend paid by Sura Jute Mill was entered Mr. Ganga Sagar gave an evasive reply. He did not disclose the fact that this income (which amounted to Rs. 18,000) had been used by him in purchasing further shares. It has been contended on behalf of Mr. Ganga Sagar that the latter, most foolishly, but honestly, believed that if he employed a part of his income in purchasing shares at prices which went beyond the face values he would be entitled to treat the excess amount so paid above the face

value as his loss and he would be entitled to deduct the same from his total income and to show the balance alone as his real income. On the evidence given by Mr. Chatura Dutt Joshi, a Deputy Collector, there can be no doubt that Mr. Ganga Sagar did think that he might escape payment of heavy income-tax and still heavier super-tax if he could show that he had suffered a loss in his dealing with shares. Mr. Chatura Datt Joshi, whose evidence is beyond suspicion and has never been challenged, stated that the applicant met him at Cawnpore and spoke to him about his investments and asked him if he was not justified in debiting himself, as with a loss, with the amounts paid by him in excess of the face values of the shares. Mr. Chatura Dutt Joshi plainly told him that he could not do so and Mr. Ganga Sagar argued that the money so spent was really his "loss." This happened either at the end of October or early in November 1927. Soon after that Mr. Ganga Sagar sent him the letter and statement of accounts already mentioned (Exs. W and W 1).

On the basis of the evidence of Mr. Chatura Dutt Joshi, Sir Tej Bahadur has argued and with great vehemence that the applicant was under the honest but extremely foolish impression that he was entitled to deduct the money invested as described from his total income and to show the balance as his real income. I am prepared to concede and it must indeed be conceded that a man who is liable to pay a tax is entitled to take shelter under all devices which he may adopt, within the law, to avoid payment of the tax. Indeed, the whole scheme of the Indian Income-tax Act contemplates that people, liable to be assessed with the income-tax, were likely to shirk making true disclosures and if they did go wrong they were to be treated with more or less leniency. But it does not follow that a person who has made a return can legitimately suppress matters within his knowledge.

Mr. Ganga Sagar did not disclose to Mr. Samiullah the fact that he had received dividends from companies other than those mentioned at p. 37 of the khata bahi, and that he had invested them in such a way as to entail him a supposed loss. If Mr. Ganga Sagar had done that, he would have disclosed the whole truth and, then, the question would have been, for decision, by the Income-tax Officer and his superior officers and perhaps ultimately by the High Court, whether Mr. Ganga was entitled to the deduction he claimed. There can be no doubt that Mr. Ganga Sagar did not want to commit himself definitely by making a return, on his own responsibility. That is why he took all his books to the Income-tax Officer and laid them before that gentleman. But it was not to be expected that Mr. Samiullah would be able to find out what were the entries at p. 39 of the khata book and whether, they, if read with the entries in the naqal bahi, showed that Mr. Ganga Sagar had received dividends other than those noted by Mr. Samiullah himself in Ex. O. Then it is conceivable, and indeed I am prepared to accept the statement of Mr. Ganga Sagar, that he thought that he would be able to escape payment of tax on sums invested by him in the manner already described. But the question is, did he really believe, when he said that his total income from dividends was Rs. 62,000, that he was making a correct statement? Mr. Ganga Sagar was perhaps trying to hoodwink himself and was trying to quiet his conscience, by the method adopted by him, for avoiding the payment of the income-tax. But in spite of that, it is difficult to believe that he believed it to be true that the statement Ex. P contained correct figures, against the head "dividends."

I hold that the conviction is right.

Now I come to the question of sentence. I note that not a single ground for revision has been taken on behalf of Mr. Ganga Sagar that the sentence passed against him is excessive. Nor has the Court been addressed on the ground of severity of the sentence. The reason is clear. Mr. Ganga Sagar is a very wealthy man and it is the conviction that he minds and not the amount of the fine that has been imposed on him. The learned District Magistrate has imposed the maximum fine that is provided by law under S. 177, I. P. C. and has remarked that the case did not call for any sentence of imprisonment. He said :

"coming to the question of sentence I realize that even the maximum sentence of fine

which I can inflict will be no real punishment for a rich man like the accused. At the same time the moral stigma attaching to the accused for conviction is sufficient, in my opinion, to make a sentence of imprisonment unnecessary."

Although I agree with the latter portion of his remark in my opinion, the learned Magistrate was entirely wrong in the principle he adopted in awarding the sentence. The maximum sentence whether of fine or of imprisonment, provided for by law, represents the sentence to be inflicted in extreme cases. Because a man may easily pay a fine is no ground for ordering him to pay the maximum fine, fixed by law, if the nature of the offence committed by him is not of the most serious character, having regard to the description of the offence itself. Take, for example, a conviction under the Motor Vehicles Act. Almost all the owners of private motor cars are well-to-do people. If a minor motor rule is infringed, on the principle adopted by the learned Magistrate, the maximum fine, provided by the rule, must be inflicted, because the owner of the motor can easily pay that amount. No doubt, the Court must look to the means of the accused person, his respectability, his standard of living and all similar matters in inflicting a sentence. In technical cases, a few rupees would be enough even though the convicted person be a rich man. In the case of a very poor man, a small fine may really be heavier to him than a fine of a short term of imprisonment. But, from the fact that the accused person is a rich man, it does not follow that he must pay the full penalty provided by the law, irrespective of whether the nature of the offence committed by him demands it or not.

The foregoing remarks are relevant to the application made on behalf of the Crown for enhancement of sentence.

It has been urged by the learned Government Advocate that a sentence of Rs. 1,000 is nothing to Mr. Ganga Sagar and the Courts below should have sent him to jail, and that we should do the same now. In my opinion the application for enhancement is entirely ill-advised in this case. If I had been trying the case, as a Magistrate, I would never have sentenced Mr. Ganga Sagar to a fine exceeding Rs. 250. There can be no doubt that he tried to escape payment of taxes. An anxiety to escape the payment of a tax amounting to Rs. 78,000 out of a total income of Rs 4,00,000 is almost natural. His anxiety to escape payment of this tax led him to invent the idea of debiting himself with a supposed loss in the manner already described above. I have already pointed out that the talk Mr. Ganga Sagar had with Mr. Joshi establishes that Mr. Ganga Sagar was prepared to defend his action. Mr. Ganga Sagar did, after all send a revised statement of his income which was true. No doubt he did this after he had been called upon to produce his account books of the previous year and to make a return of his income of the previous year. But when he made the revised return, he did not know what materials the Income-tax Officer had in his possession for proving his income. Indeed, the materials showed only an additional income of Rs. 75,000 and odd and not nearly Rs. 3,00,000, declared on 7th November 1927. The law does contemplate making of revised returns and and does contemplate cases, where incomes, which ought to have been taxed, have escaped taxation. S. 28, Income-tax Act, provides for penalty for concealment of income. It says:

"If the Income-tax Officer ..... is satisfied that an assessee has concealed the particulars of his income or has deliberately furnished inaccurate particulars of such income and has thereby returned it below the real amount, he may direct that the assessee in addition to the income-tax payable by him, pay by way of penalty a sum not exceeding the amount of income-tax which would have been evaded if the income, so returned by the assessee, had been accepted as the correct income."

The legislature knew that it would be hard for a person to tell the truth when the telling of the truth meant a payment of money and a heavy sum of money in some cases. Few people would be expected to realize the fact that taxation is necessary for the carrying on of the Government and, therefore, they should pay the tax ungrudgingly and honestly. People always grumble at taxation, however necessary and the Income-tax Act did recognize this fact when it made the offence under S. 52 a compoundable one, although the offence under S. 177, I. P. C., itself is not compoundable.

Then again, Mr. Ganga Sagar put all his books before the Income-tax Officer. No doubt, in doing this, he wanted to act "within the law." He thought that he would not take the risk of making a false return and would let the income-tax authorities discover, if they can, from his books, what the total income was. All this would go to show that Mr. Ganga Sagar was struggling between his anxiety to save his money and fear of committing anything which was unlawful.

For reasons best known to them, the income-tax authorities did not take action under S. 28 of the Act. If they had taken action under that Act they would have, probably, been in a position to realize nearly Rs. 70,000 from Mr. Ganga Sagar. They, under the law, could not realize more than that, even if Mr. Ganga Sagar had managed to escape payment of lawful taxes for several years. Knowing that, the income-tax authorities tried to realize, I had almost used the word "extort," Rs. 7,00,000 from Mr. Ganga Sagar. Ultimately they came down to Rs. 3,00,000 : vide the statement of Mr. Bhawan, Income-tax Officer. They were prepared to compound the offence, if Mr. Ganga Sagar paid Rs. 3,00,000. But what did the sum of Rs. 3,00,000 represent? The Government Advocate has told us that Rs. 3,00,000 were really only a small portion of the taxes Mr. Ganga Sagar should have paid in the course of several previous years. We have no evidence on the point and, even if this were true, the law did not provide for recovery of taxes on "escaped income" for more than one year : see S. 34. The Income-tax authorities were, therefore, trying to realize, by the threat of prosecution, what they could not realize under the law. This is a hardly desirable conduct in officers of the Government who are really servants of the State and, therefore, of the people. Then, I am rather surprised to find that when the negotiations for compounding the offence fell through, Mr. Ganga Sagar was charged not only with an offence under S. 177, I. P. C., but also with offences under Ss. 195 and 465, I. P. C. Neither the offence under S. 193 nor the offence under S. 465, I. P. C., is compoundable. If the income-tax authorities believed that Mr. Ganga Sagar had committed offences under those two sections of the Indian Penal Code, they had no right to drop the prosecution under these sections, on receipt of money. The talk of compromise could only have related to the offence under S. 177, I. P. C., read with S. 52, Income-tax Act. In that case, on the failure of the compromise, no prosecution under Ss. 193 and 465 should have been ordered. The officers of the Crown, therefore, on whose behalf the learned Government Advocate is now pressing for a sentence of imprisonment, have hardly been fair in their dealings with Mr. Ganga Sagar, and the prayer for a sentence of imprisonment comes but with ill grace from their mouth.

In the result I would dismiss the application in revision made by Mr. Ganga Sagar as also the application for revision made on behalf of the Crown.

Niamatullah, J.—The facts of the case have been stated at length by my learned colleague, with whom I entirely agree in the conclusions arrived at by him. It is no longer in dispute that the applicant showed only part of his income in the return which he made on 25th July 1927. A sum of Rs. 3,47,795 had been received by him as dividend on his shares in a number of jute mill concerns, which he invested in the purchase of new shares of the face value of Rs. 62,000 odd. The difference between the face value and the actual price paid, therefor (which came to several times the face value) represented the price he had to pay above par. He showed Rs. 62,000 odd as the amount of dividends received by him, as, according to the account which he produced before the Income-tax Officer, Bulandshahr, on 25th July 1927, that amount alone represented his income under that head. The remaining amount (i. e., the difference between the face value of the shares purchased and the actual price paid) was entered in the account books as a loss, in a khata headed as "profit and loss of shares." It was not till 7th November 1927, or thereabout, that he attempted to rectify the error by his letter, Ex. W, and the accompanying details given in Ex. W 1.

The contention put forward on his behalf, and strenuously arged by Sir Tej Bahadur Sapru, is that he showed Rs. 62,000 odd, on 25th July 1927, as

the net amount of dividends received, by him in consequence of a mistaken notion of his that anything paid for shares over and above the face value of the shares purchased should be considered to be his loss. I am unable to accept this contention. No one who has even an elementary knowledge of business principles, much less a man of the position and antecedents of the applicant, can possibly think that any part of the money invested in the purchase of shares of the face value below the price paid can be put down as a loss. The mere fact that he considered it worth his while to pay several times more than the face value of the shares is a proof positive of the value which he placed on such shares. It is obvious that, if he had regarded the investment as a losing bargain, he would have refrained from making the investment.

The circumstances under which the return was made on 25th July 1927 leave no doubt in my mind that the applicant did not believe the statement contained therein to be true. He had received a notice early in April to submit a return by 15th May 1927, when an extension of time was granted till 15th June 1927. Another extension of one month was obtained, but no return was made. On 25th July 1927, the applicant appeared in person before the Income-tax Officer with his account books. The Income-tax Officer examined the khata in which receipt of dividends had been shown, and within a comparatively short time prepared Exhibit O, in which various receipts of dividends were noted and totalled as Rs. 62,000 odd. The applicant, who had refrained for over two months from making his return, found his opportunity to take the Income-tax Officer at his own word, and prepared a statement there and then, entering the amount noted by the Income-tax Officer as his dividend. If he had believed that the amount shown as his dividend in the khata, which the Income tax Officer accepted, was the correct amount, he would have himself prepared a return long before 25th July 1927 instead of obtaining extensions, as he did. It seems to me that he knew the state of his account, and was not prepared to take the responsibility of submitting a return showing Rs. 62,000, odd as the only dividend received by him, the rest of it being loss according to another khata of his account. When he found that the Income-tax Officer himself arrived, on examination of his account, at the figure 62,000 odd as his receipts from dividends, he considered it quite safe to prepare a statement there and then according to the figures noted down by the Income-tax Officer himself. That he had previously prepared his account to support the plea that the major part of the dividends represented the price paid by him over and above the face value of the shares purchased and, therefore, a loss to that extent, is not open to question; but he realized that the plea was not likely to be accepted and did not, therefore, prepare his statement before he found the Income-tax Officer to have arrived at the figure 62,000 odd on a cursory examination of his account. It is significant that he did not mention to the Income-tax Officer, on 25th July 1927, that his account in respect of the dividends was made up in the manner in which it had been prepared. On the contrary, it is clear that he concealed from the Income-tax Officer entries of part of receipts of dividend in the profit and loss khata of his account. On being questioned by the Income-tax Officer regarding the receipt of certain dividends referred to in the letter received by the latter from the Income-tax Officer of Companies, he gave evasive replies, suggesting that the letter referred to receipts of dividend which had not been actually received till then, though, as a matter of fact, part of it, at any rate, was entered in the profit and loss khata.

Reliance has been placed upon the evidence of Mr. Chatur Datt Joshi in support of the plea of good faith on the part of the applicant. As I read his evidence, it does not support the case which is sought to be built on it. He says:

"I came to Cawnpore from Azamgarh about 30th October 1927, to give evidence in a case before the Sessions. I went back from Cawnpore probably on 1st November or 2nd November. In Cawnpore I met Seth Ganga Sagar at the house of Pandit Rameshar Dayal, Deputy Collector. He asked me a question about his income-tax. The question was whether he would be liable to pay tax on the money which he had spent out of his income in buying shares above their face value. I told him he would be so liable and he said it really represented his loss. I said

that might be so, but no one would accept that view and it would be taxed. He was going to Calcutta. I told him he could consult people in Calcutta and send in his return accordingly".

This statement of Mr. Chatur Datt Joshi itself shows that the applicant had misgivings in his mind. He had adopted a queer system of account, which was nothing short of a device to obtain exemption from payment of income tax in part. He consulted Mr. Joshi to ascertain if there was any chance of the device being successful, and the answer was what he probably expected. The incident does not show that he believed on 25th July 1927 that his income from dividends was no more than Rs. 62,000 odd. He had been previously examined by the Assistant Commissioner, Income-tax, on 2nd September 1927, regarding certain dividends not included in the Rs. 62,000 odd, entered in his statement of 25th July 1927. He had also received a notice, dated 19th October 1927, requiring him to submit a return of income which had escaped assessment. He must have been aware of the practice of the Income-tax Officers of companies receiving regular information from the companies regarding payment of dividends to the recipients, and communicating the same to the Income tax Officers of various districts. It was not unnatural, under these circumstances, for the applicant to have become nervous by 1st November 1927, when he met Mr. Chatur Datt Joshi, to whom he mentioned his peculiar views in the matter of investment of money in shares purchased above par, and subsequently wrote the letter, Ex. W, enclosing details given in Ex. W1, which disclosed the actual amount of dividends received by him, namely Rs. 3,42,795.

It has been urged on behalf of the applicant that Exs. W and W1 should be regarded as a revised return within the meaning of S. 22 (3), Income-tax Act, which permits a locus paenitentiae to the assessee. If an action, such as this, of the applicant can be properly styled locus paenitentiae and a revised return under S. 22 (3) it may have the effect of relieving him of the consequences contemplated by S. 23 (4), i. e., liability to be assessed according to the best judgment of the Income-tax Officer, from which no appeal is allowed, but cannot condone the offence, if any, under S. 177, I. P. C., read with S. 52, Income-Tax Act, previously committed. If once it is established that the applicant made a statement in a verification mentioned in S. 22, which was false and which he either knew or believed to be false or did not believe to be true, the offence was complete at the time when the statement was made. The essence of an offence under those sections lies in the verification of an untrue statement, and provided the statement was deliberately false or not believed to be true, subsequent rectification cannot make it any the less an offence, though it may be considered as an extenuating circumstance in awarding sentence. I have found above that the applicant did not believe on 25th July 1927 that his income from dividends during the period in question was believed by him to be what he showed in the return of that date. It follows that he committed on that date an offence under S. 177, I.P.C., read with S. 52, Income-tax Act.

For the reasons stated above, I agree with my learned colleague in dismissing the revision, which I hereby do.

As regards the sentence, I accept the reasons given by the learned District Magistrate for awarding the maximum sentence of fine without adding to it any sentence of imprisonment. As has been pointed out by my learned colleague, it is not always possible, nor desirable, that a deterrent sentence should be aimed at. The circumstances of each case have to be considered in awarding sentence, and I am not prepared to say that the course adopted by the learned Magistrate was faulty. If a sentence of fine only is to be regarded as lenient, any sentence of imprisonment, simple or rigorous, is too severe for a man in the position of the accused. It is to be noted that the income-tax authorities could have, if they had so chosen, imposed a heavy penalty equal to one year's tax under S. 28, Income-tax Act. They did not avail of the provisions of that section, because, as it appears to me, an attempt was made to recover from the applicant a very much larger sum for compounding the offence which he was alleged to have committed. It is in evidence that a sum of seven lakhs was originally demanded from him for allowing the case to be compounded. The demand was reduced to three lakhs

later on. The applicant did not accede to the demand and was prosecuted not only for an offence under S. 177, I. P. C., read with S. 52, Income-tax Act, but also for serious offences like perjury and forgery, which could not be substantiated. The Act empowers the income-tax authorities to compound offences on receipt of money ; but it was never the intention of the legislature that the power conferred by it should be used to obtain as much money as possible by holding out a threat of prosecution. It seems to me that action under S. 28, Income-tax Act, was not taken because the applicant refused to pay the large sum of money demanded from him for compounding the offence which he was alleged to have committed, and the anxiety to have him sentenced to a term of imprisonment for his contumatious behaviour was vindictive.

For the reasons stated above, I agree with my learned colleague in refusing to enhance the sentence awarded by the District Magistrate.

V.S./R.K. *Application dismissed.*

A. I. R. 1929 Allahabad 928

SEN, J.

Man Singh and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 529 of 1929, Decided on 14th August 1929, from an order of Addl. Sess. Judge, Cawnpore, D/- 27th May 1929.

(a) Evidence Act, S. 30—Statement by co-accused should not be accepted unless corroborated in material particulars—Evidence Act S. 114, Illus. (b).

The statement of a co-accused is admissible in evidence but according to the usual practice and as a rule of prudence it is unsafe to accept the tainted testimony of an accomplice so long as it is not corroborated in material particulars. The difficulty enhances where the said accomplice does not adhere to his statement. [P 929 C 1]

(b) Criminal Trial—Identification—Evidence as to, ought to be subject to close and careful scrutiny.

The evidence as to identification ought in each case to be subjected to a close and careful scrutiny. It is an important factor whether all the persons identified were previously known to the witnesses or were perfectly strangers to them. The time of occurrence, the state of light and the opportunities which the witnesses had of identifying are material circumstances. The range and the distance from which the witnesses say that they saw the accused should be determined. [P 929 C 2]

Saila Nath Mukerji—for Appellants.

Shankar Saran—for the Crown.

Judgment.—Man Singh, Kishori Lal, Balbhaddar Singh, Halke Singh, Rameshwar Singh and Kanhai Singh have been convicted by the learned Additional Sessions Judge of Cawnpore for an offence punishable under S. 396, I. P. C. and sentenced to eight years' rigorous imprisonment each.

The learned Sessions Judge acquitted Munian Singh, Sheonath Singh, Babu Singh and Sheonarain Singh.

It is proved beyond all reasonable doubt that on 9th May 1928, a highway dacoity of a very serious magnitude was committed at or near Banar Alipur which is in the jurisdiction of the police station of Akbarpur. In the beginning of May, a cattle fair was held at Gajnair and a large number of people had congregated to see the fair and to vend their cattle. On 9th May 1928, sometime towards the evening, as a band of persons numbered 30 and 32 were returning from the fair and were on their way towards Akbarpur about nine miles from Gajnair, they were suddenly assaulted by a party of dacoits. Fourteen persons were injured. One man of the name of Debi was killed. Cash and currency notes of the value of thousands were looted. A report was made by the village chaukidar at the police station of Akbarpur the same day at about 9 p.m. The report does not give either the names or the number of dacoits, nor does it disclose the nature or value of the property looted.

The police investigation started vigorously and at once Rameshwar Singh and Kishori Lal were arrested on 7th June 1928, Babu Singh on 11th June and Balbhaddar Singh on 29th August. Man Singh, who was requisitioned by the police, appeared before the Magistrate and surrendered himself on 13th September 1928. Halke Singh either surrendered himself or was taken in custody sometime in November 1928. The date of the arrest of Kanhai Singh does not appear from the evidence on the record. Kanhai Singh made a detailed statement before a Magistrate of the First Class on 11th September 1928, under S. 164,

Criminal P. C. This statement he has subsequently retracted.

The houses of the appellants as those of the other accused persons who have been acquitted by the learned Sessions Judge were searched by the police but nothing incriminating was found in their houses.

The case for the prosecution rests entirely upon the confession of Kanhai Singh, which has already been referred to and upon certain identification proceedings, which were held on 9th July 1928, 5th January 1929 and 9th February 1929 in Fatehpur jail, in Cawnpore jail and in Charkhari jail.

The learned Sessions Judge had some difficulty in accepting the statement of Kanhai Singh in its entirety. Kanhai Singh figures as a co-accused in the case. The statement of a co-accused is admissible in evidence but according to the usual practice and as a rule of prudence it is unsafe to accept the tainted testimony of an accomplice so long as it is not corroborated in material particulars. The difficulty enhances where the said accomplice does not adhere to his statement. In the present case, as has already been observed, the statement was retracted by Kanhai Singh.

The learned Assistant Government Advocate has been at considerable pains to rummage and ransack the evidence for the prosecution to be able to find out even a scintilla of evidence in corroboration of the statement of Kanhai Singh. There are two material facts about which Kanhai Singh has been rightly discredited by the Sessions Judge. According to Kanhai Singh, the two persons who were responsible for the murder of Debi Singh were Munian Singh and Sheo Nath. The learned Sessions Judge has acquitted Munian Singh and Sheo Nath and has come to the conclusion that their names were introduced into the story told by Kanhai by reason of the influence of Ujagar Singh and Umrao Singh, zamindars, who were in terms of bitter enmity with Munian and Sheo Nath. According to Kanhai, the dacoits were armed with carabine and spears. The injuries received by 14 persons referred to above and also by deceased were all injuries which could have been caused by blunt and not by pointed weapons.

The date of occurrence was 9th May 1928, and the identification proceedings took place between 9th July 1928 and 9th February 1929.

On 9th July 1928, Kishori Lal and Rameshwar were identified by a certain number of witnesses at the Fatehpur Jail. Laljit, Ram Charan and Debi Prasad identified Kishori and Hira Lal, Ganga Din, Kishan Prasad, Debi, Dariao and Ajudhiya identified Rameshwar.

Kanhai Singh, Balbhaddar and Man Singh were identified in the Cawnpore Jail on 5th January 1929. Kanhai by Hira Lal, Laljit, Ganga Din, Ram Charan, Dariao and Ajudia, Balbhaddar, by Hira Lal, Laljit, Ganga Din and Ajudia and Man Singh by Hira Lal, Ram Charan and Dariao.

On 9th February 1929, Ganga Din, Hira Lal, Dariao and Laljit identified Halkey Singh at the Charkhari Jail.

The evidence as to identification ought in each case to be subjected to a close and careful scrutiny. It is an important factor whether all the persons identified were previously known to the witnesses or were perfect strangers to them. It is not pointed out in this case that barring Balbhaddar Singh any other accused person was known to the identifying witnesses. The time of the occurrence, the state of the light and the opportunities which the witnesses had of identifying are material circumstances. The range and the distance from which the witnesses say that they saw the accused ought to be determined. Did the witnesses know anything particular in the features of the accused or of any one of them? Did they notice anything peculiar in their dress? Was there anything particular in the conduct of any of the accused persons which had impressed the witnesses? Did they get the front view or merely the side view of any of the accused persons? These are matters which the witnesses should be able to depose to and ought to be deposed to in each and every case. Unfortunately these matters are not sufficiently brought to light either by the counsel or by the Court in a great majority of cases.

The judgment of the learned Sessions Judge contains excellent reasons why the evidence relating to identification should not be accepted. The full passage from his judgment may be produced :

"Ganga Din identified three right men and two wrong men in Fatehpur Jail, und three right men and six wrong men in Cawnpore Jail.

"Ramcharan identified three right men and two wrong men in Fatehpur Jail. He identified two right men and two wrong men in Cawpore Jail. He could not identify Sheo Nath in the Magistrate's Court and identified Sheonarain Singh whom he did not do in jail.

"Hira Lal identified three right men and three wrong men in Fatehpur Jail and three right men and one wrong man in Cawnpore Jail. In the Magistrate's Court he did not identify Mania and Kanhai whom he did in jail.

"Kishen Prasad identified one right man and one wrong man in Fatehpur Jail.

"Ajudhia identified two right men and two wrong men in Fatehpur Jail and he identified two right men and four wrong men in Cawnpore Jail.

"Daryao identified one right man and three wrong men in Fatehpur Jail and two right men and one wrong man in Cawnpore Jail.

"Debi Prasad identified three right men and two wrong men in Fatehpur Jail. He identified Man Singh in this Court and Magistrate's Court which he did not do in jail and did not identify Rameshwar Singh here or Magistrate's Court.

"Halkey Singh was identified in Charkhari Jail. He was mixed up with nine other under-trials. Daljit, Ganga Din, Hira Lal and Daryao identified him. There was no wrong identification in Charkhari."

The identification in Charkhari Jail appears to be mysterious. Witnesses had blundered about identification in various instances in Fatehpur and Cawnpore Jails, but they were immune from such mistakes in Charkhari Jail. It is worthy of notice that of the persons who were acquitted by the learned Sessions Judge, Mania Singh was identified by Hira Lal, Laljit, Ram Charan and Debi Prasad, Sheo Nath by Hira Lal, Ganga Din, Ram Charan and Ajudhia. Babu Singh by Laljit and Ganga Din. The learned Sessions Judge did not consider the evidence of these witnesses to be of any value as against Mania Singh, Sheo Nath and Babu Singh.

It is difficult to find any real difference between the case of Kanhai Singh and the remaining five appellants. It is perfectly clear that upon the evidence the conviction of Man Singh, Kishori Lal, Balbhaddar Singh, Halkey Singh and Rameshwar Singh cannot be sustained. The statement of Kanhai Singh is entirely unworthy of credit. It is uncorroborated. The evidence relating to identification must be discarded as absolutely worthless.

The only evidence of any moment against Kanhai Singh is his retracted confession. His statement has been found to be untrue in certain material particulars. It cannot be stated with certainty that the statement was voluntary or that it was true even so far as it affects himself alone. What became of the currency notes and cash worth Rs. 1,000, which were the spoils of the dacoity?

It is not without certain amount of reluctance that I give Kanhai Singh the benefit of doubt.

The result is that I allow the appeal, set aside the conviction and sentence of Man Singh, Kishori Lal, Balbhaddar Singh, Halkey Singh, Rameshwar Singh and Kanhai Singh under S. 396, I. P. C. and direct that they be released forthwith.

R.M./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 930

YOUNG, J.

Mukhram—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 640 of 1929, Decided on 7th August 1929, from judgment of Sess. Judge, Ghazipur.

Criminal P. C., S. 562 — Enticing away widow of 16 years for honourably marrying her—Discovery by father — Charge against enticing youth under Penal Code, S. 366—No attempt to seduce or illtreat her — Case held fit for criminal being treated as first offender.

The accused a youth of 18 years took a widow of 16 years to his sister's house and placed her under the sister's care. Eventually the girl's father discovered her, took her home and brought a charge against the accused under Penal Code, S. 366. While under the custody of sister, no attempt was made by the youth to seduce her or illtreat her in any way; but on the other hand, the youth wished honourably to marry her.

Held: that it was precisely for this sort of case that S. 562 was enacted. [P 931 C 1]

S. N. Varma—for Appellant.

Sankar Saran—for the Crown.

Judgment.—In this case one Mukhram was charged under S. 366, I. P. C., before the Sessions Judge of Ghazipur, who convicted and sentenced him to two and half years' rigorous imprisonment.

Mukhram is a youth of 18 years age. I am accepting as proved the facts al-

leged by the prosecution. They are as follows :

The accused Mukhram, knowing a girl of 16 years of age who had been widowed for some six years, wished to marry her. Instead of going through the ordinary course, which he would have been well advised to adopt, he told the girl, Mt. Jasodia, that her aunt was seriously ill and that he would escort her to her aunt. The girl went with him. On the way was the house of Mukhram's sister. He put the girl under the care of his sister, and there she remained for some eight days. Her father eventually discovered her and took her home, and brought a charge against Mukhram for having abducted his daughter with the intention of forcing her to marry him.

While the youth had kept this girl under the care of his sister, she was, with the exception of being detained in the house, well treated and well fed. No attempt was made by the youth to seduce her or ill treat her in any way. The youth wished honourably to marry her. They were both of the same caste. Apart from her father's consent there was no reason why he should not marry her and he would be doing a good act by marrying her, taking into consideration that she was a widow. In my view the youth acted foolishly in this matter, but did nothing more. It is his first offence ; and it is precisely for this sort of case that S. 562, Criminal P. C., was enacted. I, therefore, propose to take the course of setting aside his sentence and releasing him on probation of good conduct. I accordingly direct that he be released on his entering into a bond for Rs. 500 on his own recognizance to appear and receive sentence when called upon during the period of one year, and in the meantime to keep the peace and be of good behaviour. There seems to me in this case no reason to send this youth to jail and thereby possibly make a criminal of him. Under the circumstances of the case there is no reason to suppose that Mukhram will not be a good citizen in the future.

V.S./R.K. *Conviction set aside.*

A. I. R. 1929 Allahabad 931

DALAL, J.

Madusudan Lal—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 419 of 1929, Decided on 25th July 1929, from order of Sess. Judge, Agra, D/- 17th May 1929.

(a) Criminal P. C., S. 195 (5)—Local Self-Government Election Rules (1925), Part. 1, Rr. 16, 17 — District Magistrate has jurisdiction to hear appeal from returning officer under S. 195 (5), Criminal P. C.

By reference to Rr. 16 and 17 of Local Self Government Rules (1925) it may be taken as certain that the returning officer is a public servant subordinate to the District Magistrate. The District Magistrate therefore has authority to hear an appeal under S. 195 (5), Criminal P. C., and he is not justified in refusing jurisdiction. [P 932 C 1]

(b) Criminal P. C., S. 435—District Magistrate exercising jurisdiction under Election Rules does not act as criminal Court and no revision lies from his order.

The provisions of S. 435 do not apply to District Magistrates but to criminal Courts inferior to the High Court. When exercising jurisdiction under the election rules of the District Board the District Magistrate does not act as a criminal Court but acts as an authority to whom the returning officer is subordinate. The High Court, therefore, cannot interfere in revision with an order of the District Magistrate under S. 195 (5) even though he denies jurisdiction under the provisions of that section : 9 *Bom. L. R.* 1347, *Rel. on.* [P 932 C 1]

K. O. Carleton, P. L. Banerji and *K. N. Malaviya*—for Applicant.

M. Waliullah—for the Crown.

Judgment.—Madusudan Lal has applied in revision to this Court from an order passed by the District Magistrate of Agra. There can be little doubt that the order is not legal, and the District Magistrate had authority to hear the appeal under S. 195 (5), Criminal P. C. The complaint under S. 182, I. P. C., has been made against Madusudan Lal by Mr. Nur-ul-Hasan Sahib, returning officer of Etmadpur in the district of Agra. Under R. 16 of the rules made by Government in the Local Self-Government Department on 27th May 1925, Part 1, the returning officer is empowered to hear all claims and objections which are made to the Electoral Roll. Under R 17, the District Magistrate is given authority to review an order of the returning officer and make any consequent correction in the Electoral Roll. By re-

ference to these two rules it may be taken as certain that the returning officer is a public servant subordinate to the District Magistrate under the rules. Direction was given by the returning officer for the prosecution of Madusudan Lal for giving false information. This complaint may be withdrawn by the District Magistrate. The District Magistrate of Agra, therefore, was not justified in refusing jurisdiction on 1st May 1929.

In my opinion, however, this Court cannot interfere in revision with an order of the District Magistrate passed under S. 195 (5) even though he denied jurisdiction under the provisions of that section. I have already quoted R. 17 under which the District Magistrate may review an order of the returning officer. It cannot be contended that from such an order of review an application for revision would lie to this Court. It was argued, however, that as the District Magistrate acquired jurisdiction in this matter under a provision of the Code of Criminal Procedure the provisions of S. 435 of that Code will apply to his order. The provisions of S. 435 do not apply to District Magistrates but to criminal Courts inferior to this Court. When exercising jurisdiction under the Election Rules of the District Board the District Magistrate does not act as a criminal Court but acts as an authority to whom the returning officer is subordinate. For that reason this Court has no jurisdiction to interfere with the order of the District Magistrate pronounced under the circumstances narrated above. There is a ruling of the Bombay High Court, *In re, Dalsukhram Hargovandas* (1). It was held there that a Magistrate having an appellate jurisdiction under the District Municipal Act of Bombay 1901, was not an inferior criminal Court to which the revisional jurisdiction of the High Court may be extended.

It is possible that if a copy of this order is submitted to the District Magistrate he would re-consider his order of 1st May, and hear the appeal filed by Madusudan Lal.

This application is dismissed.

R.M./R.K. *Application dismissed.*

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(1) [1907] 9 Bom. L.R. 1347.

A. I. R. 1929 Allahabad 932

SEN, J.

Jageshar—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 431 of 1929. Decided on 29th July 1929, made by Sess. Judge, Mirzapur, on 25th May 1929.

Criminal P. C., S. 528—Powers given by S. 528 should be exercised when absolutely necessary—Notice of application for transfer should be served upon opposite party.

The powers given by S. 528 are very extensive but the wide discretion that the Magistrate is clothed with should be sparingly exercised. It should only be exercised where it is absolutely necessary to meet the demands of justice. But before an order of transfer is made, it is proper and it is just that the notice of the application for transfer together with the copy of the affidavit, if any, should be served upon the other party and an opportunity afforded to the latter to show cause why the application for transfer should not be granted. It is also neceesary that the Magistrate should record his reasons for the transfer to bring out the fact that it was not an arbitrary order but was a judicial pronouncement : 3 *All.* 749, *Rel. on.*

[P 933 C 2 ; P 934 C 1, 2]

M. Waliullah—for the Crown.

Judgment.—A complaint was instituted on 16th March 1929 by one Jageshar Chamar under S. 323 and 426, Penal Code and S. 24, Act 1 of 1871 against Umar Khan, Muhabat Khan and Talib Khan in the Court of Munshi Nazir Ahmad Abbasi a Deputy Magistrate with First Class powers. Mr. Abbasi is a Sub Divisional Magistrate in the district of Mirzapur. On the very day that the complaint was instituted, he transferred the case to Mr. Lakshmi Chand Raizada, a Special Magistrate with Third Class powers for the disposal of the case. The complaint was registered in the Court of the Special Magistrate on 2nd April 1929. The complainant and his witnesses were examined on 16th and 24th April 1929. The accused were represented by counsel. The accused had an opportunity to cross-examine the witnesses for the prosecution and they fully and freely availed themselves of this opportunity. In the course of the cross-examination no attempt whatsoever was made by the accused to put any question either to the complainant or to the witnesses as may be suggestive of the fact that the complaint was inspired by one Afzal Khan who is

alleged to be a servant of the Maharaja of Benares. It has not been stated and it has not been disclosed by the record that Mr. Lakshmi Chand Raizada during the progress of the proceedings before him had betrayed any leaning towards the prosecution and against the accused or had raised any difficulties which might be calculated to prejudice the defence.

Before the charge was framed, all the three accused were examined. The Magistrate pointedly put a question to the accused as to what could be the reason of the complaint being preferred against them. The answer was that the complainant was the asami and the ploughman of one Raj Bahadur Khan who was on terms of enmity with the accused and that the accused persons were the victims of this enmity. It is remarkable that in the statements of the accused there is not a breath of a whisper that Jageshar was not the real complainant in the case and that the real complainant was one Afzal Khan who bore a grudge against the accused.

The charge was framed on 22nd April 1929.

It may be assumed that Afzal Khan is a servant of His Highness the Maharaja of Benares. It is not challenged that Mr. Lakshmi Chand Raizada is a Tahsildar in the Benares State.

On 23rd April 1929, Muhabat Khan, one of the three accused applied to Mr. Nazir Ahmad Abbasi for the transfer of the case from the Court of the Special Magistrate to any other Court on the ground that the complaint of Jageshar had been filed in conspiracy with Afzal Khan, who was on hostile terms with the accused, that the aforesaid Afzal Khan was running the case for the prosecution, that he was a servant of the Maharaja of Benares and commanded a particular influence upon Mr. Lakshmi Chand Raizada so that there was no reasonable prospect of a fair and impartial trial in his Court.

The procedure adopted by Mr Abbasi was improper and illegal in every way. He gave no notice to the complainant of the application. He gave no opportunity to him to show cause against the projected order. He recorded no reasons for transfer. He summarily transferred the case to the Court of Munshi Syed Dilawar Ali, a Tahsildar Magistrate with second class powers. To quote the words of Mr. Abbasi he 'quietly' transferred the case. This quietness on the part of the Sub-Divisional Magistrate appears to have created a considerable amount of disquietude in the mind of the complainant, who on 5th May 1929 lodged a petition in the Court of Mr. Muhammad Taki the learned Sessions and Subordinate Judge of Mirzapur for revision of the order of Mr. Abbasi directing the transfer. Mr. Muhammad Taki Khan has very properly referred this case to this Court with his recommendation that the order of transfer should be annulled. The learned Sessions Judge is clearly right and his recommendation ought to be given effect to.

The powers given by S. 528, Criminal P. C, are very extensive but the wide discretion that the Magistrate is clothed with should be sparingly exercised. It should only be exercised where it is absolutely necessary to meet the demands of justice. But before an order of transfer is made, it is proper and it is just that the notice of the application for transfer together with a copy of the affidavit, if any, should be served upon the opposite party and an opportunity afforded to the latter to show cause why the application for the transfer should not be granted. Where the trial of the accused has proceeded in one Court, where the complainant and his witnesses have been examined, where these witnesses have been tried and tested by cross-examination and the trial Court has framed a charge against the accused presumably on the ground that a prima facie case has been made out, the case ought not to be removed from the file of the trial Court and transferred to another Magistrate unless a very strong case has been made out to justify the transfer.

An order of transfer entails a dislocation of work. Why should the complainant be exposed to the necessity of fresh expenditure in another Court in having to pay the fee of his counsel and the expenses of his witnesses? Why again should the complainant and his witnesses be exposed to the worry and trouble of being taken through the process of examination-in-chief and cross-examination over again before the point is reached when the Magistrate has to consider whether the charge should be framed at all? In every case where evidence has

been recorded and charge framed, the transfer of the case to another Magistrate necessarily involves a prolongation of the trial. It means waste of so much of the public time which has already been occupied in the trial Court. And even in cases where the parties are reasonably inclined and are agreed that the proceedings should continue before the Court in which the case has been transferred from the point reached in the original Court, it cannot be predicated with certainty that no harm is done. The original Court had the manifest advantage of having the witnesses before it and was in a better position to deal with the case than that which was before it only as a dead record.

Mr. Abbasi has submitted what he calls an explanation. There can be no doubt that the present case is a plain case of error of judgment on the part of Mr. Abbasi. It would have been fair and it would have been courageous on his part to own his mistake; and he might well have spared himself the trouble of trying to invent an explanation, where there could have been no explanation in fact.

In the matter of the petition of *Umrao Singh* v. *Fakir Chand* (1), it was held by a very eminent Judge of this Court that when an application was made to the Magistrate of the district for the withdrawal of a case from a subordinate Magistrate by one of the parties to such another Court, notice of such application should be given to the opposite party and an opportunity should be afforded him, if desirous of doing so, to show cause against its being granted. This proposition was founded upon S. 47, Act 10 of 1872. Section 528 of the present Criminal P. C., is the result of the amendment made by Act 18 of 1923. It is true that this section does not in terms require either the issue of notice or a record of reason by the Magistrate. But it is but natural justice that notice of the application should be given to all the parties vitally concerned with the matter and that an opportunity should be granted to them to contest the application if they so desire. It is also necessary that the Magistrate should record his reasons for the transfer so as to bring out the fact that it was not an autocratic move or an arbitrary order but was a judicial pronouncement, in view of the peculiar facts of the case with the object,—which is essentially the supreme object in such case—meeting the ends of justice.

Mr. Abbasi submits that the omission to issue notice was not illegal as it did not contravene any mandatory provision of law. Mr. Abbasi is referred to the ruling cited above. He ought to have loyally obeyed the directions contained in the aforesaid ruling. The learned Deputy Magistrate tries to support his order upon the ground that the proceedings right up to the framing of the charge may very well be ignored because the accused has a further right of cross-examination and that fresh examination-in-chief before another Court would not take more than two hours. He ought to have put this question to himself as to why should the complainant and his witnesses be made to race over the same course for a second time? Why should the complainant, a poor chamar, be exposed to additional expenses by an unnecessary prolongation of the case? The want of notice, in some cases, may amount to no more than an irregularity. In the present case the complainant is beyond all reasonable doubt prejudiced by this omission to issue notice to him. Mr. Abbasi defends his position with the observation that he has transferred the case to a more experienced Magistrate. The efficiency of the Tahsildar Magistrate is not in issue in the present proceedings and it is not necessary for this Court to differ from Mr. Abbasi's estimate as regards the capability and experience of Mr. Dilawar Ali. But there is nothing on the record to suggest a doubt about the efficiency or honesty of Mr. Lakshimi Chand Raizada. No reflection against his efficiency or honesty was ever called for and this ought to have been avoided.

From what has already been stated it is abundantly clear that the story that the complaint was the result of a conspiracy between Afzal Khan and the witnesses for the prosecution is clearly an afterthought. This Court agrees with the view of the learned Sessions Judge, that this part of the affidavit of Muhabat Khan is clearly false. It cannot, moreover, be assumed that Mr. Lakshmi Chand Raizada from the very fact that he was a Tahsildar in the employ of the Benares State would be wanting in his

(1) [1881] 3 All. 749=(1881) A. W. N. 53.

sense of responsibility for the conscientious discharge of his duties as a Magistrate. The finding of the Deputy Magistrate to the contrary is based upon very scanty and insufficient materials and no reliance ought to have been placed upon the affidavit of Muhabat Khan, more specially in view of the fact that no opportunity had been given either to the complainant or to the Magistrate concerned to meet the application.

The result is that I accept the reference, set aside the order of Mr. Nazir Ahmad Abbasi dated 23rd April 1929 and direct that the trial of the case must proceed in the Court of Mr. Lakhmi Chand Raizada.

R.M./R.K. *Order set aside.*

A. I. R. 1929 Allahabad 935

SEN, J.

Bhagwan Din—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 374 of 1929, Decided on 14th August 1929, from order of Addl Sess. Judge, Allahabad, D/- 29th April 1929.

(a) Criminal P. C., S. 54—Village Chowkidar is not "police officer."

A village chowkidar is not a "police officer" within the meaning of S. 54. The whole of the Code shows that "Chowkidars" who have been given a distinctive name were not intended to be included under the term "police officer. [P 935 C 2]

(b) Penal Code, S. 43— "Illegal" — Scope and meaning explained.

The word "illegal" has an extensive meaning, including anything and everything which is prohibited by law which constitutes an offence and which furnishes the basis for a civil suit ending in damages. [P 936 C 1]

(c) Penal Code, S. 221—Duties of chowkidar ought not to be confounded with those of public servant—Obligation of chowkidar to detain not established —Chowkidar cannot be penalized under S. 221.

The duties of a chowkidar as a private citizen ought not to be confounded with his duties as a public servant. Where the legal obligation of the chowkidar to arrest or detain has not been established, there is no dereliction from his statutory duty within the purview of S. 221: and the chowkidar cannot be penalized for intentionally suffering a pilferer to escape from his detention. [P 936 C 1]

Zafar Mehdi—for Applicant.

M. Waliullah—for the Crown.

Judgment.—This is an application for revision of an order of Pandit Rup Kishan Aga, Additional Sessions Judge of Allahabad, upholding the conviction and sentence of Bhagwan Din, applicant, under Ss. 221 and 384, I. P. C. The applicant was sentenced to one year's rigorous imprisonment under S. 221, and to six months' rigorous imprisonment under S. 384, I. P. C.

On 7th February 1929, one Ramana Pasi was caught flagrante in dilicto while stealing sarson from the field of one Pancham in Khuda Buksh ka purwa. He was apprehended by Mangal Das and Bhagwan Din, Bhagwan Din is chowkidar of Singraur and Khuda Buksh ka purwa is outside his circle.

Beni Madho Bhat is chowkidar of Khuda Baksh ka purwa and figures as complainant in this case.

Only a few handfuls of sarson appear to have been stolen and Ramana, when caught, was found in possession of a few wisps of sarson stalks. Bhagwan Din chowkidar detained Ramana Pasi for the whole night after his arrest at the house of one Nanku. In the morning, he released Ramana upon payment of rupees ten as consideration for his release and for forbearing to report him to the police. Bhagwan Din chowkidar had taken away from Ramana the few handfuls of sarson.

The trying Magistrate had convicted Bhagwan Din under S. 201, I. P. C. for having intentionally caused the disappearance of evidence against Ramana with a view to screen him. The learned Sessions Judge very properly held that no offence under S. 201, I. P. C. was brought to the door of Bhagwan Din and it could never be seriously contended that the non-production of a few dry stalks of sarson amounted to a suppression of material evidence.

The conviction of the applicant under S. 221, I. P. C. cannot be maintained. A Village Chowkidar has not been referred to in terms in any one of the categories under S. 21, I. P. C. But it may be hypercritical to deny that he is a public servant. He is referred in S. 45, Criminal P. C. as a village watchman. A village chowkidar is not a "police officer" within the meaning of S. 54, Criminal P. C. The whole tenor of the Code shows that 'chowkidars' who have been given a distinctive name were not intended to be included under the term police officer. Where a non-bailable and cogni-

zable offence has been committed within the view of a private person or where there is a proclaimed offender, a private person may under S. 59, Criminal P. C' arrest such person. Under S. 221, I, P. C. where a person, being a public servant and legally bound as such public servant to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence intentionally omits to apprehend such person or intentionally suffers such person to escape, he places himself within the grip of law and is liable to punishment. Assuming that Bhagwan Din was a public servant, was he legally .bound as such public servant to apprehend or keep in confinement Ramana Pasi, where a non-bailable offence had been committed under his very eyes? It is to be remembered that Bhagwan Din was not the chowkidar of Khuda Buksh ka purwa which was outside his circle. Under S. 43, I. P. C., a person is said to be "legally bound to do" whatever it is illegal in him to omit. The word "illegal" has an extensive meaning, including anything and everything which is prohibited by law which constitutes an offence and which furnishes the basis for a civil suit, ending in damages. The Courts below do not appear to have applied themselves to the determination of the question, whether Bhagwan Din in his capacity of being a public servant was bound to apprehend or keep in confinement Ramana Pasi. The learned Assistant Government Advocate has failed to make out that it was within the statutory duty of Bhagwan 'Din to apprehend Ramana or to keep him in confinement. The duties of Bhagwan Din as a private citizen ought not to be confounded with his duties as a public servant. Where the legal obligation of the chowkidar to arrest or detain has not been established there is no dereliction from his statutory duty within the purview of S. 221, I. P. C. and Bhagwan Din cannot be penalized for intentionally suffering Ramana to escape from his detention. The conviction of the applicant under S 221 cannot be sustained and must be set aside.

All the ingredients of the offence of extortion as defined in S. 383 are present in this case. No offer of a bribe emanated from Ramana. Bhagwan Din put Ramana in fear of being continued in custody of being reported against and delivered to the police and thereby dishonestly induced Ramana to pay him ten rupees as the condition for his release. He has been rightly convicted under S. 384, I. P. C. The sentence passed on him does not err on the side of severity.

The result is that this application succeeds in part. The conviction and sentence of the applicant under S. 221, I P. C. are hereby overset and the conviction and sentence under S. 384, I. P. C. are maintained.

V.S./R.K. *Order accordingly.*

A. I. R. 1929 Allahabad 936

SEN, J.

Raja Ram—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 541 of 1929, Decided on 15th August 1929, from order of Dist. Judge, Bulandshar, D/- 25th April 1929.

(a) Penal Code, S. 193—Statement designedly false—Accused is liable irrespective of fact whether statement has material bearing or not upon matter under enquiry.

If the statement made is designedly false the accused is liable irrespective of the fact whether the statement had a material bearing or not upon the matter under enquiry before the Court. The materiality or immateriality can have a bearing upon the sentence to be passed. [P 937 C 1, 2]

(b) Penal Code, S. 193—Perjury committed in administrative enquiry — No appeal lies against order for prosecution.

When false statements amounting to perjury are made in course of administrative enquiry and order for prosecution is passed, no appeal lies against the order: 42 *All.* 130, *Foll.* [P 937 C 1]

B. L. Gour and *Nanak Chand*—for Appellant.

Sankar Saran—for the Crown.

Judgment. — Upon certain applications being presented against one Kishan Prasad, Central Nazir of Bulandshahr, an enquiry was started by the learned District Judge in the course of which the appellant Raja Ram was examined on oath on 5th and 6th April 1929. The learned District Judge was of opinion that Raja Ram was guilty of deliberate perjury with respect to certain statements and notice was issued on 20th April 1929 to Raja Ram to show cause why his prosecution should not be directed. The order dated 20th April 1929 sets out the statements which were alleged to have been intentionally false.

As Raja Ram appeared to be on leave the notice of the order dated 20th April could not be served on him. The finding of the learned District Judge is that Raja Ram was deliberately and designedly flouting the order of the Court and evading service. Upon the facts of the case, there can be no doubt that he was deliberately avoiding service.

Raja Ram is a process server. He had behind him resources aggressively large to prevent the due service of the notice issued by the learned Judge on 20th April 1929. One of the process servers called Abdul Latif stated in his report that Raja Ram had been seen in Bulandshahr on 20th April 1929 at about 9-30 a. m.

The learned District Judge by his order dated 25th April 1929 directed that Raja Ram should be prosecuted for perjury with respect to the statements set out in his order dated 20th April 1929.

It is contended that the learned District Judge instituted an enquiry about the conduct of Lala Kishan Prasad in his administrative capacity and it was not within his competence to direct the prosecution of Raja Ram for any false statements made by him in the course of the said enquiry.

In order that a person should be rendered liable for perjury under S. 193, I. P. C., it is essential that the perjury should have been committed in the course of any trial or proceedings before a civil, criminal or revenue Court or in the course of a judicial proceeding or that at least the statement to which, the assignment of perjury is attached, should have been made under a legal sanction.

The appellant is faced with the difficulty that if the statements in question were made in the course of an administrative enquiry no appeal lies to this Court. There is the authority of this Court in *Emperor* v. *Santi Lal* (1). A plea has been taken in appeal that the statements about which the prosecution of the appellant has been directed were not material to the enquiry in hand before the learned District Judge and therefore his prosecution could not be ordered under S. 193, I. P. C. If the statement was designedly false, the appellant was liable for the consequences of this statement irrespective of the fact as to whether the statement had a material bearing or not upon the matter which was under enquiry before the Court. The materiality or the immateriality of the statement could have a bearing upon the question of sentence which was to be passed in the case.

There are no materials before this Court for the determination of the question whether the order was passed by the Court in its administrative capacity or in pursuance of an enquiry held as a civil, criminal or revenue tribunal. Equally there are no materials before this Court for the determination of the question as to whether the statements were made under a legal sanction. In making this observation, I have in view the provisions of the Indian Oaths Act, of S. 80, Evidence Act. and of O. 18, R. 5, Civil P. C. The appellant had the opportunity of establishing in the Court below that no proceedings ought or should have been initiated against him. He deliberately evaded justice. He has not been able to put forward before this Court any materials to show that the order passed by the Court was without jurisdiction as being out-ide the powers possessed by the Court under Ss. 195 and 476, Criminal P. C. Mr. Nanak Chand applied for permission to refer to certain papers. I refused permission as the papers were outside the record of the case now before me.

The appeal is dismissed.

R.M./R.K. *Appeal dismissed.*

(1) [1920] 42 All. 130=58 I.C. 702=17 A.L.J. 1018.

A. I. R. 1929 Allahabad 937

SEN, J.

Rure Mal and *another*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 382 of 1929, Decided on 26th July 1929, from an order of Sess. Judge, Meerut, D/- 19th February 1929.

(a) Criminal P. C., S. 239—"Same transaction" — Offences under U. P. Public Gambling Act, Ss. 3 and 4, are complements of one another — Persons accused under Ss. 3 and 4 can be tried together.

No cast iron rule of law can be laid down on the question as to whether the keeper of a gambling den, if he frequents the said den and gambles there, could not be said to do so in the course of the same transaction within the meaning of S, 239, Criminal P. C. The words "same transaction" are not defined in the Code. The offences under Ss. 3 and 4, public Gambling Act are interdependent and

" are the complements of one another." A. Court, therefore, is justified in trying two accused persons under Ss. 3 and 4 in the course of the same trial: *A. I. R.* 1922 *Lah.* 458; 6 *P. R.* 1919 *Cr.* and *A.I.R.* 1923 *All.* 88, *Rel, on.*; 5 *P. W. R.* 1910 and 35 *P. R.* 1914 *Cr. not Foll.* [P 938 C 2, P 939 C 1]

(b) U. P. Public Gambling Act (3 of 1867), Ss. 3 and 4—Conviction of accused under Ss. 3 and 4 separately is not illegal.

The two offences under Ss. 3 and 4 may be interdependent but they are distinct offences and one cannot be said to overlap the other. It is not illegal to convict an accused under the two sections separately. It is not prcper to convict the accused person under the two sections and pass a cumulative sentenee on one count only. [P 939 C 1]

(c) Criminal P. C., S. 103—S. 103 does not apply to search warrant under U. P. Public Gambling Act S. 5.

Where a warrant has been issued for search under S. 5, Gambling Act, S. 103, Criminal P. C. is not epplicable: *A. I. R.* 1922 *Lah.* 458, *Foll.* [P 939 C 2]

(d) Criminal P. C., S. 537—Illegality or irregularity in search unattended by prejudice to accused does not vitiate trial.

Any irregularity or illegality in the search can neither vitiate the trial nor affect the conviction of the accused where the accused has not been prejudiced by the defect: *A. I. R.* 1924 *All.* 214, *Foll.* [P 939 C 2]

Saila Nath Mukerji and *Anarup Chandra Mukerji*—for Applicants.

M. Waliullah—for the Crown.

Judgment.—Rure Mal and Buland Rai were convicted by Mr. Ali Husan Khan, Magistrate First Class of Meerut, under Ss. 3 and 4, Public Gambling Act (Act 3 of 1867). The Magistrate sentenced the two accused persons to a fine of Rs. 100 each under S. 3 of the Act, or in default to suffer one month's rigorous imprisonment and a further fine Rs. 100 each under S. 4, or in default to suffer one month's rigorous imprisonment.

There was a third man Tara Chand, who was also convicted by the Magistrate, but his case is not before this Court.

Under the evidence on the record there can be no manner of doubt that the two applicants were keeping a public gambling den with the object of gambling therein with other persons. In order to prevent any possibility that the nefarious transaction carried on days in and days out in the gambling den at Baraut be discovered, the instruments of gaming resorted to and adopted in the present case were ingenious and extremely original. They mostly consisted of books, letters and telegrams couched in language, more or less cryptic, having a separate code or a separate key to unravel the meaning.

The conviction of the two applicants was upheld on appeal by the learned Additional Sessions Judge of Meerut by his judgment, dated 19th February 1929. The findings of the trial Court in all essential particulars were endorsed by the Judge on appeal and the sentences were upheld.

The learned Additional Sessions Judge could well have avoided importing into his judgment a long roll of platitudes which has no bearing upon the case one way or the other. The duty of a Court of appeal is to visualise the case before it in its proper perspective and to decide the case on the crucial questions in issue upon evidence relevant and legal. If the Court has done this, and has recorded a clear and categorical finding, and dealt with the question of sentence having regard to the nature and character of the offence alleged to have been committed, the duties and obligations, which rest upon the Court of appeal, are completely discharged. It is no province of the Judge to sermonise.

Mr. Saila Nath Mukerji for the applicants assails the judgment of the trial Court upon the grounds that two persons could not be jointly tried under Ss. 3 and 4, Public Gambling Act and that a joint trial is illegal under S. 239, Criminal P. C.

Section 239, Criminal P. C. inter alia provides that the following persons may be charged and tried together namely:

(a) Persons accused of the same offence committed in the course of the same transaction."

It has been argued that Ss. 3 and 4, Public Gambling Act, deal with distinct and independent offences which cannot be treated to be parts of the same transaction. There can be no doubt that these two sections provide for offences, separate and distinct, and prescribe separate sentences for each offence. No cast iron rule of law can .be laid down on the question as to whether the keeper of a public gambling den, if he frequents the said den and gambles there, could not be said to do so in the course of the same transaction. Reliance has been placed by the applicants upon two rulings of the Punjab Chief Court: *in re,*

Makhan v. *Emperor* (1) and *Emperor* v. *Fazal Din* (2). It has been held in these cases that the joint trial of a person accused of keeping a gambling house and others for being present in it at the time of a police raid is not warranted by the provisions of S. 239, Criminal P. C. and thus being illegal the conviction must be set aside. These authorities support the contention of the applicants. There is, however, a decision of the same Court *in re*, *Khilinda Ram* v. *Emperor* (3) which takes a contrary view. It has been held in this case that the joint trial of a keeper of a common gaming house and of the persons found therein for offences under Ss. 3 and 4, Gambling Act, respectively is legal. This decision is found upon an earlier ruling of the same Court in the case of *Bhana Mal* v. *Emperor* (4). In *Ganeshi Lal* v. *Emperor* (5) it was decided by Stuart, J. (now Sir Louis Stuart) that the offence of keeping a gaming house and the offence of using it are offences committed in the same transaction and the offenders can be tried jointly. The words "same transaction" do not appear to have been defined in the Code. The offences under Ss. 3 and 4, Public Gambling Act are interdependent and "are the complements of one another." There can be no doubt that the trial Court was justified in trying the accused persons under these two counts in the course of the same trial. In any event the accused had not been prejudiced by the joint trial and no circumstances had been brought out to show that any injustice had been done in this case.

It was next argued that separate convictions under Ss. 3 and 4, Gambling Act, were illegal. As has been pointed out, the two offences may be interdependent but they are distinct offences and one could not be said to overlap the other. It would not have been proper to convict the applicants under the two sections and pass a cumulative sentence on one count only.

It was next contended by the applicants that there was no proper search made under S. 103, Criminal P. C. inasmuch as two or more respectable inhabitants of the locality in which the place searched is situate were not sent for to attend the Court as witnesses to the search. If S. 103, Criminal P. C., governs this case, it is perfectly patent that the requisition of law was not complied with. The Sub-Inspector examined in the case was by no means an impartial or disinterested witness. Chhajjoo Singh, the only other witness examined to prove the search was 'at the time under police surveillance. Chhajjoo is not a resident of Baraut where the gaming house is situate. He lives four miles .off in a village named Bauli. It is difficult to speculate as to why the Sub-Inspector did not produce Narain, the only other search witness, to be examined in the case. Whether the omission was accidental or deliberate, the act of the Sub-Inspector in not producing Narain was, to quote words of the learned Additional Sessions Judge, "very foolish."

It may be noticed that Act 3 of 1867 is a special Act and provides a special rule of procedure as regards the holding of searches under the Act. This procedure is laid down in S. 5 which in certain respects is analogous to S. 98, Criminal P. C. It is perfectly clear that the search was conducted in strict conformity to S. 5, Act 3 of 1867. S. 103, Criminal P. C. refers to a search under this chapter, that is Ch. 7, and the general rules of procedure relating to search are to be found in Ss. 96 to 100. Where a warrant has been issued for search under S. 5, Gambling Act, S. 103, Criminal P. C. is not applicable. This was the view taken by a learned Judge of the Lahore High Court *in re*, *Khilinda Ram* v. *Emperor* (3). I am in entire accord with this view. It was held by this Court in *Ali Ahmad Khan* v. *Emperor* (6) that any irrregularity or illegality in the search can neither vitiate the trial nor affect the conviction of the accused, where the accused has not been prejudiced by the defect.

The sentence passed in this case appears to be unduly severe. Satta transaction has various phases and forms and in certain forms it is gambling. An opinion, however, was shared by a large

(1) [1910] 5 P. W. R. 1910=5 I. C. 720=11 Cr. L. J. 211.
(2) [1914] 35 P. R. 1914 Cr. =27 I. C. 844=225 P. L. R. 1915.
(3) A. I. R. 1922 Lah. 458=3 Lah. 359.
(4) [1919] 6 P. R. 1919 Cr.=49 P. L. R. 1919=49 I. C. 779=9 P. W. R. 1919 Cr.
(5) A. I. R. 1923 All. 88.
(6) A. I. R. 1924 All. 214=46 All. 86.

section of the Indian population that Satta gambling was of the nature of a commercial transaction even though one of the elements of the said transaction was speculation.

I am of opinion that the interests of justice will be served by maintaining the conviction of the two applicants under Ss. 3 and 4, Public Gambling Act, and reducing the sentence in the case of both to a fine of Rs. 25 only on each count.

V.S./R.K. *Conviction confirmed.*

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A. I. R. 1929 Allahabad 940

DALAL, J.

Abdul Rashid—Applicant.

v.

Harish Chandra—Opposite Party.

Criminal Revn. No. 427 of 1929, Decided on 22nd July 1929, from an order of Sess. Judge, Bijnor, D/- 30th May 1929.

(a) Criminal P.C , S. 403—Where offences are distinct, S. 403 is no bar to prosecution for second offence.

Where the two offences committed are quite distinct and committed against distinct persons, S 403 is no bar to prosecution for the second offence. [P 940 C 2]

(b) Criminal P. C., S. 403—Not framing charge under particular section amounts to discharge and not acquittal.

Where the Magistrate states that he did not frame a charge under a particular section, that is tantamount to the discharge of the accused from that offence and not to acquittal. [P 940 C 2]

(c) Criminal P. C., S. 403—Where accused is acquitted on ground that lower Court has no jurisdiction, S. 403 does not bar second prosecution.

Where the appellate Court acquits the accused on the ground that the conviction was recorded without the sanction necessary under S. 195, and that therefore the Magistrate had no jurisdiction, the provisions of S. 403 will not bar a second prosecution ; 37 *All.* 107, *Rel. on.* [P 940 C 2]

(d) Penal Code, S. 95—Charge of obstructing peon of municipality is very slight.

The charge of obstructing peons of municipality is very slight, so slight that no person of ordinary sense and temper would complain of such harm, and where the municipality has not been active in proving the other offences of gravity, namely, evasion of octroi duty and causing hurt to peons the complaint against the accused should be dismissed. [P 941 C 1]

Akhtar Husain Khan and *M. A. Aziz*—for Appellant.

Saila Nath Mukerji—for Opposite Party.

M. Waliullah—for the Crown.

Judgment. — The argument is not clearly detailed in the grounds of the application for revision. The allegation of the Nagina Municipality was that Abdul Rashid had introduced a parcel into the municipality without payment of octroi duty and had obstructed the municipal peons in the discharge of their duties when they demanded an examination of the parcel for the purposes of levying octroi duty. Abdul Rashid was prosecuted under S. 155, Municipalities Act, for evasion of octroi duty and acquitted on the ground that the case was an old one and the complainant had not put in his appearance. The present prosecution is started for obstructing the municipal peons and the acquittal under S. 155, Municipalities Act, is put forward as a bar to the present prosecution under S. 403, Criminal P. C. The two offences, however, were quite distinct and committed against distinct persons. The evasion of octroi duty caused loss to the municipality, while the obstruction of the public servants was an offence against the municipal peons independently of harm done to the municipality.

Abdul Rashid was also previously prosecuted by the police under S. 353 for assaulting the peons and was convicted under S. 186 by the Magistrate. The case as put in revision before me was that Abdul Rashid was acquitted of an offence under S. 353 and he could not be prosecuted on the same facts for an offence under S. 186. If Abdul Rashid had really been acquitted of the offence under S. 353, the argument would have been correct. The Magistrate in his judgment of 3rd December 1929, has, however, stated that he did not frame a charge under S. 353. This is tantamount to the discharge of the accused from that offence and not to an acquittal.

Finally, though the appellant was convicted under S. 186 by the Magistrate, the Sessions Judge acquitted the applicant on the ground that the conviction was recorded without the sanction necessary under S. 195, Criminal P. C. and that therefore the Magistrate had no jurisdiction. It has been held by this Court that in such a case the provisions of S. 403, Criminal P. C will not bar a second prosecution : *Emperor* v. *Jiwan* (1). I desire, however,

(1) [1915] 37 All. 107=27 I. C. 208=13 A. L. J. 4.

to interfere and put an end to these repeated prosecutions. If the Magistrate had acted correctly on 3rd December 1926, he ought to have acquitted the applicant under S. 353. There has been laxity on the part of the municipality during the different prosecutions and I am of opinion that the provisions of S. 95, I. P. C, may be applied to this case If any offences were committed by Abdul Rashid, the offences of gravity were, his evasion of the payment of octroi duty and the causing of hurt to the peons. The municipality was not sufficiently active in proving these charges. The charge of obstructing the peons is very slight, so slight that no person of ordinary sense and temper would complain of such harm.

I direct that no further proceedings would be taken against Abdul Rashid and dismiss the complaint made against his under S. 186, I. P. C.

R.M./R.K. :*Order accordingly.*

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* A. I. R. 1929 Allahabad 941

BENNETT AND IQBAL AHMAD, JJ.

Baldeo Prasad and *others*—Plaintiffs—Appellants.

v.

Bhola Nath—Defendant—Respondent.

Second Appeal No. 1014 of 1926, Decided on 18th July 1929, from a decree of Dist. Judge, Farrukhabad, D/- 15th March 1926.

*** Civil P. C., O. 34, R. 1, O. 1, Rr. 9, 10 (2)—Court should add necessary parties and then apply S. 22, Limitation Act, to see result on relief—No relief asked against party to be added—O. 34, R. 1 should not be used to dismiss whole suit.**

Where an application for adding certain mortgagees as parties is made, the limitation for them to sue as plaintiffs having elapsed, the Court should in compliance with O. 34, R. 1 and O. 1, Rr. 9 and 10 (2) add necessary parties and then apply S. 22, Limitation Act, to see the result on the relief asked for or against the parties added. The Court should not refuse to add a person as defendant merely on the ground that if he were plaintiff his suit would be barred when the plaintiffs do not ask for any relief against him nor does he get any relief by being added. Where it is possible for the Court to do justice between the parties before it, it should do so and should not make O. 34, R. 1, a ground for dismissing the entire suit: 9 *A. L. J.* 410 and *A. I. R.* 1924 *All.* 107, *Ref.*; 1 *Pat. L. J.* 468; 25 *I.C.* 508 and *A. I. R.* 1926 *Cal.* 416, *Dist.* [P 942 C 2, P 943 C 1]

U. S. Bajpai and *R. C. Ghatak*—for Appellants.

Baleshwari Prasad—for Respondent.

Judgment.—This is a second appeal against concurring decrees of the two lower Courts dismissing the suit of the plaintiffs-appellants for recovery of the mortgage money on two hypothecation bonds dated 27th March 1911 and 12th August 1911 Defendants represent the mortgagors. On the other the plaintiffs, although they are the descendants of the original mortgagees, only own five-ninths of the mortgagee rights. By a partition deed dated 10th September 1917 two mortgagees divided their mortgagee rights with their four brothers, who acquired by this partition four-ninths of the mortgagee rights. The owners of these four-ninths were not parties to the suit as brought on 7th August 1923.

The mortgage money in the first bond was due for payment on 27th March 1912, and the mortgage money in the second bond was due on 18th May 1912. On 3rd July 1924 the plaintiffs applied asking that the present owners of the remaining four-ninths of the mortgagee rights should be added as parties to the suit. Limitation for these persons to sue as plaintiffs had elapsed before that date. The application was refused.

Order 34, R. 1, lays down:

"Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

It has been ruled in a number of cases that R. 9, O. 1 is subordinate to R. 1, O. 34, and that a mortgage is one and indivisible and if all the parties entitled to a share in the mortgage money due are not upon the record the suit to recover the mortgage money must be dismissed in its entirety. The point which has been argued before this Court in second appeal is that the application of 3rd July 1924 should be allowed and the owners of the remaining four-ninths should be added as defendants and the suit of the plaintiffs should be decreed for five-ninths only of the sum claimed in

the plaint, which was the whole of the mortgage money with interest. This contention was based on *Nathi Lal* v. *Lala* (1), (pp. 415 & 418) where it was pointed out that if persons were added as plaintiffs after the period of limitation for their suit had expired, S. 22, Lim. Act, would bar their suit, but if they were added as defendants no such result would follow and there would be no ground for the application of limitation in their case, if no relief was asked for against them or on their behalf.

Section 22, Lim. Act, provides:

"Where, after the institution of a suit, a new plaintiff, or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party."

Reference is made to S. 22, Lim. Act, in O. 1, R. 10 (5), and it is clearly a section which should be taken into account in determining the question before the Court.

The contention for the defendants-respondents is that where a necessary party has been brought on the record after the period of limitation has expired the whole suit must be dismissed. In support of this the defence refer to the following rulings:

Girwar Narain v. *Mt. Nakbulunissa* (2). In this case ten descendants of the mortgagees had been omitted from the suit and they applied to be made plaintiffs, and the plaintiffs also applied for these persons to be made plaintiffs, both applications being made after the period of limitation had expired.

The question as to whether these ten persons might not be joined as defendants was not considered at all in this ruling. In fact the ruling wrongly quotes O. 34, R. 1 on p. 471 as follows:

"Order 34, R. 1, which makes it imperative that all persons interested in the mortgage security shall be joined as plaintiffs."

The rule merely says that the persons interested are to be joined as parties. There is no reference to S. 22, Lim. Act, in this ruling and the effect of it was not considered. For these reasons we do not think that this ruling is a sound authority on the point.

Mushtaq Ali Khan v. *Behari Lal* (3). In this brief ruling the question was not considered whether the remaining owners of the mortgagee rights could not be added as defendants, after the period of limitation for a suit brought by them as plaintiffs had expired. Nor is there any reference to the provisions of S. 22, Lim. Act. As the question now before us has not been discussed at all in that ruling it is not an authority on the point. It merely laid down that all owners of the mortgagee rights were necessary parties, and the debt could not be recovered except by all the mortgagees bringing a suit within the time prescribed by law.

Abdul Rahman v. *Salimannessa Bibi*, *A. I. R.* 1926, *Cal.* 416. This ruling merely lays down that all the owners of the mortgagee rights are necessary parties. It was alleged that the claim of the remaining mortgagees was barred by limitation but the Court did not refuse to consider an application to add them as parties on that ground, but refused because the plaintiffs had wilfully refused to make them parties at an earlier stage'

In the rulings cited by the defence there is no rule laid down in regard to the contention before us.

On the other hand the rule laid down in *Nathi Lal* v. *Lala* (1) is in favour of the appellant. That principle is that in compliance with O. 34, R. 1 and O. 1, Rr. 9 and 10 (2), the Court should add necessary parties, and after they have been added apply S. 22, Lim. Act, to see the result on the relief asked for or against the parties added. It is not correct for the Court to refuse to add a person as a party merely on the ground that if he were a plaintiff his suit would be barred; that is, if the application is to add him as a defendant. Applying this method, if the owners of four-ninths of the mortgagee rights are added as defendants pro forma in the present case the plaintiffs are not asking for any relief against them, nor can the defendants added get any relief, and accordingly S. 22 does not affect them if they are merely made pro forma defendants. By doing so the provisions of O. 34, R. 1 are satisfied.

The plaintiffs will only be able to recover the five-ninths of the amount which they have claimed in the plaint, as they were not in any case entitled to sue on behalf of the owners of the remaining four ninths.

(1) [1912] 9 A. L. J. 410=14 I. C. 35.
(2) [1916] 1 Pat. L. J. 468=36 I. C. 542.
(3) [1914] 25 I. C. 503.

Objection was taken that such a rule would result in more suits than one on the same mortgage deed. It does not have that result, because if the application was made before the expiry of limitation, the remaining owners would be added as plaintiffs; and if the application is made after limitation, the remaining owners cannot bring a suit later as that suit would be barred by limitation.

Reference has also been made by the counsel for appellant to *Parshadi Lal* v. *Laiq Singh* (4), where in a suit for sale of the mortgaged property it was held that the omission to implead a subsequent mortgagee was not fatal to the suit and that a decree might properly be passed subject to the subsequent mortgage. At p. 702 (*of* 21 *A.L.J.*) it is stated:

"The object of O. 34, R. 1, is to prevent multiplicity of suits and to secure that no injury is done to the rights of any party through his not being impleaded. The provision is expressly made subject to other provisions of the Code which include O. 1, R. 9, and it has been laid down many times that where it is possible for the Court to do justice between the parties before it, it should do so and should not make O. 34, R. 1, a ground for dismissing the entire suit."

Applying this principle to the present class of cases it appears that it is possible to do justice between the plaintiffs and the defendants by granting the plaintiffs a decree for the five-ninths part of the mortgage money and interest due to the plaintiffs. To this extent the appeal is allowed and the suit remanded for disposal on the remaining issues.

R.M./R.K. *Appeal allowed.*

(4) A. I. R. 1924 All. 107.

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* A. I. R. 1929 Allahabad 943

SULAIMAN AND PULLAN, JJ.

Md. Shafiqullah Khan—Defendant—Appellant.

v.

Md. Samiullah Khan — Plaintiff — Respondent.

Second Appeal No. 211 of 1927, Decided on 19th July 1929, against decree of Dist. Judge, Aligarh, D/- 31st May 1926.

*** (a) Transfer of Property Act, Ss. 41 and 52—S. 52 becomes operative from institution of suit—Institution of suit is strong proof that consent as required by S. 41 did not subsist—Estoppel arising under S. 41 cannot override imperative provisions of S. 52.**

Where, subsequently to the institution of suit against the mortgagors, the property, subject matter of the suit, is mortgaged, the mortgagee cannot get a decree for sale on the ground of estoppel under S. 41 alleging consent on the part of the person instituting the suit. S. 52 is imperative and becomes operative from the moment of the institution of a bona fide suit. The institution of the suit is itself a strong and unmistakable proof that the consent did not subsist. In presence of a special provision of law applicable to pending suits, the general provisions of estoppel in S. 41 cannot apply : 29 *All.* 339, *Ref.*

[P 945 C 2]

(b) Transfer of Property Act, S. 52—Subsequent mortgagee paying off prior incumbrance is entitled to claim charge — Doctrine of lis pendens does not apply to such case (*Obiter.*)

If the subsequent mortgagee pay off a prior incumbrance and is entitled under law to claim a charge in respect of such payment, the doctrine of lis pendens would not affect him, for the taking over of the prior debt would not amount to any dealing with property in suit. It would be a mere continuance of a pre-existing paramount liability.

[P 945 C 2]

(c) Transfer of Property Act, S. 74—Where mortgage debt is paid off out of money left with subsequent mortgagee, S. 74 is inapplicable—Intention to keep previous mortgage debt alive must exist.

A subsequent mortgagee is not entitled to subrogation in every case where he pays off a prior mortgage. Where the prior mortgage debt is paid off out of the amount left in the hands of the snbsequent mortgagee for which there is a charge created by the deed itself, S. 74 is apparently inapplicable. The section implies a tender by the subsequent mortgagee on his own account and not as an agent of the mortgagor. There should be intention of the parties that the previous mortgage debt would be kept alive for the benefit of the subsequent mortgagee as against the mortgagors and in absence of direct evidence of intention to keep the prior mortgage debt alive, it is impossible to hold that the previous mortgage debt was not extinguished by the payment : 9 *Cal.* 961 (*P. C.*); 1 *I. C.* 683 ; 21 *M. L. J.* 180; *A.I.R.* 1925 *Mad.* 1219 and 14 *A.L.J.* 953, *Ref.*

[P 946 C 1, 2]

(d) Limitation Act, Art. 61—Where subsequent mortgagee pays off amount of prior mortgage, Art. 61 applies.

Where the subsequent mortgagee himself pays the amount of the prior mortgage which the mortgagor is bound by law to pay, the case is governed by Art. 61 being money payable to the plaintiff for money paid for the defendant. A suit brought more than three years after such payment is barred.

[P 946 C 2, P 947 C 1]

T. A. K. Sherwani; *Mahmudullah* and *P. L. Banerji*—for Appellant.

A. M. Khwaja—for Respondent.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for recovery of money by sale. It appears that one Inayatullah Khan was the former owner of the property in suit and made a simple mortgage in favour of Ahmad Said Khan for Rs. 6,000 on 12th June 1912. He died in 1916. The defendant Muhammad Shafiqullah Khan is admittedly his son. There were three other persons, Nuhullah, Hakimullah and Halimullah, defendants 1, 2 and 3 who asserted themselves to be the legitimate sons of Inayatullah Khan, but whose legitimacy had been denied by Shafiqullah Khan. The names of these four persons were entered in the revenue papers against the property left by **Inayatullah.**

The mortgagee Ahmad Said Khan brought a suit on his mortgage and obtained a decree for sale. In 1919 Shafiqullah Khan paid one-fourth of the decretal amoant and got a one-fourth share of the mortgaged property released from the mortgage.

On 19th May 1920, defendants 1, 2 and 3 borrowed Rs. 1,000 on a promissory note from one Tota Ram and on 20th May 1920, they deposited the amount and thereby partially discharged the mortgage decree.

On 19th July 1920 defendants 1, 2 and 3 executed a mortgage deed in favour of the plaintiff-respondent Samiullah Khan for Rs. 3,000. It is this deed which is the basis of the present suit. The mortgage money consisted of the following three items: Rs. 180 previouslv taken for expenses of the deed, 1,020 left with the mortgagee to be paid to Tota Ram, and Rs. 1,800 received in cash at the time of the registration. So far as the deed went there was no recital of the necessity for borrowing Rs. 1,800. It is, however, clear that Rs. 1,800 were paid before the Sub-Registrar in the afternoon of 19th July 1920 to the mortgagors and the mortgagors deposited Rs. 1,783-7-9 in Court on 20th July 1920 and thereby discharged the outstanding balance of the decretal amount.

It may here be mentioned that just four days before the mortgage namely on 15th July 1920 Shafiqullah had instituted a suit against Nuhullah and others for recovery of possession of the property standing in their names.

This suit was disinissed by the first Court in 1921 but was ultimately decreed by the High Court on 8th June 1925 and the decree of the High Court was affirmed by their Lordships of the Privy Council on 2nd May 1929. It was accordingly held inter partes that Nuhullah and the two others were not the legitimate sons of Inayatullah and that Shafiqullah was the sole heir to the inheritance left by him.

On 10th August 192[illegible] the present suit was instituted by the mortgagee Samiullah against Nuhullah and others. By a subsequent order Shafiqullah Khan also was brought on the record.

The principle pleas taken by Shafiq Ullah Khan were that the mortgage had been taken pendente lite and was a nullity as against him, that Samiullah Khan was not a bona fide transferee from an ostensible owner and that he had no right to maintain the suit.

The first Court decreed the claim for a portion of the amount and dismissed the rest of the claim. Two appeals were preferred before the District Judge who has decreed the claim in full.

On the question of the benefit of S. 41, T. P. Act, the finding of the lower appellate Court is that Samiullah had no knowledge of the institution of the suit by Shafiqullah, that he acted in good faith and took the property from Nuhullah and others believing them to have title and that this belief was induced in his mind by the previous conduct of Shafiqullah Khan who had allowed the names of Nuhullah and others to remain in the revenue papers and had allowed them to remain in possession of the property. He accordingly held that the mortgagee Samiullah was protected under S. 41, T. P. Act, and Shafiqullah Khan was estopped from setting up his own title. In the opinion of the learned Judge the fact that the mortgage had been taken during the pendency of the suit did not help the defendant because the principle of lis pendens could not operate to set aside the estoppel.

Under S. 52, T. P. Act, during the active prosecution of a suit the property in dispute cannot be transferred or otherwise dealt with by any party so as to affect the rights of any other party

under any decree that may be made therein. The section is imperative and becomes operative from the very moment of the institution of a bona fide suit which is not in any way collusive: *Faiyaz Husain Khan* v. *Prag Narain* (1). It would, therefore, follow that the mortgage in favour of Samiullah Khan was invalid as against Shafiqullah Khan when ultimately he succeeded in the suit. It is, however, argued that the effect of the estoppel arising under S. 41 is to prevent Shafiqullah Khan from exercising his option to avoid the transfer under S. 52. Now under S. 41, not only should the transferrer be the ostensible owner of the property with the consent express or implied of the true owner but he must also transfer the same with such consent express or implied. There can be no doubt that the adverbial clause "with the consent express or implied" modifies not only the verb "is" but also the verb "transfers." It must, therefore, be held that the consent express or implied must continue up to the time of the transfer.

If the principle underlying S. 52 were based on the presumption of a constructive notice of the pendency of the suit by persons who take transfers from the parties thereto, the conclusion would be clear that the previous consent express or implied must be deemed to be revoked by the subsequent constructive notice of the pendency of the suit. Storey in his Equity Jurisprudence has put forward the proposition that the doctrine of lis pendens is based on some such constructive notice. I am of opinion that the remark of their Lordships of the Privy Council in the case of *Faiyaz Husain Khan* v. *Prag Narain* (1), (at p. 345), precludes us from saying that the doctrine of lis pendens is founded upon any equitable principle of implied or constructive notice. All the same it is perfectly clear that when the Court is to record a finding whether a transfer takes place with the express or implied consent of the true owner it must take into account the fact that before the transfer the suit which is to establish the title of the principal owner against an ostensible owner was actually pending and the consent if it had existed before, had been definitely revoked. The institution of the suit is in itself a very strong and unmistakable proof of the fact that the consent did not subsist. I would not go so far as to say that a consent express or implied, once existing, can be revoked secretly without intimation to the parties who are acting upon that consent, but I have no doubt in my mind that the estoppel arising under S. 41 cannot be such as to override the imperative provisions of S. 52. Cases of an express consent given while a suit is pending or is intended to be filed may amount to an existing fraud which would alter the position of the parties completely. But in the absence of such fraud I do not see how S. 41 can override S. 52. S. 41 is a general section dealing with estoppel in the circumstances mentioned therein. S. 52 is a special section which applies to transfers during the pendency of a suit. In the presence of a special provision of law applicable to pending suits, the general provisions of estoppel contained in S. 41 would not apply. I have therefore no hesitation in holding that in spite of the finding of the District Judge that Samiullah Khan took the mortgage in good faith from an ostensible owner believing him to be the true owner and without actual knowledge of Shafiqullah's suit, the transfer taken by him is voidable at the option of Shafiqullah and the latter cannot be deprived of the benefit of S. 52 of any supposed estoppel operating against him. In this view the plaintiff's suit based on an enforcement of the mortgage taken pendente lite cannot be sustained.

If, however, he has paid off a prior incumbrance and is entitled under the law to claim a charge in respect of such payment, the doctrine of lis pendens would not affect him, for the taking over of the prior debt would not amount to any dealing with the property in suit. It would be a mere continuance of a pre-existing paramount liability.

The next question is whether the plaintiff is entitled to any decree for money against Shafiqullah Khan. The other defendants have not appealed from the decree passed against them.

The learned District Judge has found as a fact that having regard to the close proximity of the dates and the other circumstances there can be no doubt that Rs. 1,800 borrowed on 19th May was deposited on 20th to satisfy Haji Ahmad

(1) [1907] 29 All. 339=34 I. A. 102=10 C.C. 314 (P.C.).

1929 A/119 & 120

G. N. Das
Advocate High Court

Said Khan's decree. He has not definitely recorded a clear finding, but having regard to the fact that he has believed the evidence of Samiullah Khan and Nuhullah Khan, we may assume that the money had been borrowed by defendants 1, 2 and 3 in order to satisfy the mortgage debt. The counsel for the party has to concede that there is no direct evidence on the record to show that at the time when the money was borrowed by Nuhullah and others from Samiullah there was an understanding that on the payment of the mortgage decree the security would be kept alive for the benefit of the subsequent mortgagee Samiullah Khan. The evidence on either side on this point is nil, and we have merely to depend on presumptions.

It may be taken as settled law that the mere fact that a previous mortgage has been paid off is not conclusive to decide that that mortgage has not been extinguished: *Mohesh Das* v. *Baman Das* (2) (at p. 977). That was a case of the purchaser of the equity of redemption and not of a subsequent mortgagee, but the principle laid down therein has been applied by the Courts to the cases of subsequent mortgagees also provided there are no intermediary incumbrances. *Woomesh Chandra* v. *Roma Nath* (3), *Sundaramayya* v. *Munnareddi Yanadamma* (4), *Kandaswami Naicker* v. *Venkata Reddiar* (5) and *Umrai Lal* v. *Rukmin Kuar* (6).

In face of these authorities I do not think that it can be laid down that in every case where a subsequent mortgagee pays off a prior mortgagee he is entitled to subrogation. Where the prior mortgage-debt is paid off out of the amount left in the hands of the subsequent mortgagee for which there is a charge created by the deed itself, S. 74 would apparently be inapplicable. That section implies a tender by the subsequent mortgagee on his own account and not as an agent of the mortgagor and gives to him a charge which would not otherwise have existed. In cases where money is paid out of the sums left in the hands of the subsequent mortgagee the hypothecated property is already a security for the entire amount. It therefore seems to me that although in cases where the subsequent mortgagee pays an additional sum to which S. 74 would be applicable, no enquiry into the intention to keep the debt alive is required to be made, the real intention has to be ascertained in other cases and such intention, if not expressly declared, can only be inferred from all the surrounding circumstances. In the present case I have already stated that the mortgage-deed did not itself recite the necessity for Rs. 1,800. If the mortgagee intended to keep it alive one would have expected him to take care to have a clear statement recorded to that effect. On the plaintiff's own showing he believed that his mortgagors were the true owners and there was no apprehension in his mind that any other claimant would come forward to oust him. It is also clear that there was no other intermediary mortgage. Thus there was no apparent reason why the mortgagee should intend to keep alive the previous mortgage debt for the payment of which the money was being advanced. In this connexion it may also be noted that the old mortgage had merged into a decree and was no longer in existence as a mortgage, and all that was left to be done was to save the property from sale by payment of the decretal amount. We also have the fact that the amount was taken by the mortgagors in cash and paid by them directly and not left in the hands of the mortgagee for the discharge of the prior debt. It could never have been the intention of the parties that the previous mortgage debt would be kept alive for the benefit of the subsequent mortgagee as against the mortgagors. In the absence of any direct evidence or of any circumstances indicating why there should have been a reason for entertaining the intention to keep the previous mortgage-debt alive, it is impossible to hold that the previous mortgage debt was not extinguished by the payment, but was kept alive for the benefit of the subsequent mortgagee.

Even if we assume that the subsequent mortgagee has himself paid the amount of the prior mortgage which Shafiqullah was bound by law to pay and the case is covered by S. 69, Contract Act, and he is entitled to be reimbursed, the claim against Shafiqullah is hopelessly

(2) [1883] 9 Cal. 961=10 I. A. 62=13 C.L.R. 221 (P.C.).
(3) [1909] 1 I. C. 633.
(4) [1911] 21 M. L. J. 180=9 I. C. 139=9 M. L. T. 258.
(5) A. I. R. 1925 Mad. 219.
(6) [1916] 14 A. L. J. 953=35 I. C. 647.

beyond time. It would undoubtedly be governed by Art. 61, Lim. Act, being money payable to the plaintiff for money paid for the defendant. The suit was brought much more than three years after such payment.

I would accordingly allow the appeal and setting aside the decree of the lower appellate Court dismiss the plaintiff's suit in toto.

Pullan, J.—I am in agreement with the judgment of my learned brother but wish to add a few observations on two of the questions raised. The first question is the alleged conflict between Ss. 41 and 52, T. P. Act. S. 41 is a provision which can be invoked by the transferee who has received property by transfer from the ostensible owner. And the section provides that in order to defend the transfer of such a nature the transferee must show that he had taken reasonable care to ascertain that the transferrer had power to make the transfer and has acted in good faith. Taking reasonable care involves some enquiry as to the opinion of other persons interested in the property and the section lays down as a preliminary that the transaction must be with the consent, express or implied, of such persons. It is not enough for the transferee to say that as far as he knows the other persons interested in the property have no objection to the transfer. He must take some definite step to ascertain whether they consent or not. This again does not mean that they consented in the past, but the transferee must ascertain if they consent at the time of transfer. A person who has filed a suit challenging the whole right of the transferrers to dispose of the property, ipso facto does not consent to the transfer. The fact that such a suit has been brought in good faith is one which the transferee must be able to ascertain by taking reasonable care. S 52 states the law as to the transfer of property when a bona fide suit has been brought challenging the right of a transferrer. I would say that this section overrides S. 41. I would rather say that the sections are mutually exclusive. Where a suit such as that brought by Shafiqullah has been instituted prior to the transfer S. 41 does not arise.

Secondly I wish to add a few words on the subject of subrogation. The only section of the Transfer of Property Act which applies to subrogation is S. 74, and that section is confined entirely to a case of a subsequent mortgagee who tenders the amount of his mortgage to the next prior mortgagee. On general principles I am averse to extending Indian statutes in order to make them cover analogous cases. The proposed extension in the present case appears to me to be objectionable on several grounds. In the first place I have seen no authority which would permit a plaintiff to base his claim on a principle which is intended to be set up as a shield, but not used as a weapon of offence. Again, even if it were granted that the plaintiff can base his suit on such a plea it appears to me that he must have made his intention clear at the time when he entered into the transaction, and not kept it in reserve for use when he is seeking his remedy by litigation. When the plaintiff advanced the money on this mortgage he had possibly the knowledge that the cash advanced by him was to be spent in paying off the prior mortgage, but it is impossible to infer either from the facts known to us or from the probabilities of the case that he had any intention of reviving in his own favour the prior mortgage which had already been merged in a decree of the Court. Lord Macnaughten in the case of *Liquidation Estates Purchase Co.* v. *Willoughby* (7) laid stress on the importance of the intention of the parties at the time. He said :

"The answer to this question depends npon the intention of the parties at the time and that intention must be found from the terms of the deed and the circumstances under which it was executed."

For these reasons I agree in the order proposed.

By the Court.—This appeal is allowed and the decree of the lower appellate Court set aside and the plaintiff's suit is dismissed in toto. But having regard to the finding of the District Judge that the plaintiff acted in good faith and was induced by the previous conduct of Shafiqullah Khan to believe that his mortgagors were the true owners, we think that this is a fit case in which the parties should bear their owa costs throughout.

R.M./R.K. *Appeal allowed.*

(7) [1898] A. C. 321=67 L. J. Ch. 251=14 T. L. R. 295=78 L. T. 329.

A. I. R. 1929 Allahabad 948

SULAIMAN AND PULLAN, JJ.

Rup Kishore — Decree-holder—Appellant.

v.

Collector of Etah and *others*—Judgment-debtors—Respondents.

First Appeal No. 17 of 1928, Decided on 16th July 1929, from order of Sub-Judge, Etah, D/ 7th January 1928.

(a) Civil P. C., O. 21, R. 90 — Failure to state value of property does not necessarily amount to material irregularity.

It is difficult to say that in all cases an omission to specify the valuation is necessarily a material irregularity, though there may be circumstances in which it may become necessary to specify the value in order to enable the bidder to judge of the value of the property : 20 *All.* 412, *Dist.*

[P 949 C 2]

(b) Civil P. C., O. 21, R. 90—Omission to affix proclamation on property itself amounts to material irregularity.

Where the sale proclamation is not affixed on any part of the property to be sold but on a tree at some distance from the place, the omission to affix the sale proclamation on the property itself as required by R. 54 (2) is a material irregularity. [P 950 C 1]

(c) Civil P. C., O. 21, R. 90—Altering date of sale without notice to parties amounts to material irregularity.

Where the Court alters the date fixed for a sale without giving notice to the parties as required by R. 66 (2), there is a material isregularity, the sale being a sale of which no notice has been given and consequently of which no proclamation has been made and where the irregularity results in the property fetching a low price the sale should be set aside. An adjournment under S. 69 (1) can take place only on the date of the sale when the parties have received their notice and have had opportunity of appearing at the place of sale. [P 949 C 1, 2]

Benod Behari Lal—for Appellant.

U. S. Bajpai—for Respondents.

Pullan, J.—This is an appeal by an auction-purchaser against an order of the Subordinate Judge setting aside a sale. The sale took place on 28th February 1927, and certain property was sold for Rs. 6,500. The purchaser was the decree-holder. It is alleged, and the lower Court has held, that the property is of a much greater value and this fact is conceded by the appellant. We have, however, to consider whether the low price was caused by a material irregularity in the proclamation or conduct of the sale. The first question raised is whether there was any legal proclamation of the sale for 28th February, and the second is whether supposing that the proclamation as made for 27th February can be taken to be a proclamation for the sale held on the 28th, that proclamation itself was irregular. I will take the second point first.

The proclamation of sale for 27th February contains the ordinary details required by law under R. 66, O. 21, Civil P. C., that is to say, there is a description of the property to be sold and a statement of the incumbrances and the amount of the decree. There is no statement of the value of the property, and the lower Court has held that this is a material irregularity, relying upon the judgment of their Lordships of the Privy Council in the case of *Saadatmand Khan* v. *Phul Kuar* (1). I do not consider that the remarks of their Lordships in that case are authority for holding that the Court must under Cl. (e), R. 66 (2) give a valuation of the property. What their Lordships held was that if the Court stated the valuation of the property, that must be considered to be a material fact. They did not say that this being a material fact must always be stated by the Court in the sale proclamation and I am of opinion that it will be unwise to direct that the Court should in every case give a valuation for the property to be sold. It is clear that such action on the part of the Court might affect the price in an undesirable manner, and although certainly it is open to the Court to state anything which it considers material for the purchaser to know, and undoubtedly the opinion of the Court as to the value of the property is a material fact, yet I am not of opinion that the Court should be compelled by law to give this guide to the purchaser. For the rest there are certain minor irregularities which have been mentioned in connexion with this proclamation; thus there is some doubt as to the drum having been beaten at the right place, and it is said that the notice was not affixed to the property itself but on a tree in the neighbourhood. Failing definite proof that these irregularities affected the price finally realized at the sale I should not be disposed to hold that the proclamation was defective as regards the sale fixed for 27th February. But the sale did not take place on 27th February. It took place on the

(1) [1898] 20 All. 412=25 I. A. 146=7 Sar. 380 (P.C.).

28th. The reason for this is that on 21st February the amin who was the sale officer informed the Court that 27th February was a Sunday, and on 24th February the sale officer gave an order to the amin to hold the sale on 28th February instead. The lower Court has gone into the evidence as to whether the change of date was notified by beat of drum and it has found that the evidence is conflicting, but in my opinion this is not an essential point in the case. Either the Court could adjourn the sale to the 28th under R. 69, O. 21, in which case the old proclamation for 27th February was still a valid proclamation, and as the new date was within 14 days there was no need for any further action; or the Court could not alter the date from 24th February to 28th without giving notice to the parties concerned. R. 69, Cl. 1 runs as follows:

"The Court may in its discretion adjourn any sale hereunder to a specified day and hour and the officer conducting any such sale may in his discretion adjourn the sale recording his reasons for such adjournment."

It is clear to me that this rule so far as it relates to the officer conducting the sale can only apply to an adjournment on the date of the sale, and I see no reason to form a different opinion as to the rule relating to the Court. In my opinion the rule means that when the date of the sale arrives it may be adjourned either by the Court or by the officer conducting the sale Such an adjournment takes place when the parties have received their notice and have had an opportunity of appearing at the place of sale. It is for this reason that there is no need for a fresh proclamation unless the adjournment is for a longer period than 14 days But I am not prepared to hold that the Court can, unknown to the parties, at any time alter the date fixed for the sale to some other date without giving notice. In my opinion a sale held under such circumstances would be a sale of which no notice has been given and consequently no proclamation.

A proclamation for 27th February is not a proclamation for 28th February and a notice given for 27th February is not a notice given for 28th February. Unless the parties could be proved to have been present on 24th February when the date was altered, it cannot be held that they have had a notice that the sale would be held on 28th, and I would, therefore, find that this sale on 28th was made without any proclamation for that date as required under R. 66 (2) and without any notice being given to the parties concerned. There is, therefore, a material irregularity, and as it is admitted that the sale took place for a very low value I am prepared to find that the irregularity committed is the cause of the low price. I am further led to this view by the fact that no notice of the altered date was given to the Court of Wards who represent the judgment-debtor in this case, and neither the judgment-debtor himself nor the Court of Wards had any representative present at the time of the sale.

In these circumstances I would dismiss this appeal.

Sulaiman, J.—I agree that this appeal ought to be dismissed. Before a sale is set aside under O 21, R. 90, it is incumbent upon the judgment-debtor to make out that there was a material irregularity or fraud in publishing or conducting the sale, and he must further show that he has sustained substantial injury by reason of such irregularity or fraud.

That he has sustained a substantial injury admits of no doubt. The property was actually sold for a sum just exceeding Rs. 6,000 but several persons are prepared to offer much more. Indeed the judgment-debtor himself offered to take the property on payment of Rs. 10,000 but the decree-holder who has himself purchased the property did not agree to accept less than Rs. 15,000. There can, therefore, be no doubt that the property has been sold very cheap and the judgment-debtor has suffered loss. The question for consideration is whether there has been a material irregularity and whether the loss is its consequence.

The learned Subordinate Judge has referred to the fact that there was no mention of any value in the proclamation of sale. It is difficult to say that in all cases an omission to specify the valuation is necessarily a material irregularity, though there may be circumstances in which it may become necessary to specify the value in order to enable the bidders to judge of the value of the property. I would, therefore, not to be prepared to hold that in this pre-

sent case the omission was a material irregularity.

Under O. 21, R. 54, sub-Cl. (2) it was necessary that the order for sale should be proclaimed at some place on or adjacent to the property by beat of drum or other customary mode and that a copy of the order should be affixed on a conspicuous part of the property and upon a conspicuous part of the Court house. Admittedly the sale proclamation was not affixed on any part of the property which was going to be sold. It was hung up on a pipal tree at some distance from the place. An omission to affix the sale proclamation on the property itself, when it was required expressly by the Act, was a material irregularity. That fact might have contributed towards the absence of sufficient bidders on the date of the sale which prevented the proper price from being offered.

The main circumstance which undoubtedly has led to the property being sold for an inadequate price is that, on the report of the amin that the date previously proclaimed was a Sunday, the Court directed that the sale should take place on the following Monday. No notice of this alteration of the date was given to the judgment-debtor or the Court of Wards in which the property had become vested. Admittedly no fresh proclamation of sale was issued. The evidence led by the decree-holder was to the effect that there was a fresh beat of drum on 27th and 28th February 1927, announcing that the sale would take place on 28th February. The learned Subordinate Judge, who heard this evidence has considered it unworthy of belief and has rejected it. I see no reason for taking a contrary view.

The question for consideration is whether there has been a material irregularity in the publication of the sale. The learned advocate for the appellant argues that under O. 21, R. 69, the Court has an absolute discretion to adjourn any sale to a specified day and hour and that if the adjournment is not for a longer period than 14 days no fresh proclamation is necessary. The rule, however, merely lays down that if the adjournment is for more than 14 days a fresh proclamation shall be made. The argument addressed to us on behalf of the respondent is that under this rule the Court can adjourn the sale only by an order passed on that very day i. e., the day fixed for the sale, and that it would not be a case of adjournment if the date is altered or the sale is postponed in advance. The language of the rule is undoubtedly ambiguous, but I am not prepared to commit myself to holding that the word "adjournment" would not be wide enough to cover a postponement by an order passed in advance.

But it seems to me that no exhaustive list of material irregularities is given in O. 21, and the absence of due notice to the parties concerned may in certain circumstances itself amount to a material irregularity. The order in this particular case was passed on a report received from the amin. It is not at all clear why Sunday was necessarily objectionable. The sale had been previously proclaimed to take place on that date and prospective purchasers might have made arrangements to be present on that date. The date was suddenly altered without any notice having been given to the Court of Wards, which might have liked to send a representative to be present on that date. In this particular case the amin did not appear at the proper time and place on 27th February to announce to the bidders, who arrived there, that the sale would take place on the next day, but merely absented himself. Thus even if bidders arrived on the scene on 27th, they would have no means of knowing that the sale was going to take place the very next day. I am, therefore, of opinion that the cumulative effect of the entire proceedings is that there has been a material irregularity in the publication of the sale and that in consequence of it the judgment-debtor had suffered substantial loss inasmuch as the property had been knocked down for a grossly inadequate price. I would, therefore, dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 950

SEN, J.

Mt. Kaluiya—Applicant.

v.

Hira—Opposite Party.

Criminal Revn. No. 456 of 1929, Decided on 11th July 1929, from an order of City Magistrate, Allahabad, D/- 13th June 1929.

Criminal P. C., S. 488—Wife subjected to cruelty and oppression is entitled to maintenance even though parties belong to low class.

The words "just ground" in the amended Code invest the Magistrate with a large discretion in the matter of granting maintenance. Where the evidence before the Magistrate clearly shows that the husband subjected his wife to a systematic course of ill-treatment and brutal oppression for a number of years, there is just ground for the wife to refuse to live with her husband and she is entitled to maintenance. The fact that the parties belong to a low class can make no difference. [P 952 C 1]

Ajudhiya Prasad and *A. P. Verma*—for Applicant.

M. M. Banerji—for Opposite Party.

Judgment.—This is an application for revision of an order of a Magistrate of first class rejecting the petition of Mt. Kaluiya, which was made under S. 488, Criminal P. C. The date of the application is 2nd April 1929. It was directed against Hira, the husband of Mt. Kaluiya.

The parties are Koris by caste. The marriage between the parties took place about ten years ago and a girl was born about three years ago as the fruit of this marriage.

No aspersion has been cast upon the character of Mt. Kaluiya. She has been a faithful wife and "has kept unsullied the bed of her lord." It has also not been alleged or proved that she has been guilty of such minor offences in the performance of her household duties which were in any way calculated to cause annoyance to or impair the comfort of her husband.

The husband, however, appears to have conceived an intense dislike for his wife. He has practically put her away and has brought into his keeping a chamar woman whom he has introduced into the household.

There is evidence on the record that the husband habitually ill-treats his wife and in this matter he was seconded by his Chamar mistress. The fact of Hira keeping a Chamar mistress led to a panchayat being held about three years back and the panchayat outcasted Hira. Mt. Kaluiya, although the wife of Hira, may have conscientious scruples in either living or cohabiting with her outcaste husband. Time after time Hira has kicked and cuffed her. Time after time as the result of this ill-treatment the unfortunate woman has been compelled to run away from her husband who should have been her natural protector and has gone to seek shelter in the house of her father. Panchayats were convened on several occasions. The decree of the panchayat was that the wife should go back to her husband and try to make up with him. In obedience to the fiat of the panchayat, the woman returned to her husband but each time she failed because each time she became the object of her husband's abuse and inhuman oppression. On the last occasion after the return of the wife he kept her without food for a day or two and then turned her out.

At the time of presenting this application in the Court of the Magistrate Mt. Kaluiya was living in the house of her father. She had signified that she was not willing to return to her old life. She had signified in the clearest terms that she was not prepared to go and live in the house of her husband. In the petition she had claimed Rs. 10 per month as her maintenance.

Hira, the husband, as was to be expected opposed the application. He stated that he was prepared to maintain his wife upon the condition of the wife living with him. The wife refused to go back to her husband's house to live with him.

Section 488, Criminal P. C., contains the following proviso in Cl. (3) that :

"if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer if he is satisfied that there is just ground for so doing."

My attention has also been drawn by Mr. M. M. Banerji who appears for Hira in this Court to Cl (4) which runs as follows :

"No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, of if they are living separately by mutual consent."

The vital question in this case is whether there was just ground on the part of Mt. Kaluiya for her refusal to go back to her husband to live with him.

The learned Magistrate deals with this matter in the following strain :

"There are occasional outbursts of temper even in well organised families and it is not a matter of surprise or of unusual importance that there should have been such a

treatment of the wife by the husband who are Koris and unfortunately not very civilized and still governed by the social rules in force among them."

The learned Magistrate continues :

"the evidence of ill-treatment does not prove that the husband has been unusually hard on her, judging of course from the standard of mutual treatment, observed among the class to which they belong or that he has been constantly and habitually treating her with cruelty."

It has escaped the notice of the Magistrate that the words "that he habitually treats his wife with cruelty" which occurred in the earlier Act have been omitted in the present Criminal Procedure Code and the words "that there is just ground for so doing" have been substituted. The result of the amendment is that under the present Criminal Procedure Code the right of the woman who is living separately from her husband is not restricted to payment of maintenance to cases in which she has been treated by her husband with habitual cruelty. The words "just ground" invest the Magistrate with larger discretion in the matter of giving or granting maintenance. Habitual cruelty may be a just ground but there may be other grounds apart from habitual cruelty.

In the present case the evidence which was before the Magistrate, if properly read and properly appreciated, was capable of one and only one conclusion and that conclusion was that the husband Hira had subjected his wife to a systematic course of ill treatment and brutal oppression for a number of years. It was not that the husband had "slapped" his wife with his open hand once or twice in the course of five years. Even this would have been reprehensible and could not have been justified but it might have been attributed to "occasional outbursts of bad temper."

The evidence shows that he used to abuse his wife. This by itself could not have been a very serious matter but the evidence further shows that time after time he kicked and cuffed her, turned her out of the house and on one occasion kept her without food for one or two days. If this evidence was not evidence of habitual ill-treatment and habitual cruelty, what was it?

It is astounding that the Magistrate has advised the woman to go and live with her husband. He says :

"There is no reasonable justification for the wife to refuse to go and live with him."

Is it reasonably certain that the husband will not ill-treat her again, if she returns ? An appeal to the experience of the past presents a sad outlook for the wife and makes it more than probable that the return of the wife would give rise to a resumption of the ill-treatment.

The learned Magistrate was wrong in holding that the matter would be lightly brushed aside as being due to "occasional outbursts of temper."

Then again is the husband to be allowed to be brutal towards his wife on the ground that he is a Kori by caste or on the ground that the husband is : "unfortunately not very civilized and still governed by the social rules in force among them."

The British Indian Legislature in enacting S. 488, Criminal P. C., makes no distinction between a blue blooded patrician of a very high caste and social standing and another person who is the lowest of the low in the social strata. The effect of the legislation is levelling and humanizing If a person, belonging to the Kori caste, having sufficient means is not alive to the duties and responsibilities towards his wife and neglects or refuses to maintain his wife, he is amenable to the provisions of S. 488, Criminal P C. If one of his reasons for his not attending to his duties is that "unfortunately he is not very civilized," S. 488, Criminal P. C. should be applied in the case and the provisions of that section should be administered as a healthy antidote to his barbarous tendencies.

I am not aware of any social rules prevailing in the Hindu system of society, at the present day and hour or in comparatively recent times which allow or countenance the habitual ill-treatment of the wife by the husband nor am I aware of any custom in vogue which would compel upon the return of the wife to the husband is spite of his habitual ill-treatment, rendering thereby the wife subject to a perpetual course of brutal and inhuman treatment. The learned Magistrate has observed that the husband is not a man with sufficient means being of the labouring class. The complainant stated in her petition that the husband was a mason or brick-layer and that he earned Rs. 1-4-0 a day. This

statement was not traversed by Hira. This statement has also not been traversed by his counsel who appears before me to-day. The monthly income of Hira if he gets work day after day would amount to Rs. 37-8-0. Treating his monthly earnings on an average as about Rs. 24 a month and making allowance for days when Hira might be left without any work, I direct that Hira should pay to his wife Rs. 8 a month and that the payment should be made on the first day of every month commencing from 1st August 1929. The result is that subject to the remarks indicated above I allow the application for revision, set aside the order of the Court below and direct that Hira should pay Rs. 8 per month to his wife Mt. Kaluiya from 1st August 1929. In view of the peculiar circumstances of the case I make no order as to costs.

R.M./R.K. *Application allowed.*

A. I. R. 1929 Allahabad 953

SULAIMAN AND BOYS, JJ.

Anrup Misir—Plaintiff—Appellant.

v.

Ram Harakh Misir — Defendant — Respondent.

Second Appeal No. 1554 of 1927, Decided on 7th June 1929, from decree of Addl. Sub-Judge, Azamgarh, D/- 27th May 1927.

(a) Civil P. C., O. 20, R. 14—(Per *Sulaiman, J.*)—**Joint decree does not pass title to all joint decree-holders even if one pays amount—Rights of decree-holders will have to be determined in case dispute arises**—(*Boys, J.* contra).

Sulaiman, J.—The mere fact that a joint decree has been passed in favour of all has not the necessary result of passing title to all joint decree-holders even if one of them pays the amount. The rights of decree-holders as to their shares will have to be determined in case dispute arises. A joint decree-holder refusing to contribute towards payment of purchase money is not entitled to recover a share of property on an offer to pay the proportionate amount subsequently. [P 954 C 1, 2]

Boys, J.—In absence of definite allegation that the decree-holder is depositing money solely on his own account and claims to reap the benefit of the whole decree, the Court can only assume that the payment is being made for the benefit of all decree-holders. [P 956 C 2]

(b) Civil P. C., O. 20, R. 14—Title to property accrues from date of payment—Mere passing of decree does not confer any title.

Order 20, R. 14 (1) (b) lays down that the title to property shall be deemed to have accrued from the date of the payment of pre-emption money. A mere passing of decree does not confer any title on the plaintiff. [P 954 C 2]

(c) Agra Pre-emption Act, S. 13—Persons equally entitled to pre-emption must pay equal consideration—To determine shares of joint plaintiffs circumstances under which payment is made are to be taken into account.

Section 13 clearly lays down that persons equally entitled to pre-emption must pay an equal share of consideration. Therefore in order to determine in what proportion the joint plaintiffs are to share the property the circumstances under which the payment was made must in each case be enquired into. [P 954 C 2]

(d) Civil P. C., O. 21, R 15—(Per *Sulaiman, J.*)—**Deposit of pre-emption money is neither proceeding in execution nor step-in-aid of it—O. 21, R. 15, does not apply**—(*Boys, J.* contra).

Sulaiman, J.—The deposit of pre-emption money within the time fixed by the Court is neither a proceeding in execution, nor any step-in-aid of it. O. 21, R. 15, therefore, does not apply to the deposit of purchase money: *All. S. A. No.* 506 *of* 1925, *Rel. on.* [P 955 C 1]

Boys, J.—In pre-emption proceedings there is one decree and one only and any step taken by the decree-holder by virtue of the pre-emption decree to secure his rights is a step in execution. Application for delivery of possession is an application in execution, O. 21 R. 15, applies to these. [P 957 C 1]

N. Upadhiya—for Appellant.

Shiv Prasad Sinha—for Respondent.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for declaration and possession. The parties to the present suit had jointly instituted a suit for pre-emption and a joint decree was passed in their favour by the trial Court. The pre-emption money was deposited in the name of the present defendant Ram Harakh Misir. The present plaintiff Anrup Misir does not appear to have attempted to deposit any money or to apply to the civil Court for execution of the decree or for delivery of the property to him. Ram Harakh Misir, however, applied for execution in his own favour alleging that the amount had been deposited by him alone. Execution was allowed and the possession was delivered to him of the entire pre-emption property. In spite of an objection raised by Anrup Misir in the revenue Court, Ram Harakh Misir succeeded in obtaining mutation of names. Anrup Misir then filed the present suit for a declaration that he had paid half the pre-emption money and asked for possession of the half share. In

his plaint he did not offer to pay half the amount in case it was found that he had not paid it, but later on his vakil made a statement in the trial Court to that effect.

Both the Courts below have found that the plaintiff had not paid a pie to the defendant on account of the pre-emption money as was alleged by him. The first Court decreed the suit on payment of half the amount but the appellate Court has dismissed it in toto.

The main question raised before us on behalf of the appellant is that when a joint decree for pre-emption had been passed in favour of two plaintiffs, the payment by even one of the plaintiffs would enure for the benefit of both the decree-holders and both would be entitled to equal shares in the property, the defendant at best should recover the half of the amount which the plaintiff did not pay.

In order to answer this question it is necessary to consider the true nature of a pre-emption suit. Several persons may be entitled to pre-empt a sale. They may institute separate suits each claiming the whole property and all the suits may be consolidated and their respective rights and priorities be determined, or they may agree to institute a joint suit for pre-emption.

Order 20, R. 14, Civil P. C, provides the form which a pre-emption decree may take. Where the rival claims to pre-emption have been adjudicated upon, the decree has to specify their respective rights as provided in sub-Cl. (2). But where the plaintiffs do not ask the Court to adjudicate upon their respective rights inter se, a joint decree may be passed and if the amount is deposited in compliance with the decree, the defendant has no concern with the way in which the property is to be shared by the plaintiffs.

But I am unable to hold that the mere fact that a joint decree has been passed in favour of all has the necessary result of passing title to all the joint decree-holders even if only one of them pays the amount. Any pre-emptor is at liberty to withdraw at any stage and he may withdraw even after the decree and before the date fixed for payment. The remaining pre-emptor would then have a right to deposit the whole amount and pre-empt the entire property. I cannot see why a co-plaintiff, who has got a joint decree in his favour should, in spite of a refusal to contribute towards the payment of the purchase-money or even an express desire to withdraw, still be entitled to recover a share of the property on an offer to pay the proportionate amount subsequently. The pre-emption money has got to be paid within the short time fixed for its payment. A co-plaintiff who refuses to pay the amount within that time cannot be allowed to claim the property, say after 11 years, if he then is in a position to contribute. It therefore seems to me that the rights of the joint decree-holders as to the shares which they are entitled to in the property on account of the payment of the purchase-money, will have to be determined in case a dispute arises. The property cannot be divided among them automatically merely because the decree was a joint one.

This result in my opinion follows from the following considerations. R. 14, Sub-Cl. (1) under Cl. (b), O. 20, Civil P. C. lays down that the title to the property shall be deemed to have accrued from the date of the payment. It is therefore clear that a mere passing of the decree does not confer on the plaintiffs any title to the property. It is the payment of the pre-emption money which gives them such title. A similar provision is to be found in S. 24, Agra Pre-emption Act (Act No. 11 of 1922) which lays down that a person who has obtained a decree for pre-emption in respect of any property shall acquire no title to have the property until he pays the purchase-money into Court in accordance with the pre-emption decree.

That in order to get equal shares in the property persons equally entitled to pre-emption must pay an equal share of the consideration is clearly laid down in S. 13, Pre-emption Act. I therefore think that in order to determine in what proportion the joint plaintiffs are to share the property the circumstances under which the payment was made must in each case be enquired into.

If any one of the co-plaintiffs has really refused to contribute towards the payment of the purchase-money and in that way impliedly withdrawn his claim and the payment of the whole amount is made by the other co-plaintiff the whole property ought to go to the latter. On the other hand, the mere fact that the

whole amount has been paid by one co-plaintiff would not destroy the right of the other, if there was any understanding between them that the payment would be made on behalf of both and that the accounts would be adjusted afterwards.

In the course of the argument it was urged that the deposit of the amount in pursuance of the decree was a proceeding in execution, and O. 21, R. 15 applied to it and that the joint decree could not be executed in favour of one decree-holder without protecting the interests of the other. It was therefore contended that the necessary result was that the entire property passed to both the decree-holders. I am unable to accept this contention. The deposit of the pre-emption money within the time fixed by the Court is neither a proceeding in execution of the decree nor any step-in-aid of it. In fact a conditional decree has been passed and it does not become a perfect decree in favour of the plaintiffs for pre-emption of the property until that condition has been fulfilled. In case of its non-fulfilment the decree is really one of dismissal of the suit. Dalal, J. in *Narain Dat Tewari* v. *Ram Baran* (*S. A. No.* 506 *of* 1925, *decided on* 19th *October* 1927) also held that such deposit was not in execution of the decree. I therefore do not think that O. 21, R. 15 applied to the deposit of the purchase-money.

In the present case the Court which passed the pre-emption decree ordered the delivery of possession in favour of Ram Harakh Misir apparently without any investigation of the matter. That, however, does not, in my opinion, preclude the question from being gone into in the present case.

Coming to the facts of the present case the plaintiff alleged that he had actually paid half of the amount of the pre-emption money to the defendant before the deposit was made. On this allegation he cannot possibly say that he had really not paid the amount but there was an understanding between the parties that Ram Harakh should pay the whole and the parties would adjust their accounts afterwards. The defendant in his written statement asserted that the plaintiff had been included for the mere purpose of preventing him from colluding with the vendees and that when the plaintiff was asked at the time of depositing the money he said that he was in debt and could not pay the amount. The lower appellate Court has recorded a distinct finding that the defendant's allegation that the plaintiff was merely a dummy and was associated in the pre-emption suit to make his collusion with the vendees impossible'. On this finding there could not possibly have been any intention in the minds of the parties that the plaintiff should have a share in half of the property and the accounts would be settled between them afterwards. The deposit of the whole amount was made by the defendant on his own behalf and in my opinion the plaintiff cannot take advantage of it in order to claim half the property, even though he is now prepared to pay his half share of the pre-emption money.

The suit was rightly dismissed by the lower appellate Court.

Boys, J.—This is a plaintiff's appeal arising out of a suit for a declaration of his right to one-half of certain property and possession thereof. The present suit arises out of an earlier pre-emption suit. The present plaintiff and the present defendant jointly as co-plaintiffs brought suit No. 32 of 1925 against one Ram Baran for pre-emption on the ground that the so-called deed of gift to him by one Rambaran was in reality a sale, and that they were entitled to pre-empt. The present plaintiff had apparently a superior claim to that of the defendant if he had chosen to enforce it separately. But the two, the present plaintiff and the present defendant, did in fact bring the suit jointly.

On 20th May 1925, a decree was passed in the ordinary form contained in O. 20, R. 14, para. 1, providing for the payment of Rs. 1,075 and the usual 30 days.

On 28th May 1925, the joint decree-holders joined in an application asking for further time as they had appealed in reference to the amount of the consideration money. It is not clear, as we have not the pre-emption record before us, how time was extended, for the only order on the application is "File."

On 6th July 1925, a deposit was made by the present defendant of the full amount of Rs. 1,075.

On 12th December 1925, the present defendant applied for and obtained delivery of possession to him alone, and then

applied for mutation. The plaintiff receiving notice of the mutation proceedings objected, but his objection was disallowed on the ground that the defendant was in sole possession, and mutation was effected in favour of the present defendant alone.

Hence the present suit which the plaintiff has brought asking for a declaration that he has a half share in the property, and further that a decree for possession of half may be passed if he be found to be out of possession; and he brought this suit on the allegation that he had paid to the defendant half of the consideration money of the property before the money was deposited.

The trial Court found against the plaintiff on the allegation of fact, and it further found, but not in very precise terms, that the plaintiff was really a dummy. The words of the trial Court are :

"He was joined as a party so that he may not bring a collusive suit for the vendees. This is a good ground. A real vendee generally tries to catch hold of some preferentially entitled person to pre-empt and admit the whole sale consideration and sometimes cherishes a hope to get the property through some device or another. An anxious pre-emptor therefore not only files a suit but labours hard to bring in his file preferentially entitled persons so that there may not be a collusive action with an adverse effect against the pre-emptor's suit. I, therefore, hold that plaintiff did not pay the amount he alleges and the whole sum was a matter of fact deposited by Ram Harakh" (the present defendant).

On the issue whether the plaintiff was entitled to any relief, the trial Court notwithstanding the finding which I have quoted, held that the plaintiff was entitled to a decree for possession of half on payment of half the purchase money.

Both parties appealed. The lower appellate Court held definitely that the present plaintiff was merely a dummy, and was associated in the pre-emption suit to make his collusion with the vendees impossible. It also found against the plaintiff that that he had paid none of the money, and dismissed the plaintiff's appeal, and allowing the defendant's appeal set aside the decree of the trial Court and dismissed the plaintiff's suit with costs.

Plaintiff appeals now to this Court against both the decrees of the lower appellate Court. The present Second Appeal No 1554 of 1927 is against the decree of the lower appellate Court in the defendant's appeal to that Court.

The plaintiff-appellant's contention is that the payment of Rs. 1,075 by the defendant respondent in the pre-emption suit was a payment which, even if made by the defendant, as found by both Courts, entirely out of his own pocket, enured equally to the benefit of the plaintiff, and that similarly the application of 12th December 1925, for delivery of possession to the defendant alone must be taken as enuring also to the benefit of the plaintiff.

If there were no further facts found than these I should be inclined to hold that the plaintiff's appeal must be decreed and the decree of the trial Court restored. We have been referred to O. 20, R. 14, which provides for the form of decree in a pre-emption suit. It appears to me to be impossible to hold that the trial Court in a pre-emption suit must, when the money is deposited by one of two or more co-plaintiffs, inquire into the question whether the money is deposited on behalf of all the plaintiffs or only on behalf of one.

We have nothing before us to show with what accompanying statements the tender of the money was made. We have got the accompanying application before us, owing to the absence of the pre-emption record, and so we can only assume that it contained no specific allegation that the defendant was depositing the money solely on his own account and claimed to reap the whole benefit of the decree: and in such circumstances I think that the trial Court should and could only assume that the payment is being made for the benefit of all the co-decree holders.

I need not enter into the question of what action the Court should take if the application of the person depositing the money did show that he was claiming to deposit solely on his own account and claiming the whole benefit arising from such deposit. It may be that the trial Court's proper course would be to refuse to accept the money or to accept it provisionally and issue notice to the other decree-holders. I have not to determine that question in this case.

It is urged for the defendant that the deposit of money in accordance with a pre-emption decree is not part of execution proceedings so as to make O. 21, R. 15, applicable. On the other hand it

may reasonably be suggested that in pre-emption proceedings there is one decree and one only, and that they differ from proceedings in a mortgage suit, where there is a preliminary and a final decree, and that any step taken by a decree-holder by virtue of the pre-emption decree to secure his rights is a step in execution. It is difficult to see what it is, if it is not a step in execution. The decree stands complete and the decree-holder desires to obtain his rights under it. It is necessary, before he can demand delivery of the property by an application for such delivery, for him to show that he has paid the money. It is difficult to see how an application to be allowed to deposit the money can be regarded as an application in the suit, and if it is not an application in execution, then it is difficult to see into what category it will fall. I have already held that prima facie a deposit must be taken to be made on behalf of all the decree-holders, and I would further hold that the principle of O. 21, R. 15 is applicable and that this is an additional reason for holding that where there is nothing to show, as in this case, that the person depositing the money was claiming the sole benefit of the rights following upon such deposit to the exclusion of his co-decree-holders the trial Court can and can only treat the deposit as made on behalf of all the decree-holders.

Again, if the appellant had secured, as he should have done, the summoning of the pre emption record, it would almost certainly have been found that the tender of the money had been accompanied by a prayer for the delivery of the property and, if that were so, it would be still more difficult to suggest that it was not a proceeding in execution to which O. 21, R. 15, would directly apply.

So far, then, I would hold that the deposit whether made by the defendant out of his own pocket or not, enured to the benefit of the plaintiff also.

Similarly I would hold that the application of 12th December 1925, for delivery of possession to the defendant alone was beyond doubt an application in execution therefore an application to which O. 21, R. 15 applied. The Court did not in fact make any order under sub-R. 2, R. 15, O. 21, but I do not think that the plaintiff would be debarred from claiming half the property.

This is, however, in the present case by no means all. Both Courts have found, the lower appellate Court in the most express terms, that the plaintiff was merely a dummy in the proceedings induced by the present defendant to join as a co-plaintiff merely in order that he might not be put up by the original vendee to bring a collusive suit which would defeat the present defendant. In face of this finding I have no hesitation in holding that the present plaintiff cannot now plead that the deposit made by the defendant enured to his benefit or that the possession obtained by him in what was undoubtedly execution of the decree enured to his benefit, and the suit of the plaintiff was rightly dismissed.

I would add that, in my opinion, if neither the appellant nor the respondent secures the presence of a necessary record for the information of the Court hearing an appeal, the one or the other has only himself to blame if the ordinary presumptions are made against him. It is ordinarily too late at the hearing of the appeal to suggest that the hearing should be interrupted and the case adjourned for the record to be sent for.

I would dismiss the appeal with costs.

By the Court:—The appeal is dismissed with costs including in this Court fees on the higher scale.

R.M./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Allahabad 957

MUKERJI AND NIAMATULLAH, JJ.

L. Bal Krishna and *others*—Plaintiffs—Applicants.

v.

Ram Kishun and *others*—Defendants—Opposite Parties.

Civil Revn. No. 228 of 1928, Decided on 12th July 1929, from an order of Addl. Sub-Judge, Banda, D/- 21st July 1928.

(a) Civil P. C., S. 115 — Court deciding that it should proceed with suit does not decide case within meaning of S. 115.

Where the Court below decides that it should proceed with a suit, it does not decide a case within the meaning of S. 115 and no revision lies. The question whether the trial of a particular suit or issue should go on or should be stayed, is no question on the merits of the case and the decision of the question cannot be said to be the decision of an issue in the case. The whole thing relates to a matter of procedure. A case must be something complete in itself so that it may be

treated as independent matter : *A. I. R.* 1921 *All.* 1 (*F. B.*), *Ref.* [P 958 C 2 ; P 959 C 1]

*** (b) Civil P. C., S. 115 — Where suit has been stayed under S. 10, Court proceeding to try suit even under order of appellate Court having no notice of order under S. 10 acts improperly.**

Where the appellate Court has not been informed that the suit was stayed under S. 10 and it orders it to be taken up forthwith, thinking it to be pending without adequate cause, the Court below if it proceeds with the suit acts improperly. The order of the appellate Court cannot override express provisions of law and it is open to a party aggrieved to ask Court below to reconsider its order, although no revision is maintainable.

[P 959 C 2]

K. N. Katju—for Applicants.

P. L. Banerji—for Opposite Parties.

Mukerji, J.—The questions that we have to decide in this petition for revision are : (1) whether a revision is entertainable and (2) whether the order of the Court below was right:

The facts of the case, briefly, are these: The plaintiffs represent two or three brothers and the respondents represent the third brother, Lal Man. A partition suit was instituted by Lal Man, in his lifetime, and it is now pending for final decision before His Majesty in Council. The question in that case is whether Lal Man had separated or had an interest still left in the family property, on the ground that he was still joint with his brothers and their descendants. The applicants who were the plaintiffs in the Court below, filed a second suit, being No. 32 of 1925, for recovery of certain moneys due from debtors, as a delay in recovery of the debts would entail a loss of the property. Among the defendants were not only the debtors but also the representatives of Lal Man the respondents. The debtors paid the money into Court and the sole dispute in the suit remained between the very parties who are parties to the litigation now before the Privy Council. The learned Subordinate Judge, before whom the suit (No. 32 of 1925) came, directed that the trial of the second suit should be stayed till the final decision of the former suit.

While the trial was stayed, the plaintiffs thought that they, being the owners of more than one-half share of the money in deposit, should be allowed to take away the amount deposited in Court on furnishing security. They made a request to the Court below accordingly, and that request was granted. Thereupon the present respondents came up in revision to this Court (No. 47 of 1927).

This Court in the said revision case, set aside the order of the Court below and remarked that the decision as to who should have the money could not be arrived at, till the suit No. 32 of 1925 was decided. The learned Judges could not discover the cause of the delay in the disposing of the suit No. 32 of 1925 and directed the Court below to proceed with the suit. Evidently, nobody pointed out to the learned Judges that S. 10, Civil P. C., had been applied, without contest by the other side, and the suit could not be decided as desired by those Judges.

On receipt of the order of this Court, as contained in the judgment passed in revision on 9th February 1928, the learned Judge of the Court below proceeded to try the suit and, therefore, the question whether Lal Man was joint with his brothers or not. Thereupon the plaintiffs (of suit No. 32) have come up in revision.

For the respondents, Mr. Peary Lal Banerji has not, for once even, contended that S. 10, Civil P. C., was inapplicable. His contention was that the Subordinate Judge acted on the orders of this Court and, therefore, it cannot be said that he acted with material irregularity. He further argued that the Court below had not decided a 'case' within the meaning of S. 115, Civil P. C., and that therefore a revision was not competent.

To take the second point first, it appears to me that when the learned Judge in the Court below decided that he would proceed with the suit, he did not decide a 'case' within the meaning of S. 115, Civil P. C. In the Full Bench case of *Buddhu Lal* v. *Mewa Ram* (1) the majority of the learned Judges held that a decision of one of the issues in a suit could not be taken to be the decision of a 'case' within the meaning of S. 115, and that a revision would not lie to contest that decision. In this case, although an issue was actually framed on the question of the applicability or otherwise of S. 10, Civil P. C., strictly speaking, no such issue arose. The question before the Court was whether it should proceed with the trial or should stay its hand. A decision of this question could only quicken or delay the disposal of the suit,

(1) A. I. R. 1921 All. 1=43 All. 564 (F.B.).

but, otherwise, it had no effect on the merits of the case. Strictly speaking, therefore, the question whether the trial of a particular suit or the trial of a particular issue should go on or should be stayed is no question on the merits of the case, and the decision of that question cannot be said to be a decision of an issue in the case. The whole thing relates to a matter of procedure. The Court has to decide, having regard to the facts of the case before it and the facts of a previous case, whether it should stay its hand till the earlier suit is finally decided or whether it shall, forthwith, proceed to hear the case. When the Court decides either way it decides a matter of procedure which has nothing to do with the merits of the case.

The result is that there is no decision of a 'case.' The Court has to pass orders at every step, but every order cannot be called the decision of a 'case.' A 'case' must be something, complete in itself, so that it may be treated as an independent matter. Though, therefore, the Full Bench case quoted above is not strictly applicable, I am of opinion that no 'case' has been decided, and no revision therefore lies.

Coming to the second point, viz.: the Court below has acted in pursuance of an order of this Court and, therefore, it cannot be said that it has acted with material irregularity, I am of opinion that the argument is entirely fallacious. A copy of the judgment 9th February 1928 has been handed over to us by Dr. Katju. A perusal of it clearly shows that the learned Judges of this Court were never told that the trial of suit No. 32 of 1925 had been stayed under the provision of S. 10, Civil P. C. The order of the Court, to expedite the hearing, was based on the fact that the learned Judges found that the suit instituted in 1925 was still hanging fire without any adequate cause. Naturally, the learned Judges would express the desire that the case should be taken up forthwith. But this desire expressed by this Court could not override the express provisions of law. It was never meant by this Court, as the judgment itself shows, that the Subordinate Judge was to override the law. The Subordinate Judge might have made a representation to this Court, stating the circumstances under which the trial of the case had been stayed, and asked whether it was the intention of this Court that the case should be proceeded with, even under the circumstances stated by himself. In my opinion, on receipt of a copy of the judgment of 9th February 1928 the learned Subordinate Judge could have and should have contented himself with recording an order, describing the circumstances under which the trial had been stayed and saying that the stay order passed by his predecessor-in-office should stand. As I have already stated, no attempt has been made to support the order of the learned Subordinate Judge on the merits. The learned Subordinate Judge himself does not say that the justice of the case requires that the stay order, previously passed, should now be cancelled and the trial of the case should be proceeded with. In the circumstances the order of the Court below must be treated as improper.

Although no revision is maintainable, it is always open to the applicants before us to ask the Court below to reconsider its order, and it is likely that the Court will see its way to reconsider it.

The petition fails and I would dismiss it. As the respondents have no case and as the order complained of, which is an improper order, was passed at the instance of them, and the revision fails on a technical ground, I would direct the parties to pay their own costs in this Court.

Niamatullah, J.—I agree to the order which my learned brother proposes to pass. It is not necessary to decide the question whether an order staying or refusing to stay a case, on the ground that S. 10, Civil P. C., applies or does not apply, is or is not a 'case decided' within the meaning of S. 115, Civil P. C. By an order, dated 21st December 1925, it was ruled by a previous Munsif that S. 10, Civil P. C. applies, and the suit was consequently stayed. This order has not been reversed by any higher Court and is, in my opinion, in full force. The order of this Court, dated 9th February 1928, was passed on a petition for revision directed against a different order, as pointed out by my learned colleague. A remark to the effect that the suit should proceed occurs only casually, and was made without any intention of interfering with the order of stay, already referred to. The attenion of the Court was

not drawn to it, and no reference is made to it in the judgment of this Court. It is inconceivable that this Court should have set aside an order which was not and could not have been then called in question. I have dwelt on this aspect of the case, as I apprehend all subsequent proceedings, being in disregard of the mandatory provisions of S. 10, Civil P. C. may be challenged as taken without jurisdiction, and the Court below should do well to take timely action in the matter.

I agree with my learned colleague that the Court below has not decided any 'case.' It has not itself decided whether S. 10, Civil P C., applies. That question was decided before, and as I read, the judgment of the lower Court was not reopened. It has merely directed the case to proceed. An order of this character cannot be said to be one 'deciding a case' within the meaning of S. 115, Civil P. C. This being so, I concur in dismissing this application.

R.M./R.K. *Application dismissed.*

A I. R. 1929 Allahabad 960

BENNET AND IQBAL AHMAD, JJ.

Bhullan Mal Asa Ram—Plaintiff—Appellant.

v.

Secy. of State and *another*—Defendants—Respondents.

Second Appeal No 1308 of 1926, Decided on 17th July 1929, from decree of Addl. Sub-Judge, Bulandshahr, D/- 14th April 1926.

(a) Railways Act, S. 72 (1)—Sub-S. (1) does not exclude other sections of the Contract Act, in regard to bailment.

The subsection deals with the responsibility of the railway company for loss, detention or deterioration only. It does not exclude other sections of the Contract Act, in regard to bailment. If S. 72 had intended to exclude them, there would have been a reference to them in S. 72 (3). [P 960 C 2]

(b) Contract Act, S. 160—It is duty of railway company to deliver goods in accordance with reasonable directions of consignee.

Under S. 160 it is the duty of the railway company to deliver the goods in accordance with the directions of the consignor provided those directions are reasonable. When the consignor enters on the railway receipt that another person is to be the consignee S. 160 also applies to directions for delivery given by the consignee. [P 960 C 2]

(c) Railways Act, S. 72—E. I. Ry. Traffic Code, Part 2, R.73 — Railway company is bound to re-weigh before delivery is taken where there is no risk-note.

Rule 73 shows that at the request of a consignee a Station Master is bound to re-weigh a consignment if from any cause whatever the consignee suspects that there may be under-weight. The proposition holds true in case when there is no risk note, and cannot be applied generally to cases of risk-notes: 15 *C. L. J.* 211; 22 *C. W. N.* 310; 11 *A. L. J.* 772; 22 *C. W. N.* 902 and 58 *I. C.* 200, *Dist.*; 13 *A. L. J.* 417, *Ref.* [P 961 C 2]

G. Agarwala—for Appellant.

U. S. Bajpai and *Laldli Prasad Zutshi*—for Respondents.

Judgment.—This is a second appeal by a plaintiff against concurring decrees of two lower Courts dismissing his suit for damages against the E. I. Ry. Co. and the Secy. of State for India in Council. The point which has been argued before us in appeal is a very short point of law. The lower appellate Court found in the paper-book on p. 16, line 16:

"From the evidence on the record and the circumstances and probabilities of the case, I am satisfied that plaintiff's son refused to take delivery of the goods in question because the Station Master was not prepared to re-weigh the goods, as desired by plaintiff's son and not because the Station Master wanted plaintiff's son to sign the delivery book before showing the goods to the latter. A railway company is not bound by law either to re-weigh goods or certify shortage at the time of delivery to the consignee. Therefore, the refusal of a railway company to re-weigh goods before delivery does not justify a consignee in refusing to take delivery of the goods: vide, *Suraj Mal Marwari* v. *Agent B. N. Ry. Co.* (1) and *Kokamal* v. *G. I. P. Ry. Co.* (2)."

The consignment was booked to the plaintiff as consignee, and it is admitted by the learned counsel for the respondents that there was no risk-note, and, therefore, the consignmens travelled at railway risk. We consider, however, that this factor that there has been no risk-note is not of importance in deciding the general question as to whether the consignee has a right to demand re-weighment before taking delivery. The learned counsel for the respondents relies on a number of rulings which begin with *Janki Das* v. *B. N. Ry. Co.* (3). In that ruling it is noted that the plaintiffs:

"refused to take delivery of the goods which were consigned to them except on certain conditions with which the railway company were not required by law to comply. They

(1) [1919] 58 I. C. 200.
(2) [1913] 11 A. L. J. 775n=21 I. C. 428.
(3) [1912] 15 C. L. J. 211=13 I. C. 509=16 C. W. N. 356.

demanded a reweighment and a certificate of shortage. The railway is not required by law either to reweigh or to certify shortage."

This was in the judgment of the District Judge. The point as to whether the railway company was bound to comply with a demand for reweighment was not discussed at all in the ruling and it will be noted that what the plaintiff demanded was not merely a reweighment but a certificate of shortage. Accordingly this ruling is no authority whatever for the proposition advanced by the lower appellate Court. But this ruling has been treated as authority for this proposition by all subsequent rulings to which reference has been made. Thus in *Ramjash Agarwala* v. *Indian General Navigation and Ry. Co. Ltd.* (4), the decision is based solely on *Janki Das* v. *B. N. Ry. Co.* (3) without any further reason whatever. We may also note that the circumstances in *Ramjash Agarwala* v. *Indian General Navigation and Ry. Co. Ltd.* (4) were different, because it was a case where goods had been conveyed by a steamer and on arrival of the goods at the place of destination the plaintiff's servant paid the freight, signed the bill of lading and gave a clear receipt in the delivery register of the defendant company. It was after this that he asked the booking clerk to reweigh the goods that the refusal was made. The next to which reference has been made is *Jagan Nath Marwari* v. *E. I. Ry. Co.* (5). There is no reason whatever given in the judgment of the single Judge who decided this case. The above three rulings were of the Calcutta High Court. The next case is of the Patna High Court, *Suraj Mal Marwari* v. *Agent, B. N. Ry. Co.* (1). In this ruling reference is made to the three decisions of the Calcutta High Court and no reason is given for the decision that:

"a railway company is not bound by law either to reweigh goods or certify shortage at the time of delivery to the consignee."

The next case to which reference was made was of the Allahabad High Court in *Jwala Prasad & Co.* v. *G. I. P. Ry.* (6). That case was materially different, because the railway company did actually reweigh the consignment before giving delivery and the question was whether the railway company was bound to open the consignment which consisted of wine in boxes and examine it before delivery. That question is materially different from the one before us. There is, however, printed at pp. 775 and 776 a judgment otherwise unreported of this Court in *Kokamal* v. *G. I. Ry.* (2). In that judgment it is noted as follows:

"It is quite clear that the real reason why the plaintiff declined to take delivery of the chillies was not that the railway staff refused to reweigh them, but that they refused to reweigh them and allow the plaintiff to make remarks in their books which, according to them were incorrect."

That is a materially different proposition from the proposition of the lower Court and so far as the ruling goes, it indicates that the plaintiff would have been within his rights if he had confined his demand to a mere reweighing of the goods.

On behalf of the appellant reliance is placed on a judgment of this Court in *The Rohilkhand and Kumaun Ry.* v. *Ismail Khan* (7). This was no doubt the judgment of a single Judge of this Court, but we consider that it is of weight. It was held that the railway company was bound to offer the consignee reasonable facilities for weighing the goods on the spot. In this ruling the consignment was under a risk-note. In the prasent case there was no risk-note, and, therefore, the case for the consignee is still stronger. At p. 421 it is laid down:

"The consignee was entitled to have the goods weighed then and there before he surrendered the railway receipt. When this had been done he was entitled to endorse on the back of the railway receipt a statement that he accepted delivery of the consignment as it stood, while taking note of the fact that its actual weight was only so much and not the full weight as given in the railway receipt itself. He would probably also have been entitled to add to his endorsement any remarks which he might think proper to make for his own protection regarding the appearance of the consignment at the moment of his accepting delivery. The Station Master or other local officials of the railway company at the delivery station were bound to offer to the consignee reasonable facilities for weighing the goods on the spot, and would in my opinion be going beyond their legal rights if they insisted on the surrender of the railway receipt with a mere endorsement to the effect that the goods therein specified had been duly received, before allowing the consignee access to the goods for the purpose of verifying the weight."

(4) [1917] 22 C. W. N. 310=41 I. C. 387.
(5) [1918] 22 C. W. N. 902=45 I. C. 933.
(6) [1913] 11 A. L. J. 772=21 I. C. 448.
(7) [1915] 13 A. L. J. 417=29 I. C. 207.

We consider that that is a sound exposition of law on the subject. As none of the rulings in question deal with the fundamental laws on the subject, we consider that a brief reference may be made to these provisions of law. S. 72, Railways Act, lays down as follows:

"The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under Ss. 151, 152 and 161 Contract Act, 1872."

It will be noted that this subsection deals with the responsibility of the railway company for loss, destruction or deterioration only. It does not exclude other sections of the Indian Contract Act in regard to bailment. If S. 72 had intended to exclude those other sections, then there would have been a reference to those other sections in S. 72(3) which says:

"Nothing in the common law of England or in the Carriers Act, 1865, regarding responsibility of common carriers with respect to the carriage of animals or goods shall affect the responsibility as in this section defined of railway administration."

It is only liability of common carriers under the common law of England and under the Carriers Act of 1865 that is declared not to be applicable to railway companies. Accordingly we hold that the sections of the Contract Act dealing with bailment do apply to a railway company, except so far as they may be excluded by the Railways Act or rules made under that Act. One of these sections of the Contract Act is S. 160, which runs as follows:

"It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed had expired, or the purpose for which they were bailed had been accomplished."

Accordingly under this section it was the duty of the railway company to deliver the goods in accordance with the directions of the consignor, provided of course that those directions were reasonable. When the consignor enters on a railway receipt that another person is to be the consignee, we consider that S. 167 also applies to reasonable directions for delivery given by the consignee. The Indian Railways Act, S. 54, states that rules may be made by the railway administration subject to the control of the Governor-General in Council for the delivery of goods. A printed book of such rules for the East Indian Railway has been produced by the counsel for the company and placed before us. It is styled as "East Indian Railway Traffic Code, part 2, Goods Traffic." It would no doubt be open to the railway company to make a rule on this subject directing that there should be no reweighment on delivery, but we find no such rule as contained in this Manual. R. 73 deals with the subject and it provides that a proportion of not less than 20 per cent of all goods should be reweighed at the destination.

It also provides that packages showing signs of pilferage or from any cause whatever suspected of underweight, must in all cases be separately reweighed in the presence of the Station Master, in addition to those cases provided for in the traffic rules. That rule shows that at the request of a consignee a Station Master is bound to reweigh if from any cause whatever the consignee suspects that there may be underweight. It is not necessary that the package should show signs of pilferage or damage. In addition to this case there is also the general provision laid down that no less than 20 per cent of the consignment must be reweighed. Accordingly we consider that the spirit of rules intends that under request of a consignee reweighment should be made. It is entirely a reasonable request, for if a consignee takes delivery of a consignment and removes that consignment from the station premises, it is very difficult for him to get it reweighed elsewhere with reliable evidence which would be accepted by a Court that the whole consignment as delivered to him by the railway company had been reweighed. In fact the only chance that a consignee has of proving to the satisfaction of a Court that there was shortage of weight in the consignment on arrival at the destination is by having that consignment reweighed by the servant of the railway company before it is removed from the railway company's premises. If we were to uphold the contention of the railway company, it would be almost impossible for any consignee to prove a claim for shortage in weight against the company. No doubt it may be a habit of consignors to exaggerate the weight of a consignment, but in order that they should do so there must be dis-

honest connivance on the part of the railway company's staff.

We consider that the corrrect proposition of law is that a railway company is bound to reweigh a consignment before delivery is taken at the request of the consignor. We lay down this proposition in a case in which there is no risk-note. As risk-notes vary in their terms, we do not apply the proposition generally to cases of risk-notes.

Accordingly we remand this case to the lower appellate Court for disposal on issue 4 which is : " what relief if any is the plaintiff entitled to ?" We have held that the plaintiff is entitled to relief on account of the railway company wrongfully refusing reweighment of the goods on his request. The lower appellate Court will arrive at a decision as to what is the amount of damages to which the plaintiff is entitled and will grant him a decree for that amount.

Costs hitherto incurred will be costs in the case.

R.M./R.K. *Case remanded.*

A. I. R. 1929 Allahabad 963

MUKERJI AND NIAMATULLAH, JJ.

Nirman Bahadur—Plaintiff—Appellant.

v.

Fateh Bahadur Singh and *others*—Defendants—Respondents.

First Appeal No. 411 of 1926, Decided on 25th July 1929, against decision of Sub-Judge, Basti, D/- 7th May 1926.

(a) Limitation Act, S. 8—Where plaintiff is minor when cause of action arises time does not run against him until minority is over.

Under S. 8, when plaintiff is a minor when the cause of action arises, time does not run against him until the minority has ceased; A suit brought within prescribed period after minority is over is not barred : *A. I. R.* 1925 *P. C.* 33, *Dist.* [P 965 C 1]

(b) Hindu Law — Widow—Compromise—Where widow agrees by way of compromise that her husband died joint and that she is entitled only to maintenance, she cannot be said to represent estate and compromise by her does not bind reversioners.

Per *Mukerji, J.*—Where by way of compromise the widow says that her husband died joint with the opposite parties and therefore she is not entitled to possession but is entitled only to maintenance, it cannot be said that the widow represented the estate and that compromise arrived at by her would bind the reversioners. The moment she says that her husband died joint she disclaims all title to represent her husband's estate for on her own admission there is no estate to represent. Her act therefore cannot bind those whose allegation is that there was such estate and that on the death of the widow the estate would devolve on them : 33 *All.* 356 (*P. C.*) ; *A. I. R.* 1925 *P. C.* 272, *Dist.* [P 965 C 2]

(c) Hindu Law—Widow—Compromise by pardanashin widow not with full appreciation of circumstances and not after taking legal advice does not bind reversioner.

Per *Niamatullah, J.*—Compromise by a pardanashin widow not entered into with full appreciation of the circumstances and not after taking competent legal advice does not bind the reversioners. [P 971 C 2]

(d) Hindu Law—Partition—Father is competent in his lifetime to effect separation in family—Deed of partition giving separate shares to sons has effect of partition—Separation by metes and bounds is not necessary.

The father is in his lifetime competent under Hindu Law to effect a separation in the family if he gives his sons equal share with himself. A deed of partition giving separate shares to the sons has the effect of a partition. The mere fact that the share of one son is not separated by metes and bounds or that the father describes the sons as joint does not affect the status of the family split up by the deed of partition : 2 *Mad.* 317, *not Ref.* [P 967 C 2 ; P 968 C 1]

(e) Words and Phrases—' la aulad ' means issueless.

The word ' la-aulad ' in vernacular means issueless or without any sons or daughters. [P 968 C 2]

Kailash Nath Katju and *Harnandan Prasad*—for Appellant.

Peare Lal Banerji and *A. Aziz*—for Respondents.

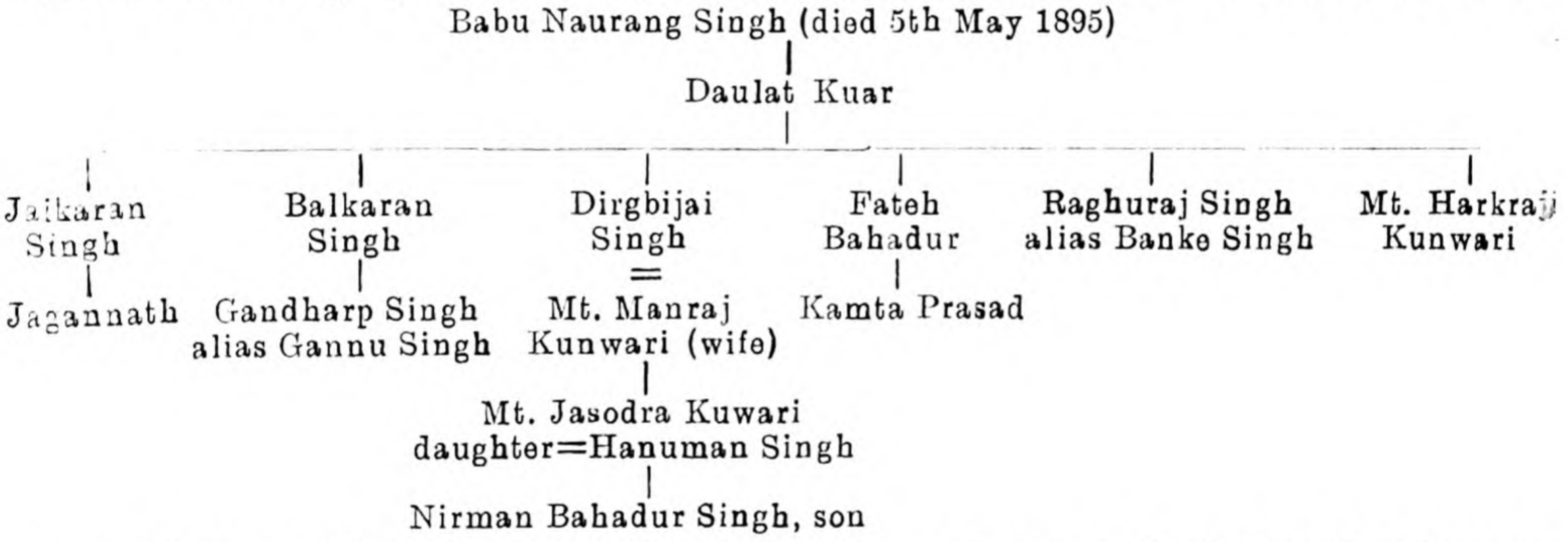
Mukerji, J.—This is the plaintiff's appeal. The following pedigree will explain the history of the case and the relationship among themselves, of the actors in this history :

(For pedigree see p. 964)

The ancestor, Naurang Singh, owned both ancestral and self-acquired property held jointly by himself and his five sons. In the year 1893, on 7th January, he executed a document entitled " Deed of partition " which will be found at p. 57 of the paper book. One of the important points that we have to decide in this appeal will be the effect of this document on the status of the family. One of the immediate results of the deed was that Jai Karan Singh the eldest son, began to live separately. Naurang Singh died on 5th May 1895. Within a few months of his death (according to one party six months and according to the

other, some 15 months) Dirgbijai Singh died. Mt. Manraj Kunwari's name was recorded in the place of her husband in the khewat. In 1914, Fateh Bahadur Singh and Raghuraj Singh alias Banke Singh, instituted a suit against Manraj Kunwari, to obtain a declaration that she was a widow of a joint Hindu family and had no right to the property over which her name had been recorded in the khewat. In the alternative, they claimed possession over two-thirds of the property, on the ground that the remaining one-third belonged to the third brother Balkaran Singh who was made a proforma defendant, see p. 107 of the printed record.

After some time, the parties, excepting Balkaran Singh, came to terms and an agreement, to be found printed at p. 113 of the record, was executed on 18th May 1916. On 12th June 1916, the learned Subordinate Judge passed a decree in



favour of the plaintiff for the entire amount of the property in suit and not only two-thirds see the decree which is on the record but which has not been printed. Being dissatisfied with this agreement on the part of her mother Mt. Jasodra Kunwari, with her son, the present plaintiff-appellant, instituted the suit out of which this appeal has arisen, to obtain a declaration that Dirgbijai Singh died separate from his brothers and that the agreement executed by Mt. Manraj Kunwari was of no effect and consequence on the interest of the reversioners for the time being.

To this suit, the two surviving brothers of Dirgbijai Singh, viz., Fateh Bahadur and Raghuraj Singh aad the son of Balkaran Singh, viz., Gandharp Singh are parties as principal defendants. Mt. Manraj Kunwari has been added as a proforma defendant. We are tcld, though there is nothing on the printed record to that effect, that after the decree was made in favour of Fateh Bahadur Singh and Raghuraj Singh, on 12th June 1916, either Balkaran Singh or his son Gandharp Singh instituted a suit against the two successful plaintiffs for recovery of his third share in the property of Dirgbijai Singh, and succeeded in that suit. This is, presumably, the reason why Gandharp Singh has been made a party to the present suit.

The principal defendants contend that the only person who separated from the family was Jaikaran Singh and that as a matter cf fact and as a matter of law, the rest of the family remained united and Dirgbijai Singh died as a member of the joint Hindu family, that Mt. Manraj Kunwari's name was recorded in the khewat for the sake of her consolation, but she was evilly influenced by certain adversaries of the defendants and they instigated her to institute suits for arrears of rent and ejectment of tenants and ultimately to make an application in the revenue Court for separation of her share by partition, that these unlawful acts on the part of Manraj Kunwari led to the institution of the suit in 1914 which was ultimately compromised, and rightly compromised, that the said decree in the suit of 1914 is binding on the plaintiff and tha suit is barred as res judicata and that the claim is also barred by time. During the pendency of the suit Mt. Jasodra Kunwari died and her son was left as the only plaintiff in the suit.

The learned Subordinate Judge framed the necessary issues and found on all the issues against the plaintiff.

The points that we have, therefore, to determine are all the points that arise in the suit and they may be stated as follows.

1. Whether the suit is time-barre d

2. Whether the suit is barred as res judicata ?

3. Whether the agreement executed by Manraj Kunwari is binding on the plaintiff ?

4. Whether Manraj Kunwari executed the agreement of 1916 with full knowledge of its effect ?

5. Whether Dirgbijai Singh died separate from his brothers ?

The first point that calls for decision is the point of limitation. The learned Subordinate Judge applied S. 120, Lim. Act and as the suit had been filed more than six years after the making of the agreement, he thought the suit was liable to be dismissed as barred by time. It is, however, clear that if Art. 120 applies, as it undoubtedly does then the cause of action for the plaintiff who is a minor of 7 years of age, could not have arisen till his birth. It could not be said that the cause of action arose in 1916. Besides, the surviving plaintiff being a minor at the date on which the cause of action arose and the date of the suit the suit cannot be timebarred.

The learned counsel for the respondent has argued that the cause of action would arise in the year 1916, even though the appellant was not born on that date. As an authority, he cited the case of *Ranodip Singh* v. *Parmeshar Prasad* (1). That case has no application whatsoever. That was a case of a Hindu father selling off property and the sons suing for setting aside their father's alienation. Art. 126 applied to the case and the starting point of alienation was " not " when the cause of action arose, but " the date of the taking of possession by the alienee." The starting point was a definite one and whether the plaintiffs or any one of them were born or not at the date of the alienation the limitation began to run all the same.

I hold that the suit is not barred by limitation.

The next question of importance is that of res judicata. It has been argued that Mt. Manraj Kunwar represented the entire estate of Dirgbijai Singh and a decree, although by consent, obtained against her by the first two defendants would operate as res judicata against persons claiming as reversioners. The principle is now well recognized that the widow, although a limited owner, represents the entire estate of the last male holder and any decision obtained against her either on a fair trial on contest, or on a bona fide compromise which amounts to a family arrangement would be binding on the estate represented by the widow. It is enough to quote one of the latest cases on the point, *Kunni Lal* v. *Govind Krishna* (2). But the case in my opinion has no application where the widow does not accept the position of representing the estate and agrees that there is no estate to represent. Where by way of compromise the widow says that her husband died joint with the opposite parties and therefore, she is not entitled to possession and is entitled only to a maintenance, it cannot be said that the widow represented the estate and a compromise honestly arrived at by her would bind the reversioners. The reason is very simple. The moment the widow says that her husband died joint, she disclaims all title to represent her husband's estate, for on her own admission, there is no estate to represent. Her act, therefore, cannot bind those whose allegation is that there was such an estate on the death of the widow that estate would devolve on them.

It was argued by the learned counsel for the respondents that if this were the true state of the law a decree obtained against a widow after a bona fide contest ending in the total failure of the widow would not bind the reversioners. In my opinion, the judgment obtained against a widow in an honestly fought case, to the effect that the widow's husband died joint, would bind the reversioners. This would be so, because the widow maintained, to the last that there was an estate to represent, she did her best to represent that estate. If she lost the case, it was in spite of her attempt to save it and not because she agreed with the opposite party that there was no estate of her husband that survived his death.

I asked the learned counsel for the respondents to cite one single case in which the Privy Council may have held that a decree on a widow's admission that no estate of her husband existed was

(1) A. I. R. 1925 P. C. 33=47 All. 165=52 I. A. 69 (P. C.).

(2) [1911] 33 All. 356=10 I. C. 477=38 I. A. 87 (P.C.).

binding on the reversioners. The learned counsel could cite only the case of *Mata Prasad* v. *Nageshar Sahai* (3). This case, in my opinion, has no application here. When Rani Chandra Kunwar entered into a compromise with Kunwar Narendra Bahadur, Kumar Narendra Bahadur was the reversioner on the death of Chandra Kunwar and there was nobody else who could take at that moment, on Rani Chandra Kunwar's death. Their Lordships take care to say that the compromise was the best "in the circumstances" of the case. Even if the Rani's husband had been separate, the Rani could not claim anything beyond the life estate and that life estate she got by a compromise with Narendra Bahadur. In the last but para. 1, at p. 899, (of 47 *All.*) their Lordships say:

> Narendra Bahadur was in their Lordships' opinion, the nearest agnate of Wazir Chand. If the property was subject to the provisions of Hindu Law, as their Lordships find, whether he was joint or separate from Wazir Chand, he was entitled to the property on the death of the widow. The compromise in fact, gave effect to this rule of the Hindu Law."

This was the real reason of the decision of their Lordships and this in no way lays down that a lady who disclaims the very title to represent the estate, must yet be regarded as representing the estate, so as to bind the reversioners who would succeed, if there were an estate.

In my opinion, the decree passed on foot of the compromise on 12th June 1916 is no bar to the maintenance of the present suit. The third question is whether the agreement executed by Manraj Kunwar is binding on the plaintiff. The reasons given in deciding point. 2 apply to this issue and I hold that the agreement entered into by Manraj Kunwar, however bona fide her act may have been, is not binding on the plaintiff.

Point 4. — In view of my finding on issue 3 it is not necessary to decide the question whether Manraj Kunwar executed the agreement of 1916 with full knowledge and appreciation of its terms and effects. The direct evidence adduced on behalf of the respondents on this point is very poor but circumstantial evidence is no doubt strong. The immediate cause of the institution of the suit by the first two defendants was that Manraj Kunwar had filed an application for partition of the village Narkhoria. After the suit in the civil Court had been decided, one would expect, Manraj Kunwar would press her application for partition in the revenue Court, if she thought that the compromise gave her a right to remain in possession in the place of her husband. The suit was finally disposed of in 1916, and the fact that Manraj Kunwar never took any steps to find out how the suit had been decided and the fact that her name was removed from the villages other than those over which she was allowed to remain in possession in lieu of maintenance, go to show that Manjraj Kunwar knew what she had done. I hold that Mt. Manraj Kunwar knew the effects of her own act and the compromise is undoubtedly binding on her. But as I have said, this is immaterial. If the agreement is binding on Manraj Kunwar, it is not binding on the plaintiff.

Point 5. — This is the most important point in the case. The history of the family is given in the partition deed of 7th January 1893. It was executed by Narendra Singh alone. He said that he was possessed of both ancestral and self-acquired property and he was living jointly with his sons. He said that in his lifetime there was a dispute between himself and his sons about partition of property and therefore, in order to remove disputes he thought it necessary to make a partition during his lifetime of the property among his heirs, so that, after his death there might be no dispute of any kind among all the five sons of his about both the moveable and immovable properties left by him. He accordingly reserved for himself and after him for his wife, a small property (an eight annas share) in village Chariband and divided the rest of the property among his five sons. The mode of division is very clearly given in the schedule, which is a part of the partition deed, at p. 59 of the record. The eldest son Jainarain got a fifth share in the village of Narkhoria and the entire shares of the family situated in two villages. The rest of the property was divided in equal shares among the other remaining four sons. Naurang provided that, on his death and on the

(3) A. I. R. 1925 P. C. 272=47 All. 883=28 O. C. 352=52 I. A. 398 (P.C.).

death of his wife, the property in Charibband should be divided equally among his five sons. He divided the family house in this way that he gave the residential house to his four sons and a small shed and a female elephant to his eldest son. The father had a debt of Rs. 2,000 and the partition deed recites that Jaikaran Singh gave him one-fifth of that, namely Rs. 400 in cash. The result was that Jaikaran was exempted from paying his father's debt. Naurang Singh further provided that if any of his four sons, whom he described as joint, died childless (la aulad) and left a widow, she would get only maintenance and not a share in the property. He further provided that if any of the four sons inherited any property he should be deprived of his share in the ancestral property. On foot of this deed it is contended on behalf of the appellant that the necessary legal effect of the deed was a splitting up of the family into six portions, five portions being represented by each of the sons and the sixth by the father.

According to the deposition of the defendant, Raghuraj Singh alias Banke Singh, Dirgbijai Singh died six months after his father's death. The father himself died a little over two years after the execution of the deed of partition. The time that elapsed between the execution of the deed of partition and the death of Naurang Singh and Dirgbijai Singh was not so large as to enable us to expect the existence of clear and cogent evidence indicating the separation of the family. All that we know is that Jaikaran Singh, who was a very troublesome man, became entirely separated and the father and the other sons continued to live in the old dwelling-house. I would further note that mutation of names did not take place till the death of not only Naurang Singh, but also that of Dirgbijai Singh. On the death of these two men, the property that was held in the family excepting the property given to Jaikaran Singh, was divided into four equal shares according to the terms of the deed of partition, which is expressly quoted as a deed of partition and Manraj Kunwar's name was recorded where Dirgbijai Singh's name would have been recorded had he been alive : vide p. 82, para. 3 : It is true that in that very application the surviving brothers of Dirgbijai Singh said that they wanted to have the name of Manraj Kunwar recorded "simply in order to please her," but, as a matter of law, any statement made by a party cannot be evidence in his favour. The fact remains that Manraj Kunwar's name was recorded. The further fact is established that during the course of this mutation, the name of Daulat Kuar, the mother was recorded with respect to the village of Charibund as contemplated in the deed of partition, and further on her death, the names of the four surviving sons and that of Manraj Kunwar were recorded over this property on the death of Daulat Kuar. Manraj Kunwar was therefore allowed to have that share which would have fallen to her husband if he had been living. These facts and the fact recited in the plaint of 1914, namely, Manraj Kunwar had been suing for recovery of arrears of rent, for ejectment of tenants, and had applied for partition, all go to indicate that Manraj Kunwar did exercise possession over her husband's share. But when all is told, the fact remains, that we have not got any clear evidence as to what happened between the date of the deed of partition and the deaths of Naurang and Dirgbijai Singh which followed in quick succession. In my opinion, we have to decide the case on a proper construction and on a consideration of the legal effects of the deed of partition. If the deed of partition effected a separation among the sons inter se, the mere fact that the share of Dirgbijai Singh was not separated by metes and bounds will not, in my opinion affect the status of the family, if it had been, as a matter of law, split up by the deed of partition,

Dr. Katju has argued that the father in his lifetime was competent, under the Hindu Law, to effect a separation in the family and he has quoted from the Mitakshara : see Ch. 1, S. 3, Colebrooke's Translation). The original text has also been put before us. Yajnavalkya says that if and when a father wants a partition, he may divide the sons. For this purpose, he may give the eldest son the largest share or he may divide the inheritance among the sons, equally. Mr. Peare Lal Banerji on behalf of the respondents had relied on the commentary of Vigyaneshar where he says that the father may separate the sons "from him-

self." His argument is that the provision as to partition by the father made by Yajnavalkya relates only to the father who has separated himself from the sons and does not relate to a separation of the sons, inter se. This interpretation, however, is not commendable. The second sentence in the sloka mentions unequal divisions among sons and this alone is sufficient to indicate that the sons could also be divided among themselves. In *Kandasami* v. *Doraisami Ayyar* (4) the same interpretation was put on the same text by that eminent Judge, Muttusami Ayyar. Again, Mr. Banerji has argued that where a father is authorized to make equal division among the sons he has to give his wives a share equal to that of the sons: see Ch. 1, S. 3. para. 9, Colebrooke's Translation. It is urged that where, as in this case, the father has not given a share to his wife equal to that of the sons, it must be held that the partition by the father was illegal and cannot be upheld. This interpretation is hardly correct. It might be that the wife could claim an equal share with her sons, but it was really for her and her alone to say whether she has not been fairly treated. I have no doubt that under the Hindu Law a father has a right to divide up the family at any moment he likes, provided he gives his sons equal shares with himself.

Then it remains to see whether this intention of the father has been carried out by the language employed by him. I have no hesitation in coming to the conclusion that this intention has been effectually carried out. I have already quoted from the text of the deed and have pointed out that the father mentioned that there was a dispute among the sons and he wanted the separation of the sons.

The apprehension that, on the death of the father disputes might arise, among all the five sons, was one of the reasons for the execution of the deed and was one of the motives why Naurang should separate the sons and also himself. Reading the document as a whole I have not the least doubt that the father did separate himself and did divide up the five sons by giving each an equal share and thenceforward the family became a separated family.

(4) [1879] 2 Mad. 317.

On behalf of the respondents it has been urged that the provision in the deed of partition that if one of the sons died issueless, his widow should get only maintenance indicated that the father did not contemplate a division among his four sons other than Jaikaran. It is further urged that the words "if any of the four sons who are joint" also indicated the father's intention not to separate these sons. It is sufficient to say that by this provision the father wanted to do which he had no authority in law to do. At the date of the execution of the deed the sons were, in fact, joint with the father and it was by operation of the deed itself that separation in law was brought about. If, therefore, on 7th January 1893, the father said that the four sons were joint he did not necessarily imply that the sons were to continue joint after the execution of the deed. Then it was only in the case of one of the four sons (other than Jaikaran) dying issueless that the rule was to come into operation. The word "la aulad" in vernacular means "issueless" or without any son or daughter. That this is the popular meaning of the words "la aulad" is not denied. Although "wald" means a son the plural form "Aulad" means sons and daughters. To satisfy myself further on the point I consulted Richardson's and Far Hang Asfiaya dictionaries and both say that the word "aulad" means "issues" and is sons and daughters. The counsel for the respondents could not cite any authority to show that the meaning given in these two dictionaries was, in any way incorrect. That being the case, the desire of Naurang Singh was that only in the case of a son dying without a daughter or a son, the widow was to get nothing in the way of maintenance and some pocket money. This was neither a rule applicable to a joint Hindu family nor to a separated family.

It must be clear that Naurang had his own ideas about the proper rule of inheritance and he tried to impose it on his sons. This being beyond his power the provision becomes ineffective. Again the provision that the sons were to lose their properties, under certain contingencies, was beyond his competence. As I have said, reading the document as a whole, I am satisfied that the family was split up and at the date of his death

Dirgabijai Singh was a separated Hindu, in law, if also not in fact.

The result of my findings, on the above issues, is that the suit of the plaintiff, Nirman Bahadur Singh, ought to succeed and I would grant him a declaration that the compromise entered into by Manraj Kunwar in the Suit No. 196 of 1914 and the decree that followed is not binding on the reversioner who may succeed on the death of Manraj Kunwar. I would further allow the plaintiff his costs both in this Court and in the Court below.

Niamatullah, J.—I took time to consider the various questions which arise for decision in this case, and have since had the advantage of reading the judgment of my learned colleague, with whose conclusions I find myself in agreement. The most important question in the case is the one relating to the interpretation of the deed of partition dated 7th January 1893, by which Naurang Singh purported to divide his property among his sons, reserving part of it for himself. The deed was probably drawn up by a layman not conversant with the intricacies of Hindu Law relating to joint family property, and hence the difficulty in arriving at a definite conclusion regarding the intention of Naurang Singh as to whether he desired all his sons to separate from one another. Reading the deed as a whole, I am of opinion that Naurang Singh intended a complete disruption of his family, each son of his holding in severalty what he allotted to him. The predominant motive stated in the preamble of the deed for executing it is to remove all chance of friction between any two members of his family, after his death. The deed recites :

"In order to remove disputes for ever I think it proper to partition during my lifetime the said property among my heirs, and it is necessary as well as my duty to partition the said property during my lifetime among my heirs, so that after my death there might arise no dispute of any kind among all the five sons of mine about the moveable or immovable property left by me. Therefore, I..... divide my muafi, ancestral and self-acquired property..... as well as the debts due by me, as specified below, among all the five sons of mine mentioned above and put each of them in possession of everything which each has got by virtue of the partition. None of my sons have or shall have right or power to interfere with anybody contrary to the partition made by me."

And again :

"Each of my sons shall enter into possession of the property partitioned by me and pay Government revenue, consider the property to belong to them for ever and remain in possession and enjoy it generation after generation. Each of my sons shall get my name removed from the pattidari khewat against the share partitioned, and get his name entered ; otherwise I shall do so."

The residential house was given to four of his sons, the fifth, Jai Karan Singh, being otherwise compensated. The total debt, amounting to Rs. 2,000, was distributed among the five sons, the share of each being specified as one-fifth. The properties specified at foot of the deed were distributed among the five sons. Those allotted to Jai Karan Singh are shares in villages in which no interest was reserved for himself or for any of the other sons. The remaining four sons were given one-fourth share each in a number of villages, that is, they were to hold those villages or shares therein as tenants-in-common in specified shares. It is significant that the distribution of shares among the five sons was made by a tabular statement with five columns, one headed by the name of each son whose share is separately specified in his column. If there had been nothing else in the deed, no question could have arisen as regards the intention of Naurang Singh as to whether he intended his sons other than Jai Karan Singh to continue as members of a joint Hindu family or to be separate from one another. A clause added towards the end of the deed has, however, created some difficulty. It provides that :

"If any of the four sons, who are joint, dies childless and leaves his widow, she shall get Rs. 100 yearly in addition to raiment expenses. She shall have nothing to do with the property. If any of the four sons inherits any other property, he shall be deprived of the ancestral property. The remaining three sons shall divide his property among themselves."

It is argued that this clause indicates a desire on the part of Naurang Singh to treat his four sons as joint and to make the rule of survivorship applicable to them. This reading of the clause makes it in direct conflict with other parts of the deed already referred to. If it is possible to adopt a construction which harmonises it with the rest of the deed without violating the language used in it, such construction is to be preferred. The clause does not, in my opinion, provide a rule of survivorship to apply to the four sons, but imposes a condition

which confers a contingent interest on each of the four sons in the property allotted to any other of them. In other words, it lays down that if any of his four sons dies childless, his share would devolve on his brothers other than Jai Karan Singh. The contigency contemplated by the clause has not happened, as Dirgbijai Singh did not die childless, having left a daughter. The expressions used in the deed is "be aulad," which has been correctly translated as "childless." The object of Naurang Singh evidently was to exclude Jai Karan Singh's line from inheriting any part of the property allotted to the other sons. The condition is of the same nature as another which follows it, namely, that if any of the four sons goes out to another family, having inherited the estate of someone whose place he occupies as regards residence, enjoyment of property etc., he would forfeit his ancestral estate. It is not necessary to decide how far these conditions could have been validly imposed by the father in dividing the family property among his sons. They are in the nature of defeasance of the estate granted to each of the four sons on the happening of a contingency; and, as already stated, no contingency contemplated by the clause has happened. It has not been argued before us, nor was it a case made in the pleadings, that the respondents' claim is based on the first condition. The clause in question was relied on as throwing a light on the intention of Naurang Singh regarding the continued jointness or separation among his sons other than Jai Karan Singh. Construing the deed with the condition aforesaid, I am of opinion that it does not in any way detract from the clearly declared intention to be gathered from other parts of the deed already adverted to that the four sons should hold the family estate in severalty.

None of the sons took any exception to the partition made by the father either as regards the allotments of the severance of their respective interests. On the contrary, their conduct in course of the mutation proceedings, which took place in 1826, clearly establishes that they had agreed to what had been done by their father in executing the deed of partition, dated 7th January 1893. The name of Naurang Singh continued to be recorded in the revenue registers till his death and thereafter till after the death of Drigbijai Singh who died a few months after Naurang Singh. The patwari made a report for entry of the name of Jai Karan Singh along with those of the other three brothers, Drigbijai Singh having died. To this the three brothers objected, relying on the clause which entitled them to succeed to the interest of their deceased brother Drigbijai Singh. They, however, consented to the name of his widow, being entered "simply in order to please her." It is significant that they did not allege any jointness between Drigbijai Singh and themselves and did not rely upon the rule of survivorship as entitling them to succeed to the interests of the deceased. They relied solely on the condition occurring in the deed of partition which has been already discussed and which entitled each of the four brothers to succeed to the estate of any other of them on his dying childless. Apparently, they regarded Drigbijai Singh to have died "be aulad," taking that expression to mean sonless.

By a mortgage deed, dated 26th May 1911, Fateh Bahadur Singh, one of the defendants-respondents, mortgaged some shares allotted to him by the deed of partition. Though the deed of partition is not referred to, the shares hypothecated are identical with those given to him in those villages by that deed. Similarly, Raghuraj Singh, another defendant-respondent, mortgaged his two anna share in village Semra out of the four anna share allotted to him by the deed.

The evidence adduced on behalf of the defendants, no doubt, tends to show that, after the deed of partition, Naurang Singh and his four sons lived in the same house and had joint mess. As regards Naurang Singh, there can be no manner of doubt that he became separate from all his sons, inasmuch as the deed provides, in clear terms, that he reserved to himself an eight-anna share in village Chari Bandh, which, he declared, would devolve on his widow for life and thereafter on his five sons in equal shares. If jointness and common residence was consistent with Naurang Singh being a separate member of the family, there is no reason why the same consideration should not apply to the case of his sons other than Jai Karan

Singh. Consistently with the object stated in the deed, no jointness of any kind in the property was left, though it might have suited to the convenience of Naurang Singh and the four sons, some of whom were young, to have joint mess and residence. It is the case of the defendants-respondents that the four sons or their descendants have been separate in all respects for about 12 years before the institution of the suit and that the shares allotted by the deed of partition are held by each as his separate property. For these reasons, I hold, in agreement with my learned colleague, that Drigbijai Singh died a separated member of the family.

In view of the finding arrived at by me, it is not necessary to decide the question whether a father can not only divide the family property among his sons a power which he undoubtedly has : see *Kandasami* v. *Doraisami Ayyar* (4) and the authorities discused there, but also to declare effectively that each of his sons is to enjoy the property allotted to him as a separated member, regardless of the wishes of the sons in that behalf. In my opinion, it is a moot question whether the father's power extends to putting an end to the jointness among his sons, so as to preclude the application of the rule of survivorship, even though the sons otherwise desire. The sons may not be competent to object to a fair division of the family property being made by their father ; but it may be that they prefer to enjoy the property alloted to them in a state of commensality, specially where no division by metes and bounds has been made by the father, who merely defines the share of each. In such a case, if the sons, or some of them, refuse to separate from one another, accepting the property allotted to them by the father, the question may arise whether it is a case of continued jointness or reunion. I am not called upon to consider this aspect of the case, as I have found that none of the sons objected to the father's action in separation of all his sons from one another. On the contrary, as shown already, they acquiesced in the arrangement made by Naurang Singh, and acted upon it.

As regards the effect of the compromise, I am not prepared to go so far as to hold that in no circumstances can a Hindu widow enter into a compromise, the effect of which is to declare her husband to have been a member of joint Hindu family whose interests devolved by survivorship on the other members to the entire exclusion of the widow as an heir. I am, however, of opinion that the compromise dated 18th May 1916, between Mt. Manraj Kuari on the one hand and her husband's brothers, Fateh Bahadur Singh and others, on the other, is not binding on the appellant, because it has not been established to my satisfaction that Mt. Manraj Kuari, a pardahnashin lady, entered into it with full appreciation of the circumstances relating to her husband's interests in the family property. There is no evidence to show that she had any competent legal advice as regards her position after her husband's death.

The effect of the deed of partition, specially the condition which makes the property of one of the four sons descendible on the rest of them in case the former dies childless (be aulad), should have been properly comprehended by her before she could judge of the fairness or otherwise of the compromise into which she entered. The deed is so drawn up as to make it difficult for her to understand her position regarding her husband's property and to realise for herself the chances of her success in case the litigation between her husband's property and herself were carried on to a conclusion. If, after fully understanding the doubtful character of the deed of partition, she enters into a fair compromise to avoid litigation, the reversioners may be bound by her action The fact that she completely abandoned all contest to the claim put forward by her husband's brothers is a clear indication that she thought or was given to understand that their claim was unanswerable. If she had any competent advice in the matter and the real character of the deed of partition had been explained to her, I have little doubt that she would never have agreed to a compromise on extremely unfavourable terms, by forgoing the entire estate of her husband for herself and all the reversioners of her husband. It is true her story as regards the circumstances under which she was persuaded to enter into the compromise

cannot be believed ; but it was for the defendants respondents, who relied on the compromise, to establish the circumstances giving rise to the inference that the compromise was the result of a bona fide settlement, agreed to by the lady to avoid litigation and reasonably believed to be fair and proper. The only direct evidence is that of the defendant Bankey Singh. It does not, however, indicate any attempt having been made to bring home to her the effect of the compromise, dated 7th January 1893 and her rights thereunder as to which she was under a complete misapprehension. The only persons who, according to Bankey Singh had access to her and who could have advised her were her mukhtar, Sheo Narain Pande, since deceased, and Gijraj Singh, a relative of her daughter's husband. How far these people themselves understood the effect of the deed of partition and the lady's chances of success in case the litigation was carried on to the end does not appear. It may be that the terms of the compromise itself were fully understood by them and by the lady ; but under the circumstances of the case I think it was not enough to make it binding on the lady or the reversionary heirs. For these reasons, I hold that the compromise in question does not stand in the way of the plaintiff-appellant obtaining the relief claimed by him.

On the question of limitation, I am in entire agreement with my learned colleague, and have nothing to add.

In view of the findings noted above I concur in allowing the appeal with costs.

R.M./R.K. *Appeal allowed.*

A. I. R. 1929 Allahabad 972

BENNET, J.

Ali Mohammad — Defendant—Appellant.

v.

Manna Lal—Plaintiff—Respondent.

Second Appeal No. 1966 of 1927, Decided on 10th April 1929, against decree of First Sub-Judge, Cawnpore, D/- 31st May 1927.

Tort—Defamation— Privilege — Application containing defamatory statement to civil Court asking to send certain papers to arbitrators in suit in which he is party—Occasion on which defamatory statement is made is absolutely privileged.

A defamatory statement was contained in an application which was made by a person to a civil Court, asking that certain papers should be sent to arbitrators in a suit in which the applicant was a party.

Held: that the application being made in a judicial proceeding the occasion on which the statement was made was absolutely privileged: 40 *All.* 341 (*F.B.*), *Rel. on.*; *A. I. R.* 1924 *All.* 445 and *A. I. R.* 1924 *All.* 535, *Dist.*; *A. I. R.* 1924 *All.* 800; 7 *All.* 107 and 11 *A.L.J.* 193, *Ref.* and 65 *I. C.* 204, *not Foll.* (*English cases referred*). [P 973 C 2]

Zahur Ahmad and *S. Majid Ali*—for Appellant.

R. C. Ghatak—for Respondent.

Judgment.—This is a second appeal by the defendant against whom the lower appellate Court has granted a decree for Rs. 200 for defamation. The defamation in question was contained in an application which was made by the appellant to a civil Court, asking that certain papers should be sent to arbitrators in a suit in which the appellant was a party, but the respondent was not a party. The passage in question is as follows:

"The plaintiff (viz., Beni Prasad the plaintiff in suit No. 1001 of 1925) has a regular gang. The plaintiff is a great forgerer, liar and a clever man, and Bala Prasad, Parbhu Dial and Manna Lal (the plaintiff in this suit) are included in that gang which is responsible for producing many forged pronotes charging others with liability and which has filed many false suits against others and has made illegal gain in this way."

In second appeal the only question raised is whether the occasion on which thie statement was made was or was not an occasion of absolute privilege. Various rulings have been produced and for the respondent the earlier rulings of the Allahabad High Court such as *Radha Prosad* v. *Bhajan Rai* (1) and *Balu Parshad* v. *Mudamal* (2), lay down that before it can be decided whether a statement made by a witness or in a pleading amounts to defamation, it has to be considered whether that statement was relevant to the enquiry in which the evidence was given or statement was made. It has also been held all along by the Calcutta High Court in *Dhiro Koch* v *Gobinda Dev* (3), and other rulings that a defamatory statement made by the parties to a suit in pleadings is not absolutely privileged. There is no doubt

(1) [1885] 7 All. 677=(1885) A. W. N. 202.
(2) [1913] 11 A. L. J, 193=18 I. C. 331.
(3) [1921] 65 I. C. 204.

that in England such statements are absolutely privileged. Halsbury's Laws of England, Vol. 18, p. 678, para. 1253, lays down that there is an absolute privilege for parties, witnesses, counsel, jury or Judge in regard to words spoken in office; and this privilege extends to statements in affidavits made by parties or witnesses as has been held in *Seman* v. *Metherclift* (4); *Astley* v. *Younge* (5) and *Kennedy* v. *Hilliard* (6). High Courts in India have, however, differed in their opinion on whether the English rule of absolute privilege should be applied to judicial proceedings, or whether S. 498, I. P. C., which made a modification in the criminal law should be considered to have made an alteration by implication in the civil law in regard to libel. This question was fully considered by a Full Bench of the Allahabad High Court in the year 1918: *Chunni Lal* v. *Narsingh Das* (7). On p. 371 (of 16 *A. L. J.*) of that ruling the Full Bench laid down that it would not accept the view that the introduction of the Penal Code had made an alteration in the civil law, on this point. At p. 371 (of 16 *A. L. J.*) it is stated:

"In this instance we consider that what is sound public policy in England is equally sound policy in India and that the rule of English Law is in accordance with the principles of justice, equity and good conscience . . . . . we cannot agree with the decision of the Calcutta High Court in *Angada Ram Shaha* v. *Nimai Chand Shaha* (8). It appears to be based upon the assumption that there was no law of defamation in India before the Penal Code. This is not the case for there are reported decisions on the subject in this province as far back as 1852. Moreover the learned Judges applied the test of the criminal law to the civil law whereas we hold that the two are independent of each other."

And finally it was held :

"We, therefore, hold that defamatory words used on such an occasion as is alleged by the plaintiff in this suit are not actionable on the ground of absolute privilege and that the present suit fails."

It is true that in the case before the Full Bench the defamatory matter was made in a petition presented to a criminal Court whereas in the present case the petition was presented to a civil Court. But I consider that although the language in the Full Bench ruling is somewhat guarded, the intention would be to apply the principles of English law in a case like the present which is also a case of an application in a judicial proceeding. There are no rulings of this Court to the contrary subsequent to this Full Bench rulings of 1918. For the respondent reference was made to *Bindeshwari Prasad* v. *Hanuman Prasad* (9), but that was not a statement in a judicial proceeding; on the contrary it was an oral statement made to a Sub-Divisional Officer on tour. Reference was also made to *Majju* v. *Lachman Prasad* (10) which was merely a police report. I consider, therefore, that I am bound to follow the principle of the Full Bench in *Chunni Lal* v. *Narsingh Das* (7) and hold that the present action was one of absolute privilege. One further argument was made on behalf of the respondent to the effect that the Court was not endowed with jurisdiction at the time to decide the suit. That suit had been referred to arbitration. No doubt *Aftab Begam* v. *Abdul Majid Khan* (11) lays down that arbitration ousts the jurisdiction of a Court except for the purpose of controlling the arbitrators, but the present application was one to send papers to the arbitrators, and, therefore, it was an application with which the Court could deal. I consider that as the case is one of absolute privilege, the lower appellate Court was wrong in granting a decree for damages for defamation to the plaintiff. Accordingly I allow this second appeal and dismiss the suit of the plaintiff for damages. In view of the fact that the statements have been found to be defamatory and that the defendant failed to prove his plea of jurisdiction, I consider that it will be equitable to order that each side should pay their own costs throughout.

P.N./R.K. *Appeal allowed.*

(4) [1877] 2 C. P. D. 53=25 W. R. 159=35 L. T. 784=46 L. J. C. P. 128.
(5) [1759] 20 Burr, 807=2 Ld. Ken. 536=97 E. R. 572.
(6) [1860] 10 C. L. R. 195=1 L. T. 578.
(7) [1918] 40 All. 341=45 I. C. 540=16 A. L. J. 360 (F.B.).
(8) [1896] 23 Cal. 867.
(9) A. I. R. 1924 All. 445.
(10) A. I. R. 1924 All. 535=46 All. 671.
(11) A. I. R. 1924 All. 800.

A. I. R. 1929 Allahabad 974

MUKERJI AND NIAMATULLAH, JJ.

Thakurji Maharaj and *others*—Plaintiffs—Appellants.

v.

Kamta Prasad and *others*—Defendants—Respondents.

First Appeal No 305 of 1926, Decided on 8th July 1929, from decree of Sub-Judge, Budaun, D/- 29th March 1926.

(a) Specific Relief Act, S. 42, Proviso— (Per Mukerji, J.) **Suit for mere declaration that idols are owners of certain property —Consequential relief as to appointment of trustees, etc., not prayed for—Suit is barred.** (Niamatullah, J. contra.)

Where plaintiffs pray for a mere declaration that two idols are the owners of the property in dispute, while they should in fact ask for the appointment of trustees, the formulation of a scheme for management and recovery of property from people who have committed breach of trust, the suit is barred under S. 42, proviso. All these things cannot be relegated to a second suit. It is exactly for the purpose of avoiding the evils of second suit that that proviso of S. 42 has been enacted. [P 975 C 2]

(b) Specific Relief Act, S. 42, Proviso—Plaintiff should be able to obtain consequential relief on date of suit.

Per Niamatullah, J.—The proviso applies to cases where at the date of the suit the plaintiff is able to obtain consequential relief and not in cases where by taking certain other proceedings the plaintiff will in future be in a position to seek such relief. It may be that the Court should, in the exercise of its discretion, refuse to grant a mere declaration if the plaintiff, though not entitled to claim possession at the date of the suit, can by taking proper proceedings more effectively vindicate his right by obtaining possession. [P 977 C 1]

Rama Kant Malaviya—for Appellants.

K. N. Katju and *Gopi Nath Kunzru*—for Respondents.

Mukerji, J.—This is an appeal by two idols Sri Thakurji Maharaj and Sri Mahadeoji Maharaj through two of three persons who originally instituted the suit on behalf of the two idols. The Court below found that plaintiff 3 Sri Ram had not signed the plaint and thought that, on that account, he could not maintain the suit. Sri Ram has been made a pro forma respondent, in the appeal.

The plaintiffs' case was as follows: The two sons of Saheb Rai: see genealogical table at p. 3 of the printed record, namely, Baldeo Prasad and Har Dayal created a wakf in favour of the two idols and, for the purposes of their worship and certain charitable purposes and for the performance of Ramlila, endowed the property in village Hasanpur Huryai. This was on 10th September 1866. On the death of the dedicators his descendants, who were the defendants in the suit, carried on the objects of the trust, although they got their own names recorded in the village papers as the proprietors of the property endowed. During the last settlement these descendants of the dedicators did not admit the existence of the wakf. Shortly before the institution of the suit defendant 6 Mt. Mehda, having obtained a decree for money against some of the other defendants, proceeded to attach and to bring to sale a part of the wakf property, as the private property of her judgment-debtors. The two persons Mul Chand and Mata Din, who belonged to the same caste as the dedicators, brought the suit on behalf of the idols to obtain a declaration that the idols are the owners of the property, that the profits arising out of the property are meant to be spent over charitable objects, Ramlila, etc., and that the property is not liable to be attached and sold in execution of the decree.

The defendants contested the suit, but some of them, later on, by a petition made in the Court below, admitted the correctness of the claim: see pp. 12 and 13 of the record. The contesting defendants pleaded, inter alia, that Mul Chand and Mata Din (as also Sri Ram) had no connexion with the trust property, (which the plaintiffs described as a private trust) and were, therefore, incompetent to maintain the suit, that the trust was of a public nature that the suit wat barred by S. 92, Civil P. C. and that the plaintiffs, being out of possession, could not maintain a suit for a pure declaration and the suit was barred by S. 42, Specific Relief Act. They denied the existence of the wakf.

The learned Subordinate Judge held that the wakf, as indicated by the award printed at p. 59 of the record and dated 15th September 1866, was of a public charitable nature, that only two persons namely Baldeo Prasad and Har Dayal having created the wakf: see para. 3 of the plaint, and they having joint sons living with them, were incompetent to make a valid wakf and the wakf was

never put into force. As regards the competence of the persons Mul Chand and Matadin to maintain the suit the learned Judge was of opinion that they could maintain it. He also held that S. 42, Specific Relief Act, was no bar to the maintenance of the suit. In the result, the suit was dismissed with costs. As regards the defendants who admitted the claim, the learned Judge held that they were not entitled to any costs.

In this Court it has been contended that the consent of the sons of Baldeo Prasad and Har Dayal to the creation of the wakf has been proved, that the learned Judge was wrong in holding that the wakf had not been enforced and that in any case the suit should have been decreed against such of the defendants as admitted the claim.

On behalf of the respondents it has been contended that Mul Chand and Mata Din have no locus standi to maintain the suit, that at any rate, the suit is barred by S. 42, Specific Relief Act, and that the decision of the Court below is right on the merits.

The learned counsel for the appellant has agreed with the Court below that the alleged wakf was, in its nature, a public and charitable one.

I am of opinion that the suit must fail on the ground that it is barred by S. 42, Specific Relief Act and, in this view, it is not necessary to decide whether Mul Chand and Mata Din could maintain the suit on behalf of the idols, they being neither shebaits nor being, in any way, entrusted with the management of the idols' property. I do not also propose to enter into the merits of the case, as anything said on that point would only amount to an obiter dictum.

I have already given a summary of the plaintiffs' case. It is common ground that the names of the descendants of Baldeo Prasad and Har Dayal are recorded in the village papers as proprietors. It is stated in the plaint that the defendants denied the existence of the wakf at the last settlement and that one of the defendants sought the sale of the share of some of the other defendants in execution of her decree. In the circumstances, a mere declaratory decree granted in favour of the idols would be of no use. The property in spite of the declaration would still remain in the hands of the defendants. They have already denied the existence of the wakf. The fact that four of the defendants admitted the correctness of the alleged wakf during the pendency of the suit will not make the entire property a wakf. The property cannot be divided up as partly wakf and partly not wakf. It follows therefore that the appellants' contention that the suit should have been decreed at least as against those persons who admitted the wakf has no force. What would be necessary in the circumstances of the case—accepting that the plaintiffs' case is true—is the appointment of a trustee or trustees and the formulation of a scheme for management and recovery of property from people who have committed the breach of trust. All these things connot be relegated to a second suit. There should be one suit and, as far as possible, a complete suit for the adjudication of such matters as may be adjudicated in one suit properly filed.

Mr. Malaviya has urged that if we decree the claim it would still be open for him to bring a second suit for the purposes indicated above. But it is exactly for the purpose of avoiding the evils of a second suit that the proviso of S. 42, Specific Relief Act, has been enacted. No one has a right to vex another in respect of the same subject matter of litigation, if one suit would serve the purpose.

Being of opinion that the suit is not maintainable in view of the proviso of S. 42, Specific Relief Act, I would maintain the decree of the Court below and dismiss the appeal with costs.

Niamatullah, J.—The plaintiffs are two idols, Sri Thakurji Maharaj and Sri Mahadeoji Maharaj, installed in a temple in village Jagat, district Budaun. The suit, out of which this appeal has arisen, was brought in the names of the aforesaid idols through Mul Chand and Mata Din, who do not claim to be the trustees or managers in respect of the property which is the subject matter of the suit. The plaint does not disclose the position of these individuals with reference to the alleged dedicated property or to the temple in which the plaintiff idols are worshipped. At best, they are interested as ordinary Hindus who are anxious for the maintenance of the worship of the idols in the particular temple and are themselves regular

or occasional worshippers therein but the suit is not one in which relief is claimed by a worshipper for himself or for himself and others.

The relief claimed is a declaration of the plaintiffs' (idols') right to the property, which consists of certain shares in zamindari villages alleged to have been dedicated by Baldeo Prasad and Har Dayal, the ancestors of some of the defendants, several of whom, according to the plaint, repudiate the endowment and all of whom are recorded as proprietors thereof. According to the plaintiffs, the income derived from the property in dispute has all along been devoted to the performance of certain religious ceremonies and on charitable objects alleged in the plaint. No consequential relief of possession or in any other form is claimed. What immediately necessitated the institution of the suit is said to be a threatened sale of the endowed property in execution of a certain decree obtained by defendant 6 against defendants 1 to 4 and father of defendant 5.

The suit was contested by a number of defendants who denied the endowment and set up their own personal rights in the property in dispute. They questioned the right of the plaintiffs to sue through Mul Chand and Mata Din, and pleaded that the plaintiffs not being in possession are not entitled to a mere declaratory relief.

The learned Subordinate Judge who dismissed the suit held (1) that the endowment set up by the plaintiffs has been established, (2) that the plaintiffs are entitled to sue and (3) that Har Dayal and Baldeo, who dedicated the property in dispute, were not competent to do so and (4) that the dedication was not given effect to.

On appeal all the questions enumerated above were argued by the parties. The learned Subordinate Judge has found that the endowment in question in the case is a public trust of a religious and charitable nature. This finding has not been impugned by the plaintiffs-appellants though they had originally alleged it to be one of a private nature. Whether the plaintiffs-appellants are entitled to sue to at all cannot be seriously questioned. An idol has been repeatedly held to be a juridical person entitled to sue in its own name. This, however, is only a fiction of law, and the suit has to be brought through some human agency. The property vested in an idol must of necessity be in possession of the shebait, and though in certain circumstances persons other than shebait can maintain a suit in the name of the idol for a declaratory relief against the shebait or other who may be found infringing the rights of the idols in whom the property is vested the possession of the property itself and management thereof cannot be claimed by a person who is not shebait or the recognized manager of such property. In *Jagindra Nath Roy* v. *Hemanta Kumari Debi* (1), their Lordships of the Judicial Committee have laid down that :

"there is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law."

And again, that :

"assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs to the shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol."

Suits are frequently permitted to be brought in the names of idols by shebaits, and are held to be maintainable: see, for example, *Ranga Charya* v. *Reoti Raman Achary* (2), and the cases cited therein. Suits have also been permitted to be brought by persons other than shebaits for certain declaratory reliefs: see, for instance *V. Ramaswamy* v. *S. Pitchayya* (3). Others have been held to be not maintainable, having been brought by persons such as mere servants of worshippers : see, for instance, *Dhadpale* v. *Gurav* (4). Where, therefore, a suit is brought by a person other than the shebait in his own name or in the names of the idol, it will depend on the circumstances and the alleged cause of action whether the plaintiff is competent to sue for the relief claimed by him. It is, however, not permissible for a person other than the shebait to claim possession and management of the endowed property, which exclusively

(1) [1905] 32 Cal. 129=31 I. A. 203=8 C. W. N. 809 (P.C.).
(2) A. I. R. 1928 All. 689.
(3) [1920] 43 Mad. 410=38 M. L. J. 226=58 I. C. 585=(1920) M. W. N. 393.
(4) [1881] 6 Bom. 122.

belonged to a propely constituted s hebait.

In the case before us, it is common ground that no shebait or legally constituted manager is in existence. Mul Chand and Mata Din do not claim to be such. As has already been stated, none of the defendants is alleged to be shebait or manager, or accepts the responsibility of that position. It is therefore pre-eminently a fit case in which the interests of the idols as regards the property alleged to be vested in them should be protected by the proper appointment of a shebait, manager or trustee, who will be entitled to the actual possession and management of the property and to carry out the objects for which the property had been originally dedicated, if at all. The relief of mere declaration if granted to the plaintiffs suing through Mul Chand and Mata Din assuming they are entitled to sue in the names of idols will be absolutely futile. They cannot obtain possession of the alleged endowed property and carry out the objects of the endowment. To achieve this end they will have to obtain the appointment of a shebait, manager or trustee even if a declaration of right be made a sprayed.

I regret I am unable to agree with my learned colleague in holding that the plaintiffs' suit is barred by the proviso of S. 42, Specific Relief Act, which lays down that the Court shall not make a declaration in favour of a plaintiff who is able to seek further relief than a mere declaration of title and who omits to do so. The idols, situated as they are at present and in the absence of a duly appointed manager, are not able to seek the relief of possession. The proviso, in my opinion, applies to cases where, at the date of suit, the plaintiff is able to obtain consequential relief, and not in cases where, by taking certain other proceedings, the plaintiff will in future, be in a position to seek such relief. It may be that the Court should, in the exercise of its discretion, refuse to grant a mere declaration if the plaintiff, though not entitled to claim possession at the date of suit can by taking proper proceedings, more effectively vindicate his right by obtaining possession. I think the case before us is one in which a mere declaratory relief will not serve any useful purpose and the plaintiffs can effectively enforce their rights by obtaining appointment of a trustee under S. 92, Civil P. C., if it is a case of religious or charitable trust of public nature, or by other appropriate legal proceedings, if it is a trust of a private character.

For the reasons stated above, I would maintain the decree passed by the Court below on the ground that the circumstances of the case do not warrant the Court, in the exercise of its discretion to grant the declaration prayed for by the plaintiffs-appellants, assuming they are entitled to sue through Mul Chand and Mata Din and assuming the property in dispute is dedicated property as alleged by them or as found by the Court below. In this view of the case it is unnecessary to decide the questions that have been raised by the pleadings of the parties and decided by the Court below. I, therefore, concur with my learned colleague in dismissing the appeal with costs.

By the Court.—The appeal fails and is hereby dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Allahabad 977

Full Bench

SULAIMAN, AG. C. J. AND MUKERJI AND KING, JJ.

Riazuddin—Plaintiff—Appellant.

v.

Mt. Phula Devi and *another* — Defendants—Respondents.

First Appeals Nos. 511 and 512 of 1926, Decided on 22nd October 1929, against decree of Addl. Dist. Judge, Moradabad, D/- 15th May 1926.

(a) Agra Tenancy Act (1926), S. 5 — S. 5 lays down rule to determine whether right of pre-emption exists in mahal.

The object of S. 5 is to lay down a rule to determine whether a right of pre-emption exists in an existing mahal or village. Once such a right is presumed to exist the question as to its nature and extent is not to be determined by S. 5 at all but we have to look to sections like 11 and 12 for that purpose. [P 978 C 2]

(b) Agra Tenancy Act (1926), Ss. 5, 11 and 12—Mahal.

The word, 'mahal' in Ss. 5 (1), 11 and 12 applies to existiug mahals. [P 980 C 1]

(c) Agra Tenancy Act, Ss. 5, 11 and 12—Where there is wajib-ul-arz containing mention of right of pre-emption applicable to portion of mahal, right of pre-emption.

should be deemed to exist throughout whole mahal.

If in any mahal, as to which a question of right of pre-emption has arisen, there be found to exist a wajib-ul-arz which contains a mention of pre-emption, applicable to any portion of the mahal by virtue of the rules enacted by legislature, a right of pre-emption should be deemed to exist throughout the whole mahal and not only in that portion which has come from the original mahal containing such a record. To confine a right of pre-emption to a specified area is contrary to the intention of legislature as is to be gathered from the provisions of Ss. 11 and 12. S. 11 provides that where any proprietary interest in land forming part of any mahal or village in which a right of pre-emption is sold a right of pre-emption shall accrue. Where therefore proprietary interest in land forming part of a mahal is sold the right of pre-emption must be deemed to exist in the whole mahal by virtue of S. 5. A mahal is a complete fiscal unit and for the purposes of the existence of the right of pre-emption the Act refers to mahals or villages and does not refer to portions of mahals or villages. [P 979 C 1]

(d) Interpretation of Statutes—Same meaning should be given to same word in different parts of enactment.

According to ordinary rule of construction the same meaning should be given to the same word in different parts of the same enactment unless context compels to give a different meaning. [P 980 C 1]

Iqbal Ahmad and *B. Malik* — for Appellant.

P. L. Banerji and *Panna Lal* — for Respondents.

Sulaiman, Ag. C. J.—The facts are set forth in the order of reference. The main question to be decided is whether when an existing mahal contains portions of earlier mahals the wajibularzes of some of which contain entries recording a right of pre-emption and of the others do not, a right can be presumed to exist in respect of the whole of the existing mahal or in respect of only that portion of it which has come out of the original mahals containing such a record or whether a right has entirely ceased to exist.

Unfortunately there is no section in the Act expressly referring to the case of union of mahals. The answer to the question referred has to be given on an examination of the language of the sections as they stand.

Section 5 provides that a right of pre-emption shall be deemed to exist only in mahals in respect of which any wajibularz prepared prior to the Act records a custom, contract or declaration whatever its extent or in whatever form it may be expressed. Sub-Cl. 6 provides that where such a right is recorded in respect of any village or mahal, and such village or mahal has been partitioned, a right shall be deemed to exist in all the portions into which such village or mahal has been divided. It seems to me that the object of S. 5 is to lay down a rule to determine whether a right of pre-emption exists, in an existing mahal or village. Once such a right is presumed to exist the question as to its nature and extent is not to be determined by S. 5 at all but we have to look to other sections like Ss. 11 and 12 for that purpose, which lay down the statutory right of pre-emption.

There can be no doubt that the words mahals or villages in sub-Cl. 1 refer to the existing mahals or villages in which the right of pre-emption is to be presumed. Had the expression been mahals or villages of which any prior wajibularz had been prepared, I would have been constrained to hold that without producing the wajibularz of a whole village or mahal out of which the existing mahal or village has come the plaintiff cannot establish the existence of a right of pre-emption. The expression used by the legislature is, however, much wider in scope and is not necessarily restricted to wajibularzes prepared for the whole of the existing mahals or villages. This view is further strengthened by the expression "whatever its extent and in whatever form it may be expressed" which undoubtedly implies that even if the right entered is limited in its scope and applies either to a limited body of cosharers or to a limited area a right in the whole mahal or village is to be deemed to exist.

I cannot therefore accept the contention of the learned advocate for the respondents that if in the existing mahal in the village there is any area which has came out of an earlier mahal in which such a right was never recorded the whole right is extinguished and a claim for pre-emption cannot be maintained as regards the sale of any portion of this new mahal.

The learned Subordinate Judge has conceded that the right continues at least as regards that portion of the new mahal Zard which has come out of mahal Bibi Begum and Niazullah Khan the wajibularzes of which did contain the record of a right of pre-emption in

1282 Fasli. But he is of opinion that that right cannot be extended to the other area in mahal Zard. It seems to me that to confine the right of pre-emption to a specified area in a mahal is contrary to the intention of the legislature as is to be gathered from the provisions of Ss. 11 and 12. If a right of pre-emption exists in a specified area of mahal Zard it must be held that a right of pre-emption exists in that mahal. S. 11 provides that where any proprietary interest in land forming part of any mahal or village, in which a right of pre-emption exists, is sold a right of pre-emption shall accrue. There is no doubt that in the present case a proprietary interest in land forming part of mahal Zard has been sold and there can also be no doubt that a right of pre-emption must be deemed to exist in mahal zard by virtue of S. 5. It, therefore, follows to my mind that the right of pre-emption must exist in the whole mahal Zard by virtue of S. 11 and that the entire body of cosharers mentioned in S. 12 have a right of pre-emption as is specified therein. A mahal is a complete fiscal unit and for purposes of the existence of a right of pre-emption the Act refers to mahals or villages and does not refer to portions of mahals or villages. It, therefore, seems to me impossible to hold that the right of pre-emption is confined to a portion only of mahal Zard and not to the rest of it. This is my answer to the question referred.

Mukerji, J.—The facts briefly are as follows : In 1875 the village of Babaina consisted of four mahals, namely, Nadir Khan, Niazullah Khan, Bibi Begum and Bhikari Das. The mahal Bibi Begum had a wajib-ul-arz which contained a mention of a custom of pre-emption. In 1890 the mahal Bibi Begum came to be divided into two mahals, namely, Mahal White and Mahal Red. Mahal Red was owned by Mt. Imamunnissa whose property, on her death, passed to her husband Qadir Shah. Qadir Shah acquired the two mahals of Nadir Khan and Niazullah Khan and, in 1898, he applied that his three mahals, namely Mahal Red, being a portion of the original mahal Bibi Begum and mahals Nadir Khan and Niazullah Khan should be united into one mahal. His application was granted. Later on in 1924, the new mahal which was known as mahal surkh Qadir Shah was divided into three mahals, namely, Yellow, Green and Skycolour. Two of the cosharers is mahal Zard have sold their shares and two separate suits for pre-emption have been brought. In these circumstances, the question for determination is :

"whether, having regard to the provisions of the Agra Pre-emption Act, a right of pre-emption exists in mahal Zard ?"

In my opinion the answer to this question is to be sought for within the provisions of S. 5, Agra Pre-emption Act The most important portions of that section, so far as it affects the present question, are these :

"A right of pre-emption shall be deemed to exist only in mahals * * *.* in respect of which any wajib-ul-arz prepared prior to the commencement of this Act records a custom *.*.* (a) recognizing * * * a right of pre-emption * * * whatever its extent and in whatever form it may be expressed * * *.* "

Before I consider this language, I must bear in mind that the law does not profess to recognize any existing custom. It professes to create a right of custom, it does not matter whether one existed or not before the Act was passed. That being so, we have to see what were the areas in which it was deemed desirable to establish a right of custom. Now coming to the language quoted above it appears to me that the language has to be applied to the mahal with respect to which the question has arisen. That being so, we have to find out the circumstances mentioned in the language quoted above with reference to the mahal in suit. The right of pre-emption would be established if the conditions mentioned in the language quoted above are fulfilled. The conditions are that as to the mahal in question there should exist a wajibul-arz prepared before the Act came into operation. It is immaterial whether the wajib-ul-arz applies to the whole of the mahal or to a part of the mahal. This second condition, in my opinion, follows from the use of the words "whatever its extent." The first condition, in my opinion follows from the use of the words "in respect of." The words "in respect of" have been explained in Webster's International Dictionary as meaning "as to," "as regards," "with respect to." I do not think that any wider language could have been used than the expression "in respect of." Therefore, the result of the joint application of the two expressions "in respect of" and

"whatever its extent" is that if in any mahal as to which a question of right of pre-emption has arisen, there be found to exist a wajib-ul-arz which contained a mention of pre-emption, applicable to any portion of the mahal, by virtue of the rule enacted by the legislature, a right of pre-emption would be deemed to exist throughout the whole mahal.

In my opinion the answer to the question is that a right of pre-emption has been granted and must be deemed to exist in the entire area of the present mahal Zard.

King, J.—I agree to the conclusions expressed by my learned brothers and need only give my reasons briefly. The question for our decision is whether a right of pre-emption shall be deemed to exist in the present mahal Zard of village Babina. This mahal was formed after the commencement of the Agra Pre-emption Act, 1922 and it contains a portion of mahal previously known as mahal Bibi Begum. A wajib-ul-arz prepared before the commencement of the Act, for mahal Bibi Begum contains a mention of the right of pre-emption in that mahal. It is clear, therefore, that a right of pre-emption must be deemed to have existed in mahal Bibi Begum. The answer to the question for our decision appears to me to depend upon whether the wajib-ul-arz prepared before the commencement of the Act for Mahal Bibi Begum can be held to have been prepared "in respect of" the present mahal Zard.

In my opinion the word "mahals" in sub-S. 1, S. 5, Pre-emption Act, must apply to existing mahals. In Ss. 11 and 12 of the Act where the word "mahal" or "village" is used the word must clearly be taken to apply to the existing mahals or villages. According to the ordinary rule of construction we would give the same meaning of the same word in different parts of the same enactment unless we are compelled by the context to give a different meaning. I see no reason why the word "mahals" in sub-S. 1, S. 5 should not be given the same meaning as in Ss. 11 and 12. In my opinion, therefore, the word "mahals" should be taken to apply to existing mahals. It is argued for the respondents that no wajib-ul-arz has been prepared for the present mahal Zard and therefore no right of pre-emption can be deemed to exist in that mahal. If this argument is accepted it would follow that whenever any new mahal is formed after the commencement of the Act by the union of two old mahals no right of pre-emption could be deemed to exist in it, since no wajib-ul-arz could have been prepared expressly for the new mahal before the commencement of the Act, and the provisions of S. 5 (3) would not be applicable. I do not think the language of S. 5 (1) compels us to accept such a conclusion, which could hardly have been contemplated by the legislature. In my opinion the words "in respect of" have a wide meaning. A wajib-ul-arz prepared expressly for an old mahal may be said to have been prepared "in respect of" a new mahal which includes the whole or part of the old mahal. I hold therefore that the wajib-ul-arz prepared for the old mahal Bibi Begum may be said to have been prepared "in respect of" the new mahal Zard which includes a portion of mahal Bibi Begum. It follows from the language of S. 5 that a right of pre-emption must be deemed to exist in the whole of the present mahal Zard.

R.M./R.K. *Reference answered.*

** A. I. R. 1929 Allahabad 980

SULAIMAN AND NIAMATULLAH, JJ.

Govind Singh—Applicant.

v.

Bijay Bahadur—Opposite Party.

Civil Revn No. 153 of 1928, Decided on 24th July 1929.

(a) Limitation Act, S. 19 — Receipt can serve as proof of acknowledgment, though inadmissible as bond for want of proper stamp.

A receipt bearing one anna stamp can serve as proof of acknowledgment of a debt, though it may be inadmissible in evidence as a bond containing express promise to pay, for want of proper stamp. [P 981 C 2]

**** (b) Limitation Act, S. 19—Clear and unconditional acknowledgment can itself be a foundation of action.**

An acknowledgment, clear and unconditional and made before the limitation period expires, can itself be the foundation of an action : *Case law Referred.* [P 981 C 2]

(c) Contract Act, S. 62—Pro-note containing promise to pay debt due under former pro-note wipes out old debt giving rise to new liability.

A pro-note containing a promise to pay the debt due under a former pronote wipes out the old debt and creates a new liability. The Court need not take up the the old transaction except where express rules of law makes it necessary to do so, e. g., where the debt acknowledged is barred by time so as to exclude the application of S. 19, Lim. Act. [P 983 C 1]

Sailanath Mukerji and *Majid Ali*— for Applicant.

Zafar Mehdi and *Haidar Mehdi*— for Opposite Party.

Niamatullah, J. — The plaintiff-applicant brought the suit, out of which this revision has arisen, for recovery of Rs. 506-6-0, alleged to be due under a pro-note, dated 6th January 1925, executed by the defendant. The plaint recites that, in consequence of the defendant's fraudulent conduct, a stamp of only one anna was affixed on the pro-note which, on that account, is inadmissible in evidence, and that the plaintiff claims to recover on foot of the loan transaction independently of the pro-note which he relies on for a collateral purpose. The plaint, as drawn up, is more capable of the interpretation that, according to the plaintiff, the loan had been advanced on 6th January 1925, though it is not altogether inconsistent with the case that the pro-note was executed in lieu of an old debt. The plaintiff started to establish the case of cash consideration having been paid on the execution of the pro-note referred to; but his own witnesses, under the circumstances which it is not necessary to go into, gave away that case and disclosed, what has been found by the Court below, that a pro-note had been executed by the defendant in favour of the plaintiff in 1923 and that, in lieu of the principal and interest due under that pro-note, the fresh loan transaction of 1925 was entered into between the parties. We must, therefore, accept, for the purpose of this case, as found by the Court below, that the defendant was indebted to the plaintiff for a sum of Rs. 349. and that his claim for that amount was within time on 6th January 1925, when a fresh pro-note was executed. A receipt of even date was also executed by the defendant and was duly attested by two witnesses. The lower Court (Small Cause Court at Allahabad) dismissed the suit on the ground that the claim to recover the debt due under the pro-note of 1923 was barred at the date of the present suit, which was brought on 5th January 1928, and that limitation was not saved by any acknowledgment of that debt inasmuch as the pro-note,dated 6-1-1925, contained no acknowledgment of the debt of 1923 but of a debt supposed to have been advanced on 6-1-1925.

I am of opinion that the plaintiff-applicant is entitled to succeed as regards the principal debt at least on the strength of the acknowledgment contained in the receipt dated 6th January 1925. I ignore the pro-note altogether for want of proper stamp. There can, in my opinion, be no question as regards the admissibility of the receipt in proof of an acknowledgment, not as saving limitation for the older debt of 1923, but as the foundation of claim to enforce liability acknowledged thereunder.

The acknowledgment of a debt implies a promise to pay. Such an acknowledgment is required to bear a stamp of one anna under Sch. 1, Art. 1, Stamp Act. Where there is an express promise to pay, the document cannot operate as an acknowledgment, but should be stamped as a bond. In so far, therefore, as a document contains a mere admission of liability, a stamp of one anna is quite sufficient: but, in so far as it may contain a promise to pay, it will be inadmissible, being a bond to that extent. The receipt before us, as I construe it, is a clear acknowledgment of the defendant being a debtor to the plaintiff to the extent of Rs. 349 under a pro-note, dated 6th January 1925, which, of course, has to be ignored as a piece of evidence. The receipt is to the effect that Bijay Bahadur Singh, the defendant, borrowed Rs. 349 under a pro-note, dated 6th January 1925, at 1/4 per cent per mensem. The portion of the receipt relating to the interest amounts to an agreement to pay interest, and is, to that extent, inadmissible for want of proper stamp duty, as if it were a bond; but the stamp of one anna, which is affixed to the receipt, would cover the other part of the receipt which acknowledges the loan of Rs. 349.

The next question is whether an acknowledgment, clear and unconditional, can itself be the foundation of an action. I think that the answer must be in the affirmative. In *Kalka Singh* v. *Paras Ram* (1) (at p. 444) their Lordships of the Privy Council observed, in a case in which the facts were different and in which the acknowledgment was held to be of no avail, that

"although an unqualified admission of a debt no doubt implies a promise to pay it,

(1) [1895] 22 Cal. 434=22 I. A. 68=6 Sar. 545 (P.C.).

heir Lordships are not prepared to hold that that is necessarily so where there is an express promise to pay in a particular manner. It must depend on the construction of the instrument in each case, and their Lordships think in the present case that the admission of the debt, by which the obligation is prefaced in the bonds of 1877 and 1879, does not import an unqualified or unconditional promise to pay, but is referable to the particular obligation or in other words is introduced for the purpcse only of fixing the amount for which the obligation is given, and which the obligor agrees to pay in the stipulated manner and not otherwise."

In a later case: *Maniram Seth* v. *Seth Rupchand* (2), in which their Lordships were concerned with an acknowledgment saving limitation under S. 19, Lim. Act, they have discussed in detail the implications arising out of an unconditional acknowledgment of a liability. They said that

"an unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do."

At one place in their judgment their Lordships say that they

"can see no reason for drawing any distinction in this respect between the English Law and the Indian Law."

In *Chunnilal* v. *Laxman Govind* (3), in which a suit was based on a mere acknowledgment which contained no promise to pay, the learned Chief Justice referred to the observations of their Lordships of the Privy Council made in *Muniram Seth* v. *Seth Rupchand* (2) and held that

"If, then, the acknowledgment, which in this case was made before the limitation period expired, implies an unconditional promise to pay, I can see no reason why it should not form the basis of a suit."

Decision of the Bombay High Court to the contrary, reported in *Shankar* v. *Mukta* (4) was declared to be no longer good law in view of the dictum of their Lordships of the Privy Council in the case already referred to. It was pointed out by the learned Judges that the older case of their Court proceeded on the principle of stare decisis, though the view of the Chief Justice expressed in *Shankar* v. *Mukta* (4) quoted at length was in conformity with their own.

The Full Bench case of *Kanhaya Lal* v. *Stowell* (5) is also quite in point. A document relied on in that case could not be admitted in evidence as a promissory note though it bore a one anna stamp. It was treated as an acknowledgment which could not be the basis of a suit.

The case before us is free from the complication which existed in other cases in which acknowledgments duly signed and stamped had been made after the debts acknowledged had become timebarred. In that class of cases an acknowledgment not fulfilling the requirements of S. 25, Contract Act, as regards agreement to pay timebarred debts, was not given effect to: see, for instance, *Gobind Das* v. *Sarju Das* (6).

Another question which was discussed before us related to the language of the receipt not being applicable to facts found by the Court below, namely, that the sum due under the pro-note of 1923 and not cash consideration formed the subject of the subsequent transaction on 6th January 1925. The defendant seems to be on the horns of a dilemma. He cannot admit that the receipt of 6th January 1925, related to any sum advanced on that date. It follows that it must be taken to refer, as found by the Court below, to the sum that had been advanced two years earlier, in 1923. It seems to me that, under the circumstances of the case, this matter is not of real importance. When two persons agree that the old debt be taken to be paid up and the rights and liabilities be taken to rest on a new footing, the transaction properly analyzed is tantamount to the old debt being paid and, at the same time, re-advanced to the debtor. The fact that money did not physically change hands is of no legal consequence. In the case of *Mohammad Abid Husain Khan* v. *Bhagwan Das* (7), a Bench of this Court had the occasion to consider the nature of almost a similar transaction. In that case a sarkhast acknowledging a loan of Rs. 5,750, of which only Rs. 250 represented cash consideration and the remaining Rs. 5,500 was due under an old loan transaction, was in question. The learned Judges observed that:

"It is clearly not a mere acknowledgment of a statute barred debt, because the defendant in it admits the receipt in cash of the sum of

(2) [1906] 33 Cal. 1047=33 I. A. 165=4 C. L. J. 94 (P.C.).
(3) A. I. R. 1922 Bom. 183=46 Bom. 24.
(4) [1898] 22 Bom. 513.
(5) [1881] 3 All. 581 (F.B.).
(6) [1908] 30 All. 268=5 A. L. J. 274=(1908) A. W. N. 129.
(7) [1910] 5 I. C. 418.

Rs. 5,750 and undertakes to pay interest upon that amount at the rate of Rs. 1-8-0 per cent per mensem . . . . . It seems to us that this document must properly be treated as a new contract. It may be that the amount of the old debt was not actually paid and then repaid. There was no necessity for paying with one hand and taking back with the other; but the parties intended that the transaction should be regarded as a new contract to secure the amount specified in it, namely Rs. 5,750, with interest."

Parties must be taken to have done what they agreed to do, and if they contracted, on the understanding that the old debt be taken to be wiped out and a new liability, on terms then agreed, is to come into existence, the Court need not rake up the old transaction except where some express rule of law makes it necessary to do so, for instance, if the acknowledgment of new liability is relied on as an acknowledgment under S. 19, the question may properly be considered as to whether the debt acknowledged had become barred by time so as to exclude the application of S. 19, Lim. Act.

The plaintiff in this case seeks to enforce the liability incurred on 6th January 1925, and I see no reason why he should not be permitted to do so. The defendant must make good his undertaking implied in his acknowledgment of liability made on 6th January 1925. In this view the fact that the debt of 1923 was barred by limitation on the date of the present suit is wholly immaterial. In fact, it has ceased to exist much earlier on 6th January 1925, when it was replaced by a new transaction of loan.

The plaintiff's right to recover interest stands on a somewhat different footing. He can be entitled to recover interest only if the stipulation, contained in the receipt, be admitted in evidence. As I have already stated, it cannot be held to be admissible in evidence for want of the proper stamp duty payable on a bond. Interest by way of damages has not been claimed, and any question with regard to it, if now entertained, may give rise to controversy which it is not desirable to decide in revision. It is doubtlul if, under the circumstances of the case, the plaintiff applicant is entitled to recover interest by way of damages. I would, therefore, refuse to allow any interest to the plaintiff-applicant. For the reasons stated above, I set aside the decree passed by the Court below, and decree the plaintiff's claim to recover the sum of Rs. 349 with interest from the date of suit at the rate of 6 % per annum.

Sulaiman, J.—I concur in the order proposed. I do not think that ordinarily a person cannot after having taken a promissory note in an insufficiently stamped paper and a contemporaneous receipt throw the promissory-note over board and make the receipt the basis of his suit. This would be encouraging an evasion of the stamp law. I also think that a receipt is ordinarily an acknowledgment of the receipt of consideration, and unless its contents suggest otherwise it does not imply a promise to pay or even an acknowledgment of an existing liability to pay. If it contains a promise to pay it may itself become insufficiently stamped, if only a stamp of one anna has been affixed on it. But the recitals in the receipt may suggest that the payment of money was by way of loan and that circumstance would necessarily imply a promise to repay it. In such cases the receipt alone with other oral evidence may be sufficient proof of a debt which is recoverable by suit. In the present case the receipt contains a clear reference to a contemporaneous promissory note. Even though the promissory note itself is inadmissible in evidence still the reference to it indicates to my mind that the payment was by way of loan and not in a way where no repayment would be expected. This justifies the inference that there was a promise to pay. The suit is, therefore, maintainable.

Even if the receipt and the inadmissible promissory note were not executed in payment of a cash payment but were in renewal of a previous debt, either that previous debt has been acknowledged afresh or very likely it has been substituted by a new contract including a fresh promise to pay. In either case the plaintiff's claim lies and is within time.

By the Court.—The application is allowed, the decree of the Court below is set aside and the plaintiff's claim is decreed for Rs. 349 with proportionate costs pendente lite and future interests at 6 per cent per annum till realization.

R.M./R.K. *Application allowed.*

Advocate High Court
Jammu & Kashmir

A. I. R. 1929 Allahabad 984

DALAL, J.

Bhikam Prasad—Appellants.

v.

Rani Indumati—Respondents.

Second Appeal No. 325 of 1928, Decided on 28th June 1929.

Registration Act, S. 28—Property not belonging to vendor included in sale deed for convenience of registration but without intention to convey it — Registration of sale deed is invalid.

For the purposes of convenience of a person who lived in Bishangarh and to save him the trouble of going to Mainpuri to register a document of sale of a grove in Mainpuri, property with which he had previously parted in Bishengarh was included in the sale deed to the knowledge of both parties and without intention of either party to have a sale transaction of the house in Bishangarh.

Held : that the registration of the sale deed was not valid: *A. I. R.* 1924 *All.* 897 and *A. I. R.* 1929 *Mad.* 432, *Dist.*; *A.I. R.* 1914 *P. C.* 57 **and** *A. I. R.* 1921 *P. C.* 8, *Rel. on*,

G. Agarwala—for Appellants.

K. N. Katju—for Respondents.

Judgment.—The plaintiffs are purchasers of a grove from the defendant Rani Indumati and sued for possession because in mutation proceedings she and other defendants objected to the entry of the plaintiff's names against the grove in suit. Both the Subordinate Courts have dismissed the suit on the ground that the registration was not valid and there could be no transfer of a grove of the value of the property in suit except by means of a registered document. The principle of the rulings of the Privy Council reported in *Harendra Lal* v. *Haridasi Debi* (1) and *Biswanath Prasad* v. *Chandra Narayan* (2) have been followed. Possibly because these rulings are considered by Indian Courts to work hardship on honest litigants, attempts have been made to distinguish cases from these rulings. The learned counsel for the appellants referred to a Bench ruling of this Court in *Durga Prasad* v. *Tameshar Prasad* (3). What happened in the present case was that for the purposes of convenience of the respondent lady who lived in Bishangarh and to save her the trouble of going to Mainpuri to register a document of sale of a grove in Mainpuri, property with which she had previously parted in Bishangarh was included in the sale deed in suit to the knowledge of both parties and without the intention of either party to have a sale transaction of the house in Bishangarh. The facts of the case in *Durga Prasad* v. *Tameshar Prasad* (3) were different. There a property of small value was included in order to save parties the trouble of going a long distance away from their homes for registration. It was, however, held as findings of fact by this Court, which had jurisdiction to arrive at such findings in first appeals that small property which was included in the sale deed for the purposes of convenience did belong to the vendor and that it was the intention of both parties to effect the transfer of the property though they would not have included this property in the sale if it had not also served the purposes of convenience. All that was held was that if the reason for the transfer of property is convenience of registration, a transfer need not be invalid simply for that reason so long as the vendor did own the property and a transfer thereof was really intended. Another case of the Madras High Court was quoted from *A. I. R.* 1929 *Mad.* 432. In that case the mortgagee was not aware that a certain property iucluded in the mortgage did not belong to the mortgagor. The Judges appear to have been inclined to believe that fraud was really practised on the mortgagee and that the mortgagee had not practised any fraud on the law of registration. These two cases are distinguishable, but the present is not, from Privy Council rulings, whatever the sympathy of the Court may be for the plaintiff, when a defence succeeds on this particular ground. Dr. Katju has informed the Court that it is not the female respondent who has been resisting the claim but there are other respondents who claim the property as their own. No particulars in the transaction in suit can be discovered to distinguish it from the transactions commented upon by the Privy Council rulings: so the suit was rightly dismissed by the two subordinate Courts. This appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1914 P. C. 67=41 Cal. 972=41 I. A. 110 (P. C.).
(2) A. I. R. 1921 P.C. 8=48 Cal. 509=48 I, A. 127 (P. C.).
(3) A. I. R. 1924 All. 897=46 All. 754.

S. K. Das
Advocate High Court
& Kashmir

END

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.